IN THE FINANCIAL SERVICES TRIBUNAL

CASE NUMBER: FAB139/2021

In the matter between:

THEUNS GREYLING Applicant

and

FLORIS VISSER First Respondent

ANNA CECELIA VISSER Second Respondent

THE OMBUD FOR FINANCIAL SERVICES PROVIDERS Third Respondent

Panel: C Woodrow SC (chair), S Mahabeer SC and G Mashaba SC

For the applicant: Mr P Bielderman
For the first and second respondent: No appearance
For the third respondent: Ms S Masina

Hearing: 9 September 2022

Summary: Property syndication matter – liability of broker for referral of client to another broker – conduct and advice – wrongfulness - negligence – causation

---

DECISION

INTRODUCTION

1. According to the directors of Bluezone Property Investments (Pty) Ltd ("**Bluezone**"),[1] Bluezone was the 'promoter' of a property syndication scheme

[1] Extracted by us from information provided to the Ombud by the attorneys for Mr JJ van Zyl and HC Lamprecht, being (*inter alia*) the directors of Bluezone, read together with a document titled "Summary of Investment".

in which the company, Spitzkop Village Properties Ltd ("**Spitzkop**") offered for subscription 425,000 units, that if fully subscribed would raise R425,000,000. The intention was that Spitskop would acquire a particular immovable property (which was at that stage zoned as agricultural land), thereafter obtain the necessary consents to establish a residential township, develop, market and then sell approximately 2500 residential erven. 'Investors' in the property syndication scheme were obliged to subscribe for a minimum of 100 units (constituting a minimum 'investment' of R100,000). A unit would comprise 1 ordinary share with a par value of R1 irrevocably linked to a debenture with a nominal value of R999. Investors / debenture holders were promised a fixed interest rate for the period of the development (expected to be three years) as follows: 9.5% from date of acceptance of the subscription for the units until 31 July 2007, 10.12% from 1 August 2007 to 31 July 2008, and 10.87% from 1 August 2008 until the debentures were redeemed on the maturity of the development. In addition to the aforesaid fixed interest rate payments, it was projected that investors would receive an estimated 20% growth on their capital invested after the term.

2. The first respondent ("**Mr Visser**") and second respondent ("**Mrs Visser**") 'invested' an amount of R600,000.00 each in the aforesaid property syndication scheme. The first respondent and second respondent shall be referred to herein collectively as the "**Vissers**".

3. The ‘investments’ were paid for by means of cheque as follows: cheque dated 23 February 2007: R300,000; cheque dated 5 March 2007: R 300,000; cheque dated 5 March 2007: R 600,000.

4. The property syndication scheme did not achieve its stated objectives. The parties to the present dispute (as well as the directors of Bluezone) all have different versions for the reason for the failure. Be the aforesaid as it may, during or about 2009, both Bluezone and Spitskop were placed in liquidation. Although the Vissers received certain payments from their ‘investment’, purportedly in the form of ‘interest payments’, it appears that much of their capital investment will never be recouped. The Vissers suffered a loss.

5. On 26 May 2011, the Vissers filed a complaint with the third respondent, the Ombud for Financial Services Providers (the “**Ombud**”), against the applicant based on their version of the role that they allege the applicant played in their investing in the property syndication scheme, and seeking to hold the applicant liable for their loss.[2]

6. A little more than ten years after the filing of the complaint and fifteen years after the conduct complained of, on 5 August 2021, the Ombud made a

[2] The applicant alleges that the complaint was in fact made against Bluezone, and not against him, and that there was only one complainant, namely the first respondent, Mr Visser. In our view the complaint form read in its totality does constitute a complaint by both Mr and Mrs Visser (as appears from the first page) against the applicant (as appears from the attachment titled “*Grief*”). The applicant was invited to answer the complaint and he did.

determination (the "**Ombud Determination**") in terms of section 28(1) of the Financial Advisory and Intermediary Services Act, Act 37 of 2002 (the "**FAIS Act**"). The Ombud found that the applicant had "*… acted negligently and such negligence was the cause of [the Vissers] loss, both factually and legally as required to find delictual liability.*" The Ombud upheld the complaints of the Vissers and directed the applicant to pay to each of them an amount of R600,000 plus interest thereon at the rate of 7% *per annum* from seven days of the date of the Ombud's order to date of final payment.

7. On or about 4 October 2021, the applicant brought an application for a reconsideration of the Ombud Determination / decision in terms of section 230 of the Financial Sector Regulation Act, Act 9 of 2017 (the "**FSR Act**"). The application was heard by us over the Teams platform on 9 September 2022, and we reserved our decision.

PARTICIPATION BY THE OMBUD IN THE PROCEEDINGS BEFORE THE TRIBUNAL

8. Before dealing with our decision on the reconsideration, we address the request of the Ombud to participate in the proceedings.

9. Ms Masina argued for the Ombud that we have a discretion to allow the Ombud to participate in the present proceedings, citing *inter alia* section 232(1)(a) and 232(2) of the FSR Act. Mr Bielderman, for the applicant, opposed such argument and submitted *inter alia* that there is no statutory basis upon which

the Ombud can participate in the hearing, such participation would render the present proceedings irregular and in breach of the Constitutional right to a fair hearing, the Ombud is *functus officio* and is not a party in the adversarial proceedings.

10. At the commencement of the proceedings, after hearing argument, we declined the request to participate in the proceedings. Even accepting the argument of the Ombud, namely that the Tribunal enjoys a discretion to hear the Ombud, the Ombud did not make out a case for the exercise of such discretion to permit its participation in the present proceedings. The Ombud has made the Ombud Determination (a "*final determination*") in terms of section 28(1) of the FAIS Act. The determination includes the facts found by the Ombud, the reasoning of the Ombud, the law relied upon by the Ombud, and spans almost 100 paragraphs. The Ombud Determination forms part of the record. The Ombud has further filed a record spanning almost 600 pages. The Ombud did not file heads of argument in respect of the merits of the reconsideration application, and did not intend to advance the case of any of the parties.

11. There may be other cases in which a panel of the Tribunal may wish to hear the Ombud. We make no finding in this regard (and in any event, any ruling or decision herein is not binding on any other panel of the Tribunal), but simply point out in this regard that:

11.1. Section 232(4) – (5) of the FSR Act provides as follows:

(4) In proceedings for reconsideration of a decision, the panel is not bound by the rules of evidence, but may, subject to this section, inform itself on any relevant matter in any appropriate way.

(5) The person presiding over a panel:-

(a) may, on good cause shown, by order, direct a specified person to appear before the panel at a time and place specified in the order to give evidence, to be questioned or to produce any document; and

(b) must administer an oath to or accept an affirmation from any person called to give evidence.

11.2. Section 232(1)(c) of the FSR Act provides that "*In proceedings for reconsideration of a decision:- … (c) any party may be represented by a legal representative.*" The FSR Act defines *"party", to proceedings on a reconsideration of a decision by the Tribunal* as follows:

> "party", to proceedings on a reconsideration of a decision by the Tribunal, means:-
>
> (a) the person who applied for the reconsideration; and
>
> (b) the decision-maker that made the decision;

THE COMPLAINT AND RESPONSES THERETO:

12. In order to bring the reader into the picture, to demonstrate the material factual disputes between the parties, and in order to provide context to the findings that we make in this decision, it is unfortunately necessary to set out the competing versions in some detail. We do so below. We have paraphrased to some extent, but have attempted to keep the version relatively true to the substance and form in which the versions are set out.

13. On or about 25 May 2011, the Vissers filed a complaint with the Ombud. Attached to the complaint form is a document signed by the Vissers containing the details of their complaint under the heading ‘Complaint’ (the document is written in Afrikaans and the heading is “Grief” – ie ‘Complaint’). The following statements are made in the initial complaint (as alleged by the Vissers and paraphrased by us):

13.1. The Vissers are married to each other and both pensioners.

13.2. In February and March 2007, Mr Visser’s pension was paid out to him.

13.3. Liberty Life was [telephonically] contacted in order to invest the amount. The day after contacting Liberty Life, the applicant contacted the Vissers regarding the investment of the amount.

13.4. During an appointment with the applicant, the Vissers were told that the applicant does investments in Liberty Life and Sanlam, and the name of his business is T&E FinOps.

13.5. During a discussion in February 2007, the applicant suggested that the (pension) amount be invested in property syndication because the interest rates [in other investments] were apparently low. A few days later a certain Mrs Stroh of Bluezone Properties Investment (Bluezone) was introduced to Mr Visser and his wife.

13.6. Mrs Stroh did not have accreditation and said that it [the accreditation] was held through the business [Bluezone]. Mrs Stroh suggested ‘Spits Kop Village’ as an investment. She informed the Vissers that R1,000.00 shares are purchased in R100,000.00 units. The company [we assume

either Bluezone or Spits Kop] was introduced by Mrs Stroh as a foreign company and that all monies paid in were guaranteed against insolvency ("*bankrotskap*"). She (Mrs Stroh) informed the Vissers that the interest rate of 9.5% per year is paid in respect of capital invested and a further 7% interest on capital escalation.

13.7. The amounts were paid in cheque payments and handed to Mrs Stroh.

13.8. Not all of the share certificates were received. Mrs Stroh was repeatedly contacted in respect thereof but without success.

13.9. All monies were paid into the trust account of attorneys, Honey & Partners, who were supposed to hold the amount in trust until the full amount had been claimed.

13.10. In June/July 2009, a notice was received in respect of a shareholders meeting related to the "Spits Kop Village" 'investment' by Bluezone. During the meeting a certain Mr Botha and several other members of the management informed the "investors" that the project was completed and would be sold to a company in the Cape, namely "Share Africa". There would apparently be a loss of 7% and the management wanted R 60 million as a bonus. After objection, this amount was turned down.

13.11. In September 2009, a letter was received stating that "Spits Kop Village" and Bluezone had been liquidated.

13.12. The members of the board knew that they had lied at the [June/July 2009] meeting. There was never a building erected nor an offer [from "Share Africa"]. Investors' money was stolen by the management by means of running a pyramid scheme and paying themselves enormous salaries from investors' monies to enrich themselves.

13.13. With the liquidation, the investor is impoverished and the board member enriched with monies wrongfully taken.

13.14. In respect of the amount of R600,000 per head there is an expected amount of about R150,000 possibly left.

13.15. [The Vissers then set out what appear to be certain complaints in bullet point form, translated and paraphrased by us, as follows]:

- the amount that was allegedly paid as 'interest' on a monthly basis was in fact investors' own money (no interest was in fact received)
- the applicant was asked about a safe investment to obtain interest to live from, not an investment in an empty shell with nothing in it. After two years the Vissers have no income and no capital. As a result of the applicant's poor recommendation, the Vissers are financially ruined and are financially dependent on their family.
- Mrs Stroh did not have accreditation and was not authorised / entitled to market Bluezone. She also lied – there was no guarantee against liquidation. Generally she had spoken nonsense.
- Mrs Stroh, despite various requests, remained in breach in failing to provide or hand over the third certificate of proof of payment to Bluezone of the amount of R300,000.
- Mr Botha and the remainder of the management wrongfully used persons as marketers who did not have accreditation.
- The management paid themselves above average salaries with other persons' hard earned money without providing any service,

in a corrupt way and hide behind the legislation as a result of the insolvency.

- The management used other people's hard-earned money in the pyramid scheme in an absolutely unconscionable manner.
- Bluezone was falsely registered by certain persons in order to mislead the public into thinking that it was a safe investment institution.
- Those who market Bluezone did not have accreditation to act as financial advisers. The management of Bluezone obtain the investments unlawfully.
- There was fraud and deceit on the part of the management at the meeting in the middle of 2009.
- The Vissers believe that the loss of R60 million was in fact misappropriated by the board.
- The management of Bluezone used "Spitz Kop" as a front to obtain capital and misappropriated such amounts in a corrupt manner.
- The Bluezone board never intended to develop and erect the "Spizkop Village".
- Certain of the directors were partners in the attorneys firm and obtained double compensation - first as the attorney and then as members of the board of Bluezone.
- The attorneys could have seen with the yearly audit of their books that the trust account was not in order. The firm is also legally liable for the financial mess.

- The attorneys firm obtained an advantage from the trust account which they were supposed to have managed which was not done. There was no control exercised over the trust account.
- The expectation was that Bluezone itself would have capital to pay out interest but it was apparently without any capital.
- The capital escalation of 7% was a lie in order to attract and deceive persons.
- The management could see that there was not enough money to run the scheme and they were supposed to have paid back the monies but did not do so and went ahead to enrich themselves recklessly at the cost of investors who had entrusted their monies to the management.

14. The complaint was sent to *inter alia* the applicant. On 28 July 2011, the applicant responded in the following terms (as paraphrased by us):

14.1. A Bluezone consultant, Mrs Stroh, was referred to the applicant by another financial adviser. The applicant and Mrs Stroh met in January 2007. Mrs Stroh briefly explained the Bluezone products to the applicant and enquired whether he had any potential investment clients.

14.2. The applicant told Mrs Stroh that he did not really do lump sum/single premium investments but when he did do such investments he usually placed the business with Liberty/Stanlib. The applicant also mentioned that he is not comfortable in marketing property syndications because he found the product to be very intricate and confusing. Mrs Stroh said

that the applicant should get the client to see her and she would market the product and handle everything.

14.3. A few weeks later the applicant received Mr Visser's details from a Liberty consultant who indicated that Mr Visser had some money to invest. The applicant called Mr Visser for an appointment and met with him and his wife on 19 February 2007.

14.4. The applicant introduced himself and handed to Mr Visser his disclosure document and mentioned that he was an independent broker who was contracted to sell Liberty, Sanlam, Discovery and Momentum products.

14.5. Mr Visser stated that he had R300,000 to invest and he wanted a monthly income. The applicant opened the file and discussed a written Liberty quote for R300,000 (Annex A to the response). As soon as the applicant mentioned the monthly income payable [which appears from Annex A to be R2,059.66 per month], Mr Visser remarked that this [the monthly income payable] was too low and he would have to look at alternative investments that offer a higher income yield. The applicant stated that he knows about a Bluezone investment that offers higher income to the investor but that he did not know the product very well and asked whether he could introduce a consultant from Bluezone to the Vissers to explain the product in detail.

14.6. The Vissers agreed and the applicant set up an appointment with Mrs Stroh a few days later. Mrs Stroh introduced herself and explained the product in detail to the Vissers. Mrs Stroh did a risk profile with Mr Visser

(Annex B to the response)[3] where she asked Mr Visser various questions pertaining to his risk appetite. The Vissers did not ask any questions and agreed to proceed with the investment as soon as Mrs Stroh was done explaining the product. Mrs Stroh completed the application form (Annex C to the response) with Mr Visser, and Mr Visser handed her a cheque in the amount of R300,000.00.

14.7. During the meeting the applicant did not say a word and only greeted the Vissers on arrival and on departure. Since the aforesaid meeting, the applicant never saw or talked to either of the Vissers again.

14.8. On 5 March 2007, the applicant received a call from Mrs Stroh who said that Mr Visser called her to say that he wished to invest a further R900,000 and that she [Mrs Stroh] was on her way to Mr Visser to collect the cheque and complete the application form.

14.9. The applicant received commission the following month for referring the client to Bluezone.

14.10. The applicant saw Mrs Stroh a few times after but never referred business to Bluezone again.

14.11. Years later, when negative rumours about Bluezone started, the applicant contacted Mrs Stroh and she reassured him that everything was in order and that it was the 'opposition' spreading rumours and that there was nothing to worry about. Bluezone also sent letters to all the investors purporting to explain the situation.

[3] This document does not appear to be the risk profile conducted with Mr Visser, but one done with Mrs Visser later on 5 March 2007

14.12. A few months later, the rumours turned into reality and the applicant heard that Bluezone had been placed under liquidation. Mrs Stroh called the applicant and said that Mr Visser is calling her numerous times a day to express his concerns and unhappiness about the situation.

14.13. The applicant later joined a group of brokers that opposed the liquidation and appointed an advocate to handle their case in ultimately recouping the clients' monies.

14.14. The applicant apologised for any inconvenience caused as this was not his intention.

15. On 30 September 2011, the Vissers responded to the version of the applicant in a letter dated 7 September 2011. In this response the Vissers stated *inter alia* that the applicant informed them at their first meeting that he invests primarily with Liberty, Sanlam *et cetera* and that there is currently no investment that can be recommended in the financial sector and that he would suggest that the Vissers look at the property market. The monthly returns are better in the property market than from financial institutions – about 9.5 % per year; in response to a question from Mr Visser about what institution the applicant means, the applicant responded Bluezone properties. The Vissers state that the applicant kept quiet during the conversation with Mrs Stroh. The Vissers state that the applicant could have, if it was his opinion, discussed the risk with them after Mrs Stroh left, but he did not. The Vissers state that Mrs Stroh stated the following in the presence of the applicant in response to certain questions posed by the Vissers: that it is foreign company with strong South African interests and financially very strong; that the property development was in a

chrome mining town in the Burgersfort area for a mine that was being set up and that it was already in the process of being established; that there would be monthly income of interest of 9.5 % per year and 7% interest per year on capital *et cetera* . The Vissers further state that a prospectus was handed over by Mrs Stroh. After the Vissers went through the prospectus, they contacted the Financial Services Board a few days later to find out if Bluezone was registered and the answer of the FSB was ‘yes’. Mrs Stroh stated in the presence of the applicant that there was a good financial management team and everything was guaranteed against maladministration and liquidation. The Vissers state that it is strange that the applicant just sat and kept quiet. It appears that the applicant by doing so agreed with the statements of Mrs Stroh in respect of the assurance given regarding liquidation and the remainder of what Mrs Stroh stated. The amount of R292,723 paid to the Vissers as ‘purported interest’ was used to pay tax and was in fact their own money – there was never any income *et cetera*.

16. On 21 October 2011, in response to the response from the Vissers, the applicant sent a letter to the Ombud persisting with and elaborating on certain points including the following: that he simply informed Mr Visser, when Mr Visser stated that the interest rate was too low [in relation to the Liberty proposal], that he knows that there are property syndications which provide higher income but that he did not have sufficient knowledge of this type of product. That pursuant to this disclosure, Mr Visser knew that the applicant did not have any contracts or accreditation with syndications. That the applicant asked whether he could introduce someone to Mr Visser to provide more

information, and Mr Visser answered ‘yes’. At the meeting with Mrs Stroh, the applicant kept quiet as he did not have sufficient knowledge of these types of investments and according to his licence was not entitled to sell such investments. The applicant did not speak to the Vissers after the meeting also for the aforesaid reasons. It was not the intention of the applicant to give any advice on products for which he was not licensed as he was aware that this would be against the relevant legislation. The applicant had no contact with the Vissers after the aforesaid meeting. All future investments and enquiries from the Vissers were directly handled by Mrs Stroh. In light of the aforesaid, the applicant is not able to provide a record of advice *et cetera* in respect of the financial services due to the fact that he did not provide any advice or sell a product to the client. The applicant states that all he did was, at the request of Mr Visser, to introduce him to somebody that marketed property investments (after the applicant had explained to Mr Visser that he (the applicant) did not do property investments himself.) The advice was given by Mrs Stroh, the application form and risk profile were done by Mrs Stroh. The cheques were collected by Mrs Stroh from the client after Mr Visser contacted her. The applicant was also not involved with any enquiries or general communication. The applicant states that what he did was introduce Mrs Stroh to Mr Visser, with Mr Visser’s consent, and Mrs Stroh paid to the applicant a referral fee because the applicant had introduced a client to Mrs Stroh.

17. On 16 November 2011, the case manager for the Ombud sent the complaint purportedly to the key individual for Bluezone. On 21 November 2011, attorneys Mostert and Bosman responded in a letter with attachments (comprising

approximately 50 pages). A further response was sent to the Ombud from the same attorneys dated 10 May 2012, a letter with attachments (comprising approximately 275 pages). This forms part of Part B of the record. These documents, with supporting evidence, create further material disputes in this matter. Without being exhaustive at all, the following is set out:[4]

17.1. Mr Visser duly signed the application form for the investment confirming *inter alia* that he had received the Disclosure Document (which itself is a substantial document setting out the details of the investment in the property syndication scheme).

17.2. The Disclosure Document fully explains *inter alia* the risks relevant to the investment.

17.3. The transaction was explained to Mr Visser by Mrs Stroh in March 2007. Mrs Stroh is a duly appointed representative of Bluezone in terms of section 13 of the FAIS Act.

17.4. Although Bluezone might or might not be at risk due to the actions of the applicant and/or Mrs Stroh who represented it at the time of the investment and transaction, the potential personal liability of the directors of Bluezone is "*highly unlikely*".

[4] We are alive to the fact that certain of this information as furnished may not be factually correct (***cf***, for example, the findings and the facts set out in the decision of **J L Weihmann N.O. FAB1/2015** handed down on 31 August 2021, and various judgments of our courts dealing with *inter alia* Bluezone and Spitskop. However, this was the information that was provided by Bluezone at that time, which would have been relied upon by representatives of Bluezone in selling units in the property syndication scheme. Further, the Ombud was obliged to take this information into consideration and deal with it in the Ombud Determination.

17.5. The investors would also have signed the “Summary of Investment” document.

17.6. Mr Visser would have had all relevant information relating to the investment prior to making the investment.

17.7. All legal, financial and compliance requirements were duly attended to, and Bluezone employed professionals in ensuring such compliance (such as attorneys, counsel, accountants, sworn valuators, and compliance services).

17.8. The project was not a pyramid scheme but complied in all respects.

17.9. Mr Visser received interest payments on the investment until August 2009.

17.10. For reasons that could not be foreseen, there was a delay in obtaining approvals for the Spitskop development. In addition, there was a sudden, severe economic downturn in the latter part of 2008 that affected the project. The delays in the project and the liquidation of Spitskop were due to reasons that were unforeseeable at the time that the investment was made by Mr Visser in 2007.

18. On 18 September 2017, a further notice / letter was directed from the Ombud to the applicant and certain questions were posed. On 19 October 2017, the applicant responded making the following points (and a number of other points, which we do not intend repeating herein) *inter alia*:

- the companies under the Bluezone management were declared an illegal deposit-taking institution on 21 August 2009 by the inspector appointed by the South African Reserve Bank (“**SARB**”).

- The cause of the loss of investments by investors was due to the factors pointed out in the letter (*inter alia* the conduct of the SARB *et cetera*) and not the conduct of any of the brokers.
- Whilst the relevant company had been investigated for a very long period, neither the investors nor the financial advisers were informed of this fact.

19. There was further correspondence, which we do not intend to recite herein. As is apparent from the versions set out above, there are certain material disputes of fact in this matter. These disputes are not simply limited to the disputes raised in respect of the versions of the parties, but further disputes arise when reference is had to the further documentation provided by the parties themselves as well as parties against whom the Ombud Determination does not in fact apply.

THE OBJECTIVES OF THE OMBUD

20. Section 20 of the FAIS Act created the office of the Ombud. The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to (a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and (b) the provisions of the FAIS Act. (Section 20(3) of FAIS) When dealing with complaints the Ombud is independent and must be impartial. (Section 20(4) of FAIS)

FACTUAL FINDINGS BY THE OMBUD:

21. There are many factual findings by the Ombud which are either not supported by the facts or in conflict with the facts on the record. We do not intend listing all of these, but point out that the (erroneous) factual findings made by the Ombud render the legal conclusions drawn in the Ombud Determination flawed.

22. We mention but a few herein:

22.1. "*… it turned out that Stroh had lied to them [the Vissers] as investor funds were not insured against insolvency.* ***Greyling was aware of this and said nothing*** *…*". Firstly, this version conflicts with the version of Bluezone in respect of the documentation that was provided to Mr Visser. Further, there is no factual evidence whatsoever on which to base the finding that the applicant was aware of what is stated in the second sentence. On a conspectus of the evidence, the applicant was not aware of this at all.

22.2. "*… a false impression was created by Greyling that the Bluezone product was promoted by Liberty Life.*" (par 35) This is a speculative conclusion drawn by the Ombud, and there is no evidence of this.

22.3. "*… The Liberty consultant and Greyling saw an opportunity to earn some easy money ...*" (par [36]) "*The probabilities are inescapable that Greyling colluded with the Liberty consultant to share the commission… the complainants were rushed into making the investment without any*

compliance with the provisions of the Code …" (par [37]) There is no evidence on which to base these speculative allegations.

22.4. "*… Stroh and Greyling were merely going through the motions and were absolutely bent on selling this product to complainants …*" (par [46]) This is not supported by the evidence. The finding is speculative and unsupported.

22.5. "*… Greyling must have realised that there was a conflict of interest and that he could not rely on Stroh to make a full and frank disclosure of all the facts about this investment …*" (par [48])[5] This is not supported by the evidence. The finding is speculative and unsupported.

22.6. "*… Greyling was recklessly in pursuit of his lucrative commission …*" (par [62]) This is not supported by the evidence. The finding is speculative and unsupported.

---

[5] On the probabilities, if the applicant was simply focussed on commission, he would simply have sold a product that he was authorised to sell, in which event he probably would not simply have received a referral amount but his full commission. A similar argument was addressed in the **Symons** matter (**Symons NO and Another v Rob Roy Investments CC t/a Assetsure** 2019 (4) SA 112 (KZP)) (in the context of the Sharemax property syndication) where the court found as follows: "*[46] The allegation that Griffin failed to exercise an independent judgment can be easily disposed of. It was based on the fact that he received an upfront commission of 6%. The suggestion was that because this was higher than the norm at the time, he would have recommended this investment in preference to others. Griffin accepted that the commission may have been somewhat higher than in the case of other lump-sum investments, but said he could have earned more commission by selling investments in unit trusts or annuities. Neither Cohen nor Swanepoel regarded the commission as excessive. I do not consider that the evidence justifies a finding that the commission of 6% compromised Griffin's independence.*"

22.7. The applicant "… *convinced [the Vissers] to invest in Bluezone. He was firmly focused on his lucrative commission and was hardly interested in acting in the best interests of his clients …*" (par [74]) This is not supported by the evidence. If anyone convinced the Vissers to invest [in Spitskop], the evidence in the record indicates that this person was Mrs Stroh and not the applicant. The finding is speculative, unsupported, and does not accord with the facts on the record.

23. The evidence does not support various conclusions drawn by the Ombud. There are further material disputes of fact in this matter. For this reason and the reasons that follow, the determination must be reconsidered and set aside.

CONDUCT:

24. Ordinarily, in a case based on a loss suffered as a result of negligent advice by an advisor, the claim is pursued on the simple basis that the investment advisor furnished negligent advice to the investor and the investor suffered loss in consequence of following that advice. (**Durr v Absa Bank Ltd and Another** 1997 (3) SA 448 (SCA); **Centriq Insurance Company Limited v Oosthuizen and Another** [2019] ZASCA 11.)) – cited from **Atwealth (Pty) Ltd and Others v Kernick and Others** 2019 (4) SA 420 (SCA) par [6] ("**Atwealth**")

25. However, in the present matter, the starting point is whether the applicant furnished any advice at all, and what in fact the nature of his conduct was.

26. The Ombud erroneously finds *inter alia* that: The Vissers made investments in a product "*on the advice of respondent (Greyling*" (par [1]); "*Greyling does not dispute that he advised complainants to make an investment in Blue Zone – Spitskop Village Properties Ltd (Bluezone).*" (par [2]); "*It cannot be disputed that Greyling advised complainants to invest in Bluezone.*" *et cetera*.

27. The first problem with these findings is that they do not accord with the facts on the record before us. The facts indicate that it was Mrs Stroh who gave the advice regarding Bluezone and Spitz Kop, not the applicant.

28. Further, the applicant repeatedly stated that he gave no advice (as understood in terms of the FAIS Act) to the Vissers. The Ombud acknowledges that this is the applicant's stated version that he "*… in fact did not give complainants advice to invest in Bluezone ...*". (par [20]) And further: "*… He also points out that he did not intend to give any advice in respect of a product for which he was unlicensed and he did not want to contravene the FAIS Act.*" (par [29]) The version of the applicant is that Mrs Stroh gave advice, Mrs Stroh conducted the risk profile analysis *et cetera*.

29. In addition, the facts do not accord with what the Ombud found, set out in the Ombud Determination, regarding what the Vissers' complaint entailed: (our emphasis)

> [11] **Stroh promised the investment will yield interest** at the rate of 9.5% per annum on capital and a further 7% for capital growth. **She also informed**

complainants that Bluezone was a very big and financially strong company with international interests. The impression was created that Bluezone had access to enormous capital resources. **During Stroh's presentation, respondent was present but did not utter a word. He heard everything Stroh had to say about Bluezone and the investment and offered no comment.** Stroh also mentioned that the prospect of Bluezone being liquidated, was nil. There was also insurance against such risk.

[12] **Stroh stated that the Spitskop project was to develop** a mining town for a mine and that the project was well on the way towards completion and **she assured complainants that their capital and income is safe**. Complainants point out that **Stroh never mentioned** that investors were going to be paid out of their own capital. **When Stroh mentioned insurance against liquidation, respondent did not say anything and created the impression that there was insurance against such risks.**

[13] Complainants question **why Greyling said nothing if he disagreed with what Stroh was saying**. Greyling as their FSP was under a duty to intervene. **But he said nothing, creating the impression that he agreed with Stroh**. Further, first complainant mentioned to Stroh that they had never before invested funds in any investment such as the Krion syndication. **Stroh assured them** that this was not such a syndication. After payment was made, complainants did not receive all their share certificates; **notwithstanding repeated calls to Stroh**.

[17] … Complainants now realise that Bluezone had no independent means with which to pay the promised rentals and that the 7% capital growth was just a lie. **Greyling gave no advice in this regard** and simply went along with Stroh and merely pocketed the commission.

30. In terms of the FAIS Act (our emphasis):

'**financial service**' means any service contemplated in paragraph (a), (b) or (c) of the definition of 'financial services provider', including any category of such services;

'**financial services provider**' means any person, other than a representative, who as a regular feature of the business of such person-

(a) **furnishes advice**; or

(b) **furnishes advice and renders any intermediary service**; or

(c) **renders an intermediary service**;

31. Advice is defined in the FAIS Act to mean:

"'**advice'** means, subject to subsection (3) (a), any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients-

(a) in respect of the purchase of any financial product; or

(b) in respect of the investment in any financial product; or

(c) on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or

(d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product,

and irrespective of whether or not such advice-

(i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or

(ii) results in any such purchase, investment, transaction, variation, replacement or termination, as the case may be, being effected;

32. Section 1(3)(a) of the FAIS Act provides that for purposes of the FAIS Act, certain conduct does not constitute advice.

33. The applicant states that he gave no advice, and did not intend to give any advice, as, in his view, he was not entitled to do so in terms of the law. This was the very reason that he referred the Vissers to Mrs Stroh. The referral of clients to another broker does not constitute advice for purposes of the Act. Not saying something does not constitute advice. The fact that the applicant stated that there were higher rates of interest / income in the property market may arguably be construed as advice, but this must be understood with reference to the facts of this matter – the applicant conveyed that he could not give advice about property investments and this was the reason for the referral to Mrs Stroh who acted on behalf of Bluezone. We find that on the facts of this matter as they appear from the record, the applicant did not in fact render advice. The facts indicate that Mrs Stroh furnished the information regarding the product; that Mrs Stroh furnished the information, the advice and the recommendations; that it was this advice that induced the Vissers to invest in the scheme. In fact the Vissers criticise the applicant for not saying anything. Not saying anything, after referring the Vissers to a person with knowledge in the relevant field, cannot be construed as giving advice.

34. A reading of **Durr v Absa Bank Ltd and Another** 1997 (3) SA 448 (SCA) ("**Durr**") indicates that the conduct of the applicant is not the same as the conduct of the advisor in **Durr** (as erroneously held by the Ombud in finding

that the **Durr** matter was on all fours with the matter at hand[6]). In **Durr** at 469H – I, the learned judge commented as follows in respect of the broker in that matter:

> Either he had to forewarn the Durrs where his skills ended, so as to enable them to appreciate the dangers of accepting his advice without more ado, or he should not have recommended Supreme. What he was not entitled to do was to venture into a field in which he professed skills which he did not have and to give them assurances about the soundness of the investments which he was not properly qualified to give.

35. The applicant told the Vissers where his skills ended. It was for this very reason that the meeting was scheduled with Mrs Stroh. The applicant did not "*... venture into a field in which he professed skills …*" nor did he give any "*…assurances about the soundness of the investments which he was not properly qualified to give.*" The applicant referred the Vissers to Mrs Stroh who he understood and believed had the relevant skill and qualification in the property industry.

36. The applicant had no contact with the Vissers after the meeting where Mrs Stroh met with the Vissers in February 2007. It was only after that meeting that the Vissers decided to invest further amounts in the total sum of R900,000 – (cheques dated 5 March 2007 in the sums of R300,000 and R600,000

[6] The finding of the Ombud that "*… On the facts of this case, the Durr judgement is applicable and cannot be distinguished on the facts ...*" is entirely incorrect. (*cf.* **Atwealth (Pty) Ltd and Others v Kernick and Others** 2019 (4) SA 420 (SCA)

respectively). Whilst the aforesaid facts are relevant also to the issue of causation, it is entirely unclear how any conduct (whether in the form of commission or omission) on the part of the applicant is relevant to the further investments that the Vissers decided to make.

37. For the aforesaid reasons, the Ombud determination ought to be set aside.

WRONGFULNESS

38. An aspect that is overlooked by the Ombud is the issue of wrongfulness. Insofar as the determination of the Ombud deals with an omission on the part of the applicant to intervene and some or other duty on the part of the applicant to intervene (see for example par [13] of the Ombud Determination: "*… Greyling as their FSP was under a duty to intervene. But he said nothing, creating the impression that he agreed with Stroh ….*"), the question of wrongfulness becomes relevant.

39. The test for determining wrongfulness in a delictual sense for omissions has been formulated by the Supreme Court of Appeal as follows:

> . . . An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, *inter alia*, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a

> legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered . . .
>
> (**Van Eeden v Minister of Safety and Security (Women's Centre Trust, as Amicus Curiae)** 2003 (1) SA 389 (SCA) par 9)

40. The applicant was not licensed to give advice in respect of the relevant product. Had he advised, he would have been in breach of the relevant legislation.

41. In terms of section 13(1) of FAIS Act (titled "Qualifications of representatives and duties of authorised financial services providers") (our emphasis):

> "(1) **A person may not**-
>
> (a) …
>
> (b) **act as a representative of an authorised financial services provider, unless** such person-
>
> (i) prior to rendering a financial service, **provides confirmation, certified by the provider**, to clients-
>
> (aa) that a service contract or **other mandate, to represent the provider, exists**; and
>
> (bb) that **the provider accepts responsibility for those activities of the representative performed within the scope of, or in the course of implementing, any such contract or mandate**;
>
> (iA) …
>
> (ii) …; or

(c) **render financial services or contract in respect of financial services other than in the name of the financial services provider of which such person is a representative**.

42. In terms of subsection (9)(b) of section 8 of FAIS (titled "Application for authorisation"):

> (9) No person may-
>
> (a) …;
>
> (b) perform any act which indicates that the person renders or is authorised to render financial services or is appointed as a representative to render financial services, unless the person is so authorised or appointed;
>
> (c) …;

43. There can be no duty to intervene in circumstances where intervening to advise would render the conduct of the applicant unlawful. For such further reason the Ombud Determination ought to be set aside.

NEGLIGENCE

44. For the purposes of liability culpa arises if —

> (a) a reasonable person in the position of the defendant —
>
> (i) would have foreseen harm of the general kind that actually occurred;

(ii) would have foreseen the general kind of causal sequence by which that harm occurred;

(iii) would have taken steps to guard against it, and

(b) the defendant failed to take those steps.

(**Atwealth** par [45] citing **Mukheiber v Raath and Another** 1999 (3) SA 1065 (SCA) par [31])

45. In determining what the standard of the reasonable person is in any particular case depends on the facts. The test for negligence must be grounded upon the factual matrix of the dispute requiring adjudication. (**Atwealth** par [46])

46. Based on the facts *in casu*, the question really boils down to whether the conduct of the applicant in (**a**) suggesting that the property market provides higher returns than the financial markets; (**b**) introducing to the Vissers a broker who provided advice in the property syndication market, namely Mrs Stroh; and (**c**) not intervening when (or after) Mrs Stroh gave advice to the Vissers, constitutes negligent conduct on the part of the applicant.

47. From the facts contained in the record it cannot be concluded that a reasonable broker in the position of the applicant would have foreseen harm of the general kind that actually occurred (i.e. loss of investment), nor the general kind of causal sequence by which that harm occurred, (which Bluezone states was due to the delay in approvals and a market downturn; which the applicant states was due to the intervention of the SARB; and which the Vissers state was as a result of *inter alia* of the unlawful conduct of the board, fraud, corruption, and

the scheme being a pyramid scheme *et cetera*). It is unclear what steps a reasonable broker without skill, knowledge or authorisation to act in the property investment field could or should have taken. Any steps that could have been taken would on the probabilities not have avoided the harm that ensued (an aspect that relates perhaps more properly to the issue of causation).

48. On the facts on the record it cannot be concluded that the applicant acted in a negligent manner. For such further reason the Ombud Determination ought to be set aside.

CAUSATION

49. The Ombud refers to the Vissers' complaint and states as follows in this regard: "*[18] … Complainants believe that Greyling did not act in their best interests and but for his advice they would not have been introduced to Bluezone and would never have invested in such a high-risk investment.*" The Ombud states that on the version of the applicant, the applicant "*… admits to having introduced them [the Vissers] to property syndication and that he brought along a representative of Bluezone to meet with the complainants.*" (Ombud determination, paragraph [20])

50. Causation involves two separate enquires – one factual and the second legal. In the matter of **International Shipping Company (Pty) Ltd v Bentley**[7] the Appellate Division (as it then was) held as follows:[8]

[7] **[1990] 1 All SA 498 (A).**

[8] At 516 – 517.

> … in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question
>
> ...
>
> On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation" …

51. The test for causation is applied as follows:[9]

> A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics.

52. In **OK Bazaars (1929) Ltd v Standard Bank of SA Ltd**,[10] the SCA held as follows regarding legal causation:[11]

---

[9] **Minister of Safety and Security v Van Duivenboden** 2002 (6) SA 431 (SCA) [25].

[10] 2002 (3) SA 688 (SCA).

[11] At par [23].

> … The test to be applied in that regard [regarding legal causation] was described by this Court in Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 (A) at 765A - B as
>
> '. . . a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all play their part'.

53. On factual causation, the Ombud states as follows: "*... Factually, it has already been established above that the complainants would never have known, much less invest in Bluezone, but for Greyling introducing property syndication investment and introducing the complainants to Stroh …*" (Ombud determination, paragraph [93]) The fallacy in the reasoning of the Ombud is illustrated by a further statement contained in the Ombud determination which reads as follows: "*If Liberty acted legally [and did not give the contact details of the Vissers to the applicant], then Bluezone and Greyling would have remained unknown to them and they would not have lost their live (sic) savings.*" (Ombud determination, paragraph [38]) On the reasoning of the Ombud there is a practically unlimited number of causes, factually, for the loss that the Vissers suffered. Neither Liberty providing contact details, nor the applicant's referral of the Vissers to Mrs Stroh are the factual cause of the loss suffered.

54. The facts contained in the record and the probabilities do not show that the applicant was the factual cause of the loss suffered by the Vissers. The Vissers themselves point to various causes for their actual loss (other than the conduct of the applicant), including the conduct of Mrs Stroh, the conduct of the board

of Bluezone *et cetera*. The applicant has furnished evidence that the property syndication scheme collapsed by virtue of the intervention of the SARB (***cf* Symons** par [58]: "… *The cause of the loss was the intervention by the Reserve Bank and not any breach on the part of the defendant. The question of legal causation does therefore not arise.*") Bluezone has stated that the project failed for other reasons.

55. On legal causation, the Ombud states as follows: "*... The facts also establish that the conduct of Greyling is sufficiently closely and directly the cause of the loss of complainants capital.*" (Ombud determination, paragraph [93])

56. The facts contained in the record and the probabilities do not show that the applicant was the legal cause of the loss suffered by the Vissers. The conduct of the applicant, both his commission of referring the Vissers to Mrs Stroh and his omission of not speaking up regarding the alleged risks, is not linked sufficiently closely or directly to the loss for legal liability to ensue. The loss is too remote. Whatever the cause of the collapse of the property syndication scheme may have been, such could not have been foreseen by the applicant. The loss suffered by the Vissers is not linked sufficiently closely or directly to any act or failure on the part of the applicant. (**Symons** par [60])

CONCLUSION

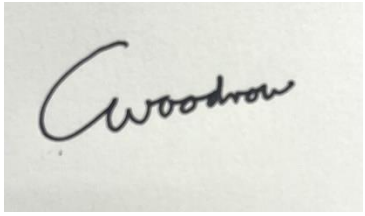
57. It is not necessary for us to traverse the further grounds raised by the applicant in his application and as raised for him in heads of argument.

58. For the reasons set out in this decision, the Ombud Determination must be set aside.

ORDER

59. The determination of the third respondent, the Ombud for Financial Services Providers, dated 5 August 2021, is set aside and referred back to the third respondent for reconsideration.

Signed on behalf of the Tribunal panel.



C Woodrow SC
23 November 2022