THE FINANCIAL SERVICES TRIBUNAL

Case No: FAB123/2018

In the matter between:

IMPECTUS BROKERS AND FINANCIAL SERVICES CC	First Applicant
FRANCOIS VAN DER WALT	Second Applicant
ANDRE JONKER	Third Applicant

and

JACOMINA CHRISTINA MULLER	First Respondent
WYNAND MULLER N.O.	Second Respondent
THE OMBUD FOR FINANCIAL SERVICE PROVIDERS	Third Respondent

Tribunal: H Kooverjie (chair), G Madlanga, A Jaffer

Hearing: 8 July 2019

Decision: 27 August 2019

Summary: Non-compliance with Section 20(3) of the Financial Advisory and Intermediary Services Act 37 of 2002("*FAIS Act*")

DECISION

A DIRECTIVE

1. This application for reconsideration was directed to this Tribunal by virtue of a ruling of the Deputy Chairperson dated 16 November 2018, and which stated:

> "***Leave to proceed with the reconsideration is granted.***
>
> ***A problem the Panel must addresses the fairness and <u>legality of the determination</u> as far as the applicants for reconsideration are concerned to be held accountable after more than ten years and the delay of the Ombud's office of nearly seven years. See section 20(3):- "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." See the effect of delay in criminal matters. On what basis is the key person held liable?***"
>
> (Our emphasis)

For the purposes of this decision, the parties will be referred to as identified aforesaid in the heading. The second applicant was a broker employed by the first applicant at the time of the complaint. The second respondent acted in his capacity as executor of the estate of the late Mr Muller.

B <u>ISSUES</u>

2. This Tribunal is required to make a determination pertaining to the delay caused by the respondents in bringing this complaint to the attention of the FAIS Ombud and the subsequent delay in the office of the Ombud in finalising its determination.

3. Consideration should be given as to whether complainants had filed their

complaint timeously and the explanation proffered by the office of the Ombud in furnishing its determination 7 years later.

4. The relevant provision is section 20(3) of the FAIS Act which requires the Ombud to *inter alia* consider and dispose of the complaint expeditiously.

5. Section 20(3) of the FAIS Act stipulates:

> "***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 the contractual arrangement or other legal relationship between the complainant and any party to the complaint…***"

C BACKGROUND

6. It is not in dispute that the complaint was lodged with this office of the FAIS Ombud in November 2011. The complaint emanated as a result of failed investments made by the complainants during January and February 2006. It was alleged that such investments were made on the advice of their broker Mr Jonker of Impectus and subsequently Mr Vontas of Bonatla. The complainants were Mrs Muller and Mr Muller, acting as executor of his late father's estate. Their funds were invested in a company called Southern Palace Investments 335 (Pty) Ltd ("***Southern Palace Limited***") and the product was "The Heights" income plan. The product was promoted by Bluezone Property Investment Limited ("***Bluezone***"), a financial services provider and the property.

7. The funds invested amounted to R1,000,000.00 in total and originated from the late Mr Muller's pension fund. Mr Muller retired at the age of sixty from the municipality due to ill health in 2005 and cashed one third of his pension fund as a lumpsum from his pension fund. At the time he was employed as a heavy-duty truck driver with the municipality. Mrs Muller was a housewife for most of her life and the investments were her only source of income. Mr Muller passed away in 2007. Mrs Muller continued to benefit from the investments until November 2011 in the form of monthly incomes. It was Mr Jonker, their broker who introduced them to the said investment.

8. We note that the Ombud received the complaint in 2011 and obtained a response from Mr Jonker in November 2012. However, it only resumed assessing the complaint again during the course of 2016. In July 2017 the respondent, Mr Jonker was given a further opportunity to address the office of the Ombud.

9. The FAIS Ombud recommended that the first applicant pay the complainants' loss. Such recommendation was issued on 12 December 2017. Shortly thereafter on 11 June 2018 the determination of the FAIS Ombud was issued. The applicants then filed their application for leave to appeal on 11 October 2018. This was followed by the aforesaid ruling of the Deputy Chairperson of 16 November 2018.

D LEGISLATIVE PRESCRIPTS

10. The relevant legislation applicable at the time was the Financial Advisory Intermediary Services Act 37 of 2002 ("***The FAIS Act***"). Section 27(3)(a)(i) of

the FAIS Act stipulates:

> "***The Ombud must decline to investigate any complaint which relates to an act <u>or</u> omission which occurred on or after the date of commencement of this act but on a date <u>more than three years after the date of receipt of such complaint by the office</u>.***"

11. Section 27(3)(a)(ii) stipulates:

> "***Where the complainant was unaware of the occurrence of the act, an omission contemplated in sub-paragraph 1, a period of three years commences on the date on which a <u>complainant became aware or ought reasonably to become aware of such occurrence whichever occurs first</u>.***" (Our emphasis)

12. By virtue of the Rules[1], particularly Rule 5(b) a complainant is required to attempt to resolve the complaint before referring it to the Ombud. Rule 5(c) specifically states:

> "***A complainant has six months after receipt of the final response of the respondent, or after such response was due, to submit the complaint to the office.***"

Rule 5(d) states:

[1] The Rules on Proceedings of the Office of the Ombud for Financial Service Providers 2003, GG, Notice 81 of 2003 (the Rules)

"***(d) On submitting a complaint to the office, the complainant must satisfy the Ombud of having endeavoured to resolve the complaint with the respondent and must produce a final response (if any) of the respondent as well as the complainants' reasons for disagreeing of the final response.***"

E FAIS OMBUD'S EXPLANATION FOR THE DELAY

13. Essentially the response from the FAIS Ombud on this particular aspect was that:[2]

13.1 It recognised its mandate to resolve complaints expeditiously. However, the delay in finalising this complaint was not due to any negligence on the part of the office.

13.2 The office was cautious in dealing and considering matters that concerned property and syndication schemes. It considered matters of this nature until 2013.

13.3 This was due to the outcome of the determinations in the **Siegrist and Bekker** matters and the subsequent appeals filed thereto. A decision was then taken by the FAIS office to hold syndication related complaints in abeyance. This was a precautionary and a necessary risk management step.

13.4 Subsequently the Financial Services Board Tribunal decided the said

[2] P681 to 683 of the record

matters, on appeal, on 10 April 2015. It was only after this decision the office commenced with adjudicating property syndication schemes matters. At that point as many as 2000 complaints were held in abeyance.

14. On 30 June 2015, the Ombud advised Mrs Muller of the outcome of the **Siegrist and Bekker** decisions and in conclusion informed her that her complaint would be considered with respect to her specific complaint against the broker.[3] The office also advised her that due to the large volume of similar matters, her patience would be apprecited.

15. To this effect, we further note correspondence dated 6 May 2016,[4] from the office of the FAIS Ombud advising Mrs Muller that the office will resume processing her complaint. It is necessary to reiterate the contents thereof:

> "***In our previous correspondence were indicating that due to an appeal application made by the directors of Sharemax to the Appeal Board of the Financial Services Board, our office was compelled to pend further proceedings against the respondent.***
>
> ***As indicated in the aforementioned correspondence, the outcome of the appeal, which is delivered on 10 April 2015 by the Financial Services Board, limited our jurisdiction to the extent that we can only proceed with action against a broker who sold the property syndication investment products and not the property syndication schemes.***

[3] P497
[4] P503

All complaints which were halted, pending the outcome of this decision, are now being actioned in the normal course. However, we cannot overlook the time which we have lost in moving the complaints towards resolution and in this regard, we ask your continuous patience and cooperation.

Currently we are dealing over 1500 property syndication complaints against various respondents and are all of a similar nature. These complaints are classified in terms of their stage of resolution being a formal or informal resolution stage…" (Our emphasis)

F APPLICANT'S RESPONSE REGARDING THE DELAY

16. In summary the applicants' main contentions regarding the delay was that:

16.1 It is clear that Mrs Muller became aware of the situation during November 2009, and confronted Mr Jonker at that time. She however lodged a complaint with the office of the FAIS Ombud in September 2011.

16.2 The office of the Ombud had no jurisdiction to consider the complaint due to the extensive time period that lapsed between the act of the broker and the date the complaint was lodged. Based on this delay, the Ombud should have declined to investigate the complaint by virtue of Section 27(3)(i) of the FAIS Act.

17. It is therefore necessary to firstly establish whether in fact the complaint was out of time in terms of Rule 5(c).

18. During the hearing Mrs Muller was represented by the second respondent, her son. He submitted that it was around 2010 that they had their last meeting with Mr Jonck. However, Mrs Muller continued communicating with Mr Jonck thereafter. It was Mr Jonck who advised Ms Muller that reinvesting in Bluezone would be the best solution.

19. Moreover, it was only when Mr Muller made contact with the media that he learnt that he could seek redress from the office of the Ombud.[5] This was around June 2011. Thereafter the remaining funds were reinvested with Bonatla and Mrs Muller received some returns but not the full amounts she expected. At the time Mr Vontas from Bonatla advised Mrs Muller. We note that the complaint was signed on 14 September 2011. We also note that the last payment from Bonatla was made on 3 September 2011.[6]

20. From the submissions on the part of the respondents made at the hearing, it was noted that:

    20.1 Mrs Muller stated that Mr Jonck furnished her with financial advice and assured her that her money was safe.[7]

    20.2 During 2010, Mrs Muller still sought advice from Mr Jonck, who at that stage was avoiding her. A meeting took place in June 2010.[8]

5 P42 of the transcript of the record of proceedings.
6 P48 of the transcript of the record of proceedings.
7 P10 of the transcript of the record of proceedings.
8 P12 of the transcript of the record of proceedings.

20.3 From December 2009 Mrs Muller stopped receiving her investments from Bluezone.

21. In her complaint she states:

> "***still being a laity and the person who acted as my financial advisor I turned to him and he assured me that everything is in order with my investment. I did now for December 2009 not receive any money which was a big concern for me as I could not accept that my advisor tells me my money was invested at a safe place."***

G FINDINGS

22. Having considered the record and the submissions made by both parties, the following factual observations were noted that:

22.1 When Mrs Muller proceeded to reinvest with Bonatla she did so without Mr Jonck assisting her.

22.2 Mr Jonck informed her of Bonatla's takeover of the property.

22.3 During 2011, Mrs Muller and her sons constantly communicated with Mr Vontas, an advisor from Bonatla. At that stage Mr Jonck was out of the picture.

22.4 It appears that Mrs Muller became aware of the bad investment around December 2009 but was assured by Mr Jonck that the

investment was sound. Such advice was given until 2010. This complaint was lodged in September 2011.

22.5 With regard to the reinvestment in Bonatla, it appears that the issue of a failed investment became a reality shortly before the lodging the complaint with the Ombud.

23. In applying Section 27(3)(a)(ii), we find that the complaint had not prescribed as the three years had not lapsed since Mrs Muller became aware of the status of her investment.

24. The second issue to then consider is whether the delay in the Ombud's office was reasonable. Between the receipt of the complaint by the office and the finalizing of such complaint, at least 5 years passed. The determination was only issued on 11 June 2018, being 7 years after the complaint was lodged.

25. The issue of delay, namely that the Ombud failed to adhere to Section 20(3) of the FAIS Act was only raised in these proceedings.

26. Mr Jonck had responded to the complaint already in November 2012 and was again furnished with an opportunity 5 years later (in 2016) to make further submissions.

27. It is trite that the Ombud is a creature of statute. Its powers and jurisdiction are confined to the prescribed legislation, the FAIS Act. Section 20(3) of FAIS provides that the objective of the Ombud is to consider and dispose of complaints expeditiously.

28. By virtue of section 28(1) of FAIS Act Ombud is empowered to either dismiss or uphold (wholly or partially) "*the complaint*".

29. The FAIS Act defines a "*complaint*" to mean:

> ***"... a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which it is alleged that the provider or representative –***
>
> ***(a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;***
>
> ***(b) has wilfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or***
>
> ***(c) has treated the complainant unfairly."***

30. Rule 2(c) of the Rules prescribes that the services rendered by the Ombud "***are confined to the investigation and determination of complaints in terms of the Act and these Rules".***

31. It could not be gainsaid therefore that the Ombud only had jurisdiction to investigate and dispose of the specific complaint lodged. The Ombud does not

have general jurisdiction to investigate or adjudicate matters that do not form part of the complaint itself.

32. Having regard to the aforesaid and in considering the delay in the office of the Ombud we find that the delay in adjudicating this complaint was unreasonable and unjustified for at least the following reasons namely:

32.1 The issue which the office was concerned about whether it could only adjudicate on the broker's misconduct in property syndication investments and whether it had powers, which included considering the liability of the directors in property syndication schemes.

32.2 It is our view that even if there was uncertainty in the ambit of "*wider powers*", this office could have proceeded in finalising the specific complaint regarding the broker's conduct.

32.3 Moreover, it was not disputed that Mr Jonck had responded to the complaint already in 2012. A determination was wanting then already. This was before the uncertainty raised in the **Siegrist and Bekker** determinations came to light.

32.4 The Ombud was duty bound by statute to deal with the matter informally and expeditiously.Due to the backlog of over 2000 complaints the office should have made provision for expediting the adjudication of the complaints. It had a statutory obligation to do so. Even though it is appreciated that the office of the Ombud has limited capacity, the office should have been mindful of its statuary

obligations in terms of Section 20 (37 of the FAIS Act.)

33. The mandate of the FAIS Ombud is constrained by the provisions of the FAIS Act. In discharging the mandate, the FAIS Ombud is bound by its provisions and cannot act beyond what is stipulated within the express wording of the statute or what is reasonably or necessarily implied therein. Courts are duty-bound to nullify an act of an official or the proceedings of a tribunal where they give expression to a power not conferred by enabling legislation. The principle, known as the principle of legality, is embodied in our Constitution. Our common-law principles of administrative law were codified by virtue Section 33 of our Constitution. Section 33(3) specifically directs that national legislation must be enacted to give effect to the right to just administrative action. This has indeed been done with the enactment of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

34. In further determining whether the delay was reasonable, consideration should be given to, *inter alia*, the relevant factors such as the explanation proffered regarding the delay and the prejudice suffered by the affected parties.

35. As alluded to above, the explanation proffered by the office of the Ombud is unjustified for the aforesaid reasons.

36. Insofar as prejudice is concerned, both parties have been disadvantaged in waiting over 7 years for a determination from the Ombud. We must be mindful that this is not in the interests of justice. Depending on the findings, an unsuccessful party's opportunity to review the Ombud's decision becomes compromised.

37. In **Gqwetha v Transkei Development Corporation Ltd and Others 2006(2) SA 603 SCA** at para 22, the Court stated:

> "***It is important for the efficient functioning of public bodies…that a challenge to the validity of their decisions by proceedings for judicial review should be limited without undue delay. The rational for that longstanding rule is twofold. First the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly there is a public interest element in the finality of administrative decisions and the exercise of administrative actions.***"

38. Insofar as consideration is given to the explanation for the delay, in **Khumalo and Another v Member of the Executive Council for Education Kwazulu-Natal 2014 (35) ILJ 613 CC** at para 49-50, it was stated:

> ***"In Gqwetha, the majority of the Supreme Court of Appeal held that an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of all relevant circumstances), and if so whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.***"

H CAUSAL CONNECTION BETWEEN THE COMPLAINT AND THE INVESTMENT

39. It is common cause that Mr Jonck was licensed to act as a representative for Bluezone and thereby entitled to sell this product.

40. It is also common cause that Bluezone was licensed by the FSB.

41. The Ombud took issue with the fact that even though the Mullers had requested an investment that produced the highest income, Mr Jonck should have been aware that the product was inappropriate.

42. The Ombud noted that the record of advice showed that other traditional products were presented but that it was incumbent for Mr Jonck to have taken the time to explain the difference between the two types of products.[9]

43. Consequently, the Ombud found that Mr Jonck failed to comply with Section 16(1) of the FAIS Act in that he failed to act "***honestly, fairly, with due care, skill and diligence in the interest of clients and the integrity of the financial services industry***".

44. The Ombud further found that if Mr Jonck had adhered to the Code, the Bluezone product would not have been presented. The complainants sought investments that would keep their capital intact. The Bluezone product carried a risk and such risk of loss materialized. Disclosure of these risks were not made to the complainants.

45. Having considered the submissions and the record, the core dispute centres on whether the complainants were advised that the Bluezone investment was a risk. The applicants persisted with the argument even though the Mullers were advised that the Bluezone product did not guarantee their capital they chose

[9] P719 of the record.

Bluezone on the basis of the high monthly returns they would receive. It is not disputed that they received over R10,000.00 return per month for at least 4 years.

46. We observe from the client advice record, that the risk factor was set out therein. Mr Jonck recorded that the complainants were advised of the fact that Bluezone investment was a high-risk investment. We refer to the relevant portions in the record of advice:

> "***Rede vir keuse: Die belegging wat naaste is aan die inkomste versoek van die klient. Die risiko profiel is aanvaarbaar en verstaan dat nie gewaarborg is nie. Ons kies dit oor die beste inkomste verskaf.***[10]"

47. Furthermore, it was recorded that a detailed analysis of the products was presented and explained to Mr Muller, and once again he was aware that the capital was not guaranteed.[11]

> "***Hierdie hele verslag is gedoen met albei…Albei is deur die hele proses met my en ek was baie punterig met detail ten opsigte van die verskillende produkte wat ons oorweeg het. Die keuses wat gemaak is ten opsigte van die B2 produk, is benadruk dat dit nie 'n kapitaal gewaarborg plan is nie, maar dat die gebou 'n goeie belegging is. Die hoofrede vir die keuse was die maandelikse inkomste met 'n mate van risiko.***"

48. It was also not disputed that the Ombud failed to take cognisance of the fact that

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10 P222 of the record
11 P223 of the record

the applicants did inspect the building in which they were to invest in. We accept the submission that even if there was a possibility of a risk, Mr Jonck could not have foreseen the fraudulent conduct of the directors and that the risk would materialize.

49. We therefore are unable to agree with the Ombud that the complainants were not aware of the risks in the Bluezone investment. The record of advice placed emphasis on the risk factor and that the capital could not be guaranteed. The Mullers benefitted from this investment for 4 years until December 2009.

50. Insofar as the conduct Bonatla's representations are concerned, the Ombud did not specifically consider the conduct of Mr Vontas. It is common cause that Mrs Muller reinvested the remains of her investment into Bonatla. The Bonatla investment survived only until September 2011.

I CONCLUSION:

51. In light of the aforesaid, we find that the decision of the Ombud should be set aside. In the premises we make the following order:

(1) The application for reconsideration is granted;

(2) The Ombud's determination is set aside;

(3) The respondent's complaint is dismissed.

SIGNED at **PRETORIA** on this **27th** day of **AUGUST 2019** on behalf of the Panel.

H KOOVERJIE