THE FINANCIAL SERVICES TRIBUNAL

Case №: FAB127/2018

FAIS00493/13 –14/KZN1)

In the matter between:

JOHANNES CHRISTIAN MOSTERT	Applicant
and	
LEONI LANDMAN	First Respondent
THE OMBUD FOR FINANCIAL SERVICES PROVIDERS	Second Respondent

Tribunal: Adv W Ndinisa (chair), Adv Elias Phiyega and Ms NP Dongwana

Date of Hearing 13 August 2019

On behalf of the Applicant:	Mr P Bielderman of Bieldermans Inc.
On behalf of the 1st Respondent:	in person
On behalf of the 2nd Respondent:	No appearance

Summary: Application for reconsideration in terms of section 230 of the Financial Sector Regulation Act 9 of 2017; Breach of provisions of the Code of Conduct by the Financial Services Provider and the legal requirement of causation (factual and legal).

DECISION

A INTRODUCTION

1. This is an application by Mr Johannes Christian Mostert for reconsideration of a determination by the Ombud for Financial Services Providers ("the Ombud") dated 14 August 2018 in which the Ombud ordered Mr Mostert to pay to Mrs Leonie Landman, a pensioner the amount in the sum of R650 000.00 together with interest at the rate of 10% per annum from the date of the determination to date of final payment ("the Determination").

2. This application is before this Tribunal in terms of section 230 of the Financial Sector Regulation Act No. 9 of 2017 ("the FSRA") read together with section 28(5)(b) of the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act"). Mr Mostert, who was represented by Mr P Bielderman, is referred to herein as the Applicant and Mrs Landman, who appeared in person, is referred to as the First Respondent. The Ombud was not represented during the hearing of the matter.

B BACKGROUND OVERVIEW

3. The First Respondent's husband passed away during the year 2003 and the proceeds of his pension were made available to the First Respondent. The First Respondent approached the Applicant for financial advice on how to deal with the funds. The funds were initially invested in Momentum and after the lapse of

five years, the First Respondent received an amount in the sum of R750 638. 00 when the investment matured.

4. Further, the First Respondent discussed with the Applicant regarding her wish to reinvest the funds but wanted to invest R650 000.00 and the balance of the fund were to be placed in a money market account as emergency funds. The Applicant advised the First Respondent to invest in the Zambezi Retail Park Limited ("Zambezi Investment"), which is a property syndication project managed by Sharemax Investments (Pty) Ltd ("Sharemax").

5. It appears from the record that the Applicant met with the First Respondent during March 2008 to discuss Sharemax and the latter was given a prospectus, which is a document containing information about the Zambezi Investment. Further, it appears from the record that the First Respondent contacted the Applicant in April 2008 and this culminated in the First Respondent opting to invest in the Zambezi Investment and documents in that regard were signed by the First Respondent on 18 April 2008.

6. According to the record, the First Respondent received her first income from the Zambezi Investment on 1 May 2008 in the amount of R5 416.00. Further, it appears that the First Respondent continued to receive interest from the Zambezi Investment from 1 May 2008 to 30 July 2010 and this equated to R146 232 .00.[1]

7. During July 2010 the Applicant informed the First Respondent that Sharemax had problems and will not be paying monthly interests anymore.[2] The Applicant

[1] Record B72
[2] Record A34, par 17

offered to pay the First Respondent a sum in the amount of R5000. 00 per month until the Sharemax 'misunderstanding' is resolved. The payment decreased to R4 000.00 per month and was later reduced to R3 500.00 monthly. According to the Applicant, these payments were to merely assist her during her difficult times. During March 2012 the First Respondent sold her house to raise funds to sustain herself and her grandson. According to the First Respondent, the Applicant stopped giving money to her during March 2012. The facts referred to herein above appear not to be in dispute.

The Complaint

8. On or about 12 February 2012 the First Respondent wrote a letter to the Ombud, detailing her complaint for consideration ("the Complaint").[3] The First Respondent specifically stated that:

> *"After a long time I agreed to invest the money at Sharemax as I trusted Mr Mostert's opinion as an "expert". I was very scared because it was my pension money, all I had and Mr Mostert knew it."* [4]

9. In essence, the First Respondent stated that the Applicant advised her to invest in Sharemax as it is a good thing and guaranteed that her money will be safe.[5] In short, the common threads that run through the Complaint are that the First Respondent was scared and that the Applicant guaranteed safety of the investment.

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[3] Record B9
[4] Record B10
[5] Record B9 - 10

10. The Applicant was informed of the Complaint and was invited to respond to same.[6] The Applicant submitted a comprehensive response on or about 25 October 2013 and was later supplemented with a further comprehensive submission on or about 25 July 2015. Apparently, an administrative error occurred in the Offices of the Ombud which resulted in the Ombud not having sight of the responses of the Applicant. Consequently, the Ombud issued a determination dated 5 May 2016 which was later set aside by the previous Appeal Board.[7]

11. The Ombud records that at the writing of the Determination, all details of the complaint were delivered to the Applicant and that included a comprehensive statement from the First Respondent. The Determination further states that all information regarding this matter available in the Ombud's offices was delivered to the Applicant. Further, the Determination records that all Applicant's submissions, both in respect of fact and in respect of law, were made available to the Offices of the Ombud for purpose of investigation and determination.

12. According to the Determination, the complaint is that the Applicant advised the First Respondent to invest in a financial product that was not suitable for her, bearing in mind the financial needs and tolerance of risk of the First Respondent.

13. In the Determination, the Ombud identified issues for investigation and determination and in essence the Ombud considered if the Applicant actually complied with the provisions of the following sections of the General Code:

Section 3(1)(a)(i) and (iii), section 7(1)(a); section 8((1)(a) and (c); section 8(2).

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[6] Record B17
[7] Record B426

14. Further, the Ombud considered if the Applicant acted in breach of his contract with the First Respondent. Furthermore, the Ombud investigated the question of whether the First Respondent suffered any loss and if so, what was the cause of the loss.

15. The Ombud in his Determination, after having investigated, upheld the claim on 14 August 2018 and ordered the Applicant to pay an amount in the sum of R650 000.00 plus interest at the rate of 10% per annum from the date of determination to the date of final payment.

C GROUNDS FOR APPEAL

16. The Applicant, in his application for leave to appeal to the Ombud dated 13 September 2018, raised issues which appear to fall within the procedural aspect on the one hand and the aspect of substantive fairness on the other. We shall first consider the procedural aspect of the Applicant's concerns.

17. The Applicant contends that the Ombud erred in the process of investigating and determining the matter and thus resulting in the Determination being unfair, unlawful and a breach of his constitutional rights. In brief, the Applicant stated the following issues in support of his contention:

    17.1 The fact that the Ombud made a determination on 5 May 2016, which determination was set aside by the Appeal Board on 25 January 2018;

    17.2 Applicant being informed of a ruling or comment given by the Deputy Chairperson of the Tribunal on 16 July 2018 relating to an application for reconsideration lodged by his attorneys on behalf of another Financial

Service Provider ("FSP") to the effect, amongst other things, that the time has unfortunately arrived to inform the instructing attorney that too many of the applications that emanate from his office are, *prima facie*, vexatious and amount to an abuse of process;

17.3 The Deputy Chairperson of the Tribunal and the Ombud are focusing more on criticizing FSPs and their attorneys as opposed to looking at the particular facts of each matter;

17.4 The Ombud in issuing the latest Determination, used sarcastic, demeaning and acerbic language in criticizing Applicant's conduct in discussing his version of events;

17.5 The impartiality of the Ombud is questioned and reference is made to a publication in Business Times on 5 August 2018 where the Ombud made a comment to the effect that he is actively engaging with brokers, their professional Indemnity Insurers and the Regulator to ensure that rulings are not challenged; and

17.6 If the Tribunal has adopted an approach similar to that of Ombud to get rid of matters and to clear the desks, it will be regrettable and unlawful.

18. We have considered the aforesaid contentions of the Applicant and it is our view that same have no basis for the following reasons:

18.1 there are no particularities or more facts to bring substance to the grounds mentioned above and therefore cannot be considered further;

18.2 reference to other matters where observations were recorded by the Ombud or Deputy Chairperson as alleged herein, does not, in our view,

constitute a procedural defect in the process without more particularities being provided; and

18.3 the Ombud has not, in our view, lost his impartiality and independence in dealing with this matter. This is demonstrated by the Ombud's haste in conceding that there was at one stage an administrative error in the process and same was addressed.

19. In short, we must have regard to the principle, namely that the more serious the allegation or its consequences, the stronger must be the evidence before a court will find an allegation established.[8] We are not of the view that the procedural grounds referred herein above provides sufficient particularities. For the aforementioned reasons, we cannot take the contentions further.

20. The Applicant has in his heads of argument contended that the Ombud did not produce a recommendation in terms of section 27(5)(c) of the FAIS Act. The relevant section states that:

"The Ombud -

(a)........

(b).........

(c) may, in order to resolve a complaint speedily by conciliation, make a recommendation to the parties, requiring them to confirm whether or not they accept the recommendation and, where the recommendation is not accepted by a party, requiring that party to give reasons for not accepting it: Provided that where the parties accept the recommendation, such recommendation has the effect of a final determination by the Ombud, contemplated in section 28(1); (own emphasis)

[8] National Director of Public Prosecutions v Zuma 2009 2) 277 (SCA), par 27

21. It is apparent, in our view, that the Ombud did not follow this procedure and to that extent, the Applicant is correct. However, we are of the view that to send this matter back to the Ombud on this point alone, will not achieve much for the following reasons:

21.1 this matter has had a long and troubled history dating back from the year 2013 and that it is in the interest of the parties to bring finality to it; and

21.2 the purpose of the provision, in our view, is to resolve the matter speedily by conciliation, and we see no prospect of achieving same at this stage.

22. The Applicant stated as part of his grounds of appeal that the Ombud erred by not properly considering the application in terms of section 27(3)(c) of the FAIS Act and finding that there are no material factual disputes. The provisions states that:

(3) The following jurisdictional provisions apply to the Ombud in respect of the investigation of complaints:

(a) ....

(b) .....

(c) The Ombud may <u>on reasonable grounds determine that it is more appropriate</u> that the complaint be dealt with by a Court or through any other available dispute resolution process, and decline to entertain the complaint. (own emphasis)

23. It is our view that in considering the aforementioned provision, one should not lose sight of, amongst other things, the object and purpose of the FAIS Act, which is captured in section 20(3) of the same Act. It specifically states that:

"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 this Act."

24. Mr Bielderman, on behalf of the Applicant, persisted during argument that the Ombud should determine that it is more appropriate that the complaint be dealt with by a Court, alternatively that the Ombud, in investigating the complaint, should afford the Applicant an opportunity to partake in a hearing, which includes, amongst other things, being entitled to have a detailed statement or pleading setting out the charges against him.

25. The Ombud, in his Determination, stated that this matter can be resolved on the undisputed facts between the parties. He maintained that the Applicant was given ample opportunity to place all facts on record and to use services of experts. He further noted that the Applicant filed a lengthy declaration and copious documents and placed his version on the disputed facts.

26. We hold a view that the Ombud should not be hasty in referring matters to court

for the fear of defeating the object of achieving an informal, economical and an expeditious handling of matters. A proper case has to be made by any applicant wherein reasonable grounds are to be provided for the Ombud to evaluate and arrive at what is fair in the circumstances of each case.

27. In this case the First Respondent is a pensioner and widow who has maintained that she has no employment or source of income. Furthermore, the Applicant states that the matter is complex and yet we find no clear explanation on the nature of the alleged complexity so contended by him. Further, this matter has remained unresolved for a period of not less than five years and any decision at this stage to delay the matter will be to the detriment of the parties. We therefore hold the view that on the facts before us, we are not in a position to interfere with the decision of the Ombud to refuse the application to have the matter referred to court.

28. We are now turning to the other grounds of appeal and note that the Applicant has raised not less than thirty five (35) grounds of appeal in this matter. We do not intend to replicate them for the simple reasons that most of the grounds are inter-related and to avoid a lengthy decision.

29. In light of the aforesaid, we shall consider the following questions which cover the essence of the grounds of appeal: namely, *(i)* Did the Ombud err by concluding that the Applicant failed to take reasonable steps to ensure that the First Respondent understood the investment and its associated risk;[9] *(ii)* Did the Ombud err in finding that factual and legal causation existed;[10] *(iii)* Did the Ombud err by his interpretation of the prospectus in relation to the structure of

[9] Record A85
[10] Record A85

the investment; and *(iv)* Did the Ombud err by dismissing the views of the expert Mr Cohen regarding the viability of the Sharemax / Zambezi and Villa structures without obtaining Ombud's expert evidence in this regard.

Did the Ombud err concluding that the Applicant failed to take reasonable steps to ensure that the First Respondent understood the investment and its associated risk?

30. Section 16 of the FAIS Act which deals with the principles of Code of Conduct requires, amongst other things, that the Code of Conduct must ensure that the clients receiving financial services are enable to make an informed decision and that their financial needs are appropriately and suitably satisfied.

31. The Code of Conduct states, amongst other things, in section 3(1)(a) that when a provider renders a financial service, representations made and information provided to a client by the FSP:-

    31.1 must be factually correct; and

    31.2 must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client.

32. Further, the Code of Conduct provides in section 7(1)(a) that an FSP must provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision.

33. Furthermore, section 8 of the Code of Conduct which deals with suitability of advice, provides, amongst other things, in section 8(1) that an FSP, must, prior to providing a client with advice:-

33.1 take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the FSP to provide the client with appropriate advice;

33.2 conduct an analysis, for purposes of the advice, based on the information obtained; and

33.3 identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the FSP under the Act or any contractual arrangement.

34. In respect of the Record of Advice, the Code of Conduct provides, amongst other things, in section 9(1) that an FSP must, maintain a record of the advice furnished to a client as contemplated in section 8, which record must reflect the basis on which the advice was given, and in particular-

34.1 a brief summary of the information and material on which the advice was based;

34.2 the financial products which were considered; and

34.3 the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the client's identified needs and objectives;

provided that such record of advice is only required to be maintained where, to the knowledge of the FSP, a transaction or contract in respect of a financial product is concluded by or on behalf of the client as a result of the advice furnished to the client in accordance with section 8.

35. This Tribunal has maintained the view that the provisions of the Code of Conduct, apart from anything else, can be considered to be implied terms of the mandate or contract between the FSP and the Client.[11]

36. In the case of *CS Brokers CC and Others v Ian Marais and Another* ("CS Brokers"), Harms J stated the following regarding contract between an FSP and a client:

"The contract requires of an FSP to give advice with appropriate degree of skill and care, i.e., not negligently. Failure to do so. i.e., giving negligent investment advice, gives rise to liability if the advice was accepted and acted upon, that it was bad advice, and ***that it caused loss****. In deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs"*[12] (own emphasis)

37. According to the records before us the Ombud maintained that there is no independent record of advice which shows that the Applicant made a full disclosure to the First Respondent, so that the latter can make an informed

[11] CS Brokers CC and Others v Ian Marais and Others Case No. FAB5/2016 ("CS" Brokers"), par 24
[12] CS Brokers CC par 23

decision.[13] According to the Ombud, apart from the First Respondent's signature on the application forms and disclosure documents, the Applicant can produce no independent record of advice that the risks were explained to the First Respondent.[14]

38. The Applicant on the other hand maintained that all documentation utilised during the advice process forms part of the record of advice.[15] Further, the Applicant contends that it would appear that the Ombud expects to see a document in a particular format although no document has been prescribed in a particular format or no template had been provided by the FAIS Act or the Regulations. Furthermore, the Applicant contends that the purpose of record keeping is to ensure that there is a documentation to show what transpired between the FSP and the investor.[16] We agree with these contentions. However more needs to be said in this regard.

39. The Code of Conduct, more specifically section 9(1)(a) to (c), requires the Applicant to provide:-

    39.1 A brief summary of information and material on which the advice is based;

    39.2 The financial products which were considered; and

    39.3 The financial product or products recommended with an explanation why the product was selected, is or are likely to satisfy the client's identified needs or objectives.

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[13] Record A43 - 44
[14] Record A45 par 57
[15] Record B150
[16] Record B150

40. According to section 9(2) of the Code of Conduct, the Applicant is required to provide the First Respondent with the summary and the information referred to in section 9(1) of the Code of Conduct.

41. The fact that an FSP had handed a copy of a prospectus, without more, to a client should not absolve an FSP from explaining risks pertinent to an investment.[17]

42. The record before us contains no summary (containing information obtained in terms of section 8 of the Code of Conduct) referred to in section 9(1) of the Code of Conduct. The fact that the Applicant handed a copy of prospectus to the First Respondent did not absolve him from complying with the FAIS Act and the Code of Conduct. The absence of a summary in terms of section 9(1) of the Code of Conduct can only mean that there was no compliance with section 9(2) of the Code of Conduct. We have not seen anything which indicates that the attention of the First Respondent was drawn to the aspects which focuses on the risks of the Sharemax and Zambezi Investment. We therefore hold the view that the Applicant breached the implied terms of the mandate contained in section 7(1) and 9(1) and (2) of the Code of Conduct.

43. It appears from the provisions of section 8 of the Code of Conduct that prior to advising the client, number of steps need to be taken in order to arrive at an appropriate financial product. For instance, a risk profiling of the client needs to be done. Further, financial needs information is required to be obtained from the client.

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[17] CS Brokers par 34

44. In respect of the financial needs and risk profiling, the Applicant submits that he consulted with the First Respondent and established that she required an investment that will provide her with higher income together with the potential of capital growth which serves as a hedge against inflation. The Applicant further states that he determined the risk profile, using a method recommended to him and made available to him by my compliance office.[18] The record before us does not reflect the method used to determine the risk profile of First Respondent and therefore this Tribunal is able to ascertain if the risk profile of the First Respondent can be reconciled with the Sharemax and Zambezi Investment.

45. The Ombud, having considered the submissions of the Applicant, made, amongst other things, the finding that the Applicant failed to ensure that the First Respondent invested in a product that was appropriate for her needs and consistent with her tolerance for risk.[19]

46. The absence of the summary of record of advice as contemplated in section 9(1) of the Code of Conduct is not assisting the Applicant. We are of the view that if the summary was available, this panel, including the Ombud, could have ascertained what factors, if any, were considered for purposes of the advice. This panel has no information that speaks to the risk profile of the First Respondent as contemplated in section 8(1)(c) of the Code of Conduct. Consequently, the Applicant has breached section 8(1)(c) and section 9(1)(a) to (c) of the Code of Conduct. The Applicant did not, in our view, give advice with the appropriate degree of skill and care and therefore he acted negligently. The legal enquiry does not end here.

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[18] Record B148
[19] Record B148

Did the Ombud err in finding that factual and legal causation existed?

47. One of the grounds of appeal listed by the Applicant is that the Ombud erred in finding that factual and legal causation existed. We shall consider this aspect as we are of the view that it is important in this matter.

48. The Determination holds that on the Applicant's own version, factual causation was established. The Ombud maintained that but for the Applicant's advice, the First Respondent would not have invested in Sharemax and her capital would not have been lost.[20]

49. The Applicant stated, amongst other things, in his grounds for appeal that the Ombud erred by finding that factual and legal causation existed. The Applicant persisted that the Ombud has ignored the intervention of the Reserve Bank which put an end to the development programme of the Villa and Zambezi schemes.[21]

50. The Applicant made submissions before the Ombud to the effect that legal and factual causation is still a requirement for liability in our law even in the context of the FAIS Act and the Code of Conduct.[22] We agree with this submission in that regard.

51. During argument, Mr Bielderman of the Applicant referred to a case *of Shane Alan Symons N.O and Another v The Rob Roy Investments CC t/a Assetsure* ("the Symons case").[23] In this case complainants sued an FSP for compensation

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[20] Record A49
[21] Record A85
[22] Record B89. A decision handed down by Appeal Board of FSB on 23 December 2011 by Honourable Howie J was in the matter between Johannes Cornelius van der Merwe and another v Desiree Ludewig was quoted to support legal position
[23] Case No. 4827/2013. The judgment in this case was delivered on 10 December 2018 by Ploos van Amstel J in the KwaZulu-Natal Division, Pietermaritzburg, noted as reportable

due to loss suffered after financial advice was rendered.

52. In *the Symons case* the court dealt with the aspect of causation and Amstel J stated that:

"*If it can be said that on a factual level Griffin's failure to explain the risks adequately was a condition sine qua non of the plaintiffs' loss (which I do not consider to be the case) then the question of legal causation arises, as factual causation on its own is not enough*".[24]

53. Amstel J referred to the case of *Standard Chartered Bank of Canada v Nedperm Bank Ltd* ("the Standard Chartered Bank)[25] and stated that Corbett CJ said that in order to determine legal causation one has to consider whether the Act was linked sufficiently closely or directly to the loss for legal liability to ensue, or whether the loss was too remote. *The Symons case* noted that according to Corbett CJ, the test to be applied is a flexible one in which factors such as a reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part.

54. *The Symons case* concluded that the loss suffered by plaintiffs does not seem to be linked sufficiently closely or directly to any failure on Griffin's part to explain the risks of the investment to Symons. According to Amstel J, those risks had nothing to do with the intervention by the Reserve Bank which the plaintiffs do not contend should have been foreseen by Griffin.[26]

55. The complainants in *the Symons case* approached the Supreme Court of Appeal

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[24] Symons, par 59
[25] 1994 (4) SA 747 (A) 764I – 765B
[26] Symons case par 60

to obtain leave to appeal the judgment of Amstel J. The Supreme Court of Appeal in turn dismissed the complainants' application on 30 May 2019.

56. In this case the Applicant raised similar issues or defences when he stated that:

"*It was only from around August / September 2010 that I learnt, through the public media, that Sharemax had defaulted on the interest that was payable to its investors and I followed the events surrounding Sharemax in the press. Subsequent thereto as I understand, due to a directive given to the Reserve Bank, Sharemax had stopped paying monthly interest to its investors.*"[27] (own emphasis)

57. The record in this matter does not show that the Ombud has countered or dispelled the above submission either by evidence, including expert evidence, where possible. Such a move may assist in throwing some light on the factual and legal causation aspect.

58. We take guidance from *the Symons case* which requires that not only a factual causation must be proved, but also a legal causation. Although the Applicant appears to have breached his statutory duties, such a conduct is not, in our view, a *condition sine qua non* of the First Respondent's loss in that the act of advice of the Applicant in April 2008 has nothing to do with Sharemax / Zambezi Investment scheme stopping payment of interest in July 2010. In short, no factual causation or causal link has been established.

59. In line with *the Symons case*, if it can be said that on a factual level the Applicant's failure to explain the risks adequately was a *condition sine qua non*

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[27] Record B91

of the First Respondent's loss (which we consider not to be the case) then the question of legal causation arises, as factual causation on its own is not enough.

60. In light of *the Standard Chartered Bank* case and *the Symons* case, we hold the view that the loss suffered by the First Respondent does not seem to be linked sufficiently closely or directly to any failure of the Applicant to explain the risks or to render appropriate advice to the First Respondent.

61. Lastly, even though the Applicant has, in our view, failed to comply with the provisions of the Code of Conduct, that is, he did not appropriately advise the First Respondent, and explain the potential risk to the First Respondent, any such breach was not causally connected to the First Respondent's loss.

D **CONCLUSION**

62. In conclusion, we find that the Applicant has not adequately explained the risks in the Sharemax / Zambezi Investment and made a frank and full disclosure of any information that would reasonably be expected to enable the First Respondent to make an informed decision. In short, the Applicant has breached the implied terms of the mandate and therefore acted negligently.

63. Notwithstanding the breach of the Code of Conduct by the Applicant, causation is, amongst others, a legal requirement in our law that must be proved to hold the Applicant liable.

64. Lastly, it is our considered view that the breach of the Code of Conduct by the Applicant has nothing to do with the Sharemax / Zambezi Investment stopping of payment of interest.

65. There is no evidence which points to a direction that the Applicant should have

reasonably foreseen the loss at the time of the mandate in April 2008. Further, there is no evidence to the effect that the act of breach of the Code of Conduct was linked sufficiently closely or directly to the loss for legal liability to ensue.

66. We recommend that the Ombud to consider, where necessary like in this case, investigating the aspect of causation and where possible to procure expert evidence on property syndication of this nature, which may throw light in matters of this nature.

67. This aspect of the factual and legal causation considered herein above, in our view, disposes of the matter and it will be pointless to consider the other listed grounds of appeal.

68. In the premises, the following order is made.

E ORDER

(a) The Determination of the Ombud dated 14 August 2018 is set aside and remit the matter to the Ombud for further reconsideration in terms of section 234(1)(a) of the FSR Act.

(b) No order as to costs.

Signed at Pretoria on this 21st day of October 2019 on behalf of the Panel.

ADV W NDINISA