THE FINANCIAL SERVICES TRIBUNAL

Case №: FAB19/2019

FAIS OMBUD REF: FAIS 09156/10-11/FS1

FAIS 09159/10-11/FS1

In the matter between:

PIETER CRONJE MAKELAARS	Applicant
and	
CAREL JACOBUS VAN ZYL	First Respondent
HESTER DORETHEA VAN ZYL	Second Respondent
OMBUD FOR FINANCIAL SERVICES PROVIDERS	Third Respondent

Tribunal: Mr W Ndinisa (chair), Mr G Madlanga and Ms NP Dongwana

Date of Hearing 25 June 2019

On behalf of the Applicant:	Mr P Bielderman of Bieldermans Inc.
On behalf of the 1st and 2nd Respondents:	in persons
On behalf of the 3rd Respondent:	No appearance

Summary: Reconsideration being another "appeal" route for aggrieved party. Application of section 234(1) of the Financial Sector Regulation Act No. 9 of 2017 ("FRS Act") in respect of determination of Ombud. Client electing to receive more limited information as envisaged in section 8(4) of the General Code of Conduct for Authorised Financial Services Providers and Representatives ("the Code"). Voluntary acceptance of risk.

DECISION

A INTRODUCTION

1. On 6 August 2018 the Ombud for Financial Services Providers ("the Ombud") issued a determination against the applicant in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (as amended) ("the FAIS Act"). The determination referred to herein forms the subject matter of this application ("the Determination").

2. The Ombud, who is cited as Third Respondent in this matter, did not make appearance and was not represented during the reconsideration hearing. The use of the word Respondents in this decision refers to both the First and Second Respondents, unless otherwise indicated.

3. The Applicant is a partnership and an authorised financial services provider with licence number 19980, which has been active since 9 November 2005. The First and Second Respondents, who are adult pensioners married to each other, lodged their respective complaints on 19 February 2011 in respect of financial services rendered by the Applicant.[1] It therefore make sense why the two matters were considered and determined together.

4. The Applicant was invited to make submissions and respond to the complaints

[1] Records, pages 6 and 25

of the Respondents.[2] The Ombud, after having considered the complaints and the response of the Applicant, issued the Determination which ordered the following:[3]

"1. The complaint is upheld;

2. The respondent is ordered to pay the following:

2.1 R337 000 to the first complainant

2.2 412 000 to the second complainant

3. Interest on this amount at the rate of 10% per annum from the date of the determination to the date of final payment.

4. the complainants are to cede their rights in respect of any further claims to these investments to the respondent."

5. In brief, the Ombud upheld the complaints of inappropriate advice and found that a sufficient link exist between inappropriate advice and the loss suffered by the Respondents existed.[4]

B BACKGROUND

6. It is common cause that the Applicant had been a financial services provider to the Respondents for number of years leading to the year 2008. When the First Respondent resigned from his employ with the municipality, he invested the proceeds of his pension in a Sanlam Glacier. The First Respondent was no longer satisfied with the earnings received from Sanlam Glacier investment and during the year 2008 they (the First and Second Respondents) approached the

[2] Records, pages 34 and 37
[3] Records, page 15
[4] Records, page 8

Applicant to discuss same.[5]

7. Further, it is common cause that the Respondents attended Sharemax and Prospect presentation(s) and/or meetings regarding investment.[6] Subsequent to the presentations, the Respondents took the following investments linked to Sharemax Zambezi Retail Park Holdings Limited and The Villa Retail Park Limited:

7.1 H van Zyl - R297 000.00 – Zambezi - March 2008;

7.2 C van Zyl - R297 000.00 – Zambezi - March 2008;

7.3 H van Zyl - R40 000.00 – Zambezi - November 2008;

7.4 C van Zyl - R30 000.00 – Zambezi - November 2008;

7.5 H van Zyl – R30 000.00 – Villa - March 2009;

7.6 C van Zyl – R10 000.00 – Villa - April 2009;

7.7 H van Zyl – R30 000.00 – Villa - January 2010.

8. Furthermore, it is common cause that the Second Respondent took an investment with Pacific Costs Investment 97 (Pty) Ltd ("Propspec") in the sum of R15 000.00.[7]

9. Further, it is common cause that the capital amounts invested herein above were never repaid to the Respondents for the reason that Sharemax Investments ceased to do business during the second half of 2010.[8] In respect of Propspec, it appears to be common understanding that the investment collapsed and the amount invested was lost.

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[5] Records, page 10, letter from complainant dated 24 January 2011.
[6] Records, page 24, Second Respondent providing details about complaints.
[7] Records, page 30
[8] Records, page 102

10. Before the Ombud issued the Determination, recommendations were directed, amongst others, to the Applicant to consider for possible settlement of the matter. In turn, the Applicant responded by delivering his extensive response for Ombud's consideration.[9]

11. As stated hereinabove, the Ombud made his Determination in favour of the Respondents on 6 August 2018. Subsequently, the Applicant sought leave to appeal and same was granted.[10]

C GROUNDS FOR APPEAL

12. The Applicant delivered his application for reconsideration of the matter in terms of section 230 of the Financial Sector Regulation Act No. 9 of 2017 ("the FSR Act"). We shall not repeat all the grounds listed by the Applicant in his application for leave to appeal and the subsequent application for reconsideration of the Determination. According to the Applicant, the Ombud erred on the following grounds listed hereunder:-

12.1 Adopted a blanket standardised approach to determine the matters of this nature, as opposed to investigating each matter;

12.2 Took into account information not put to or made available to the Applicant;

12.3 Made factual findings which were not supported by acceptable evidence contained in the record of decision;

[9] Records, 323
[10] Records, page 372

12.4 Fleshed out or expanded on behalf of the Respondents, advancing on their behalf issues which they did not raised as part of their complaint, thereby creating perception of bias;

12.5 Accepting the version of the Respondents over that of the Applicant, without legal and/or justifiable reasons to do so, particularly in circumstances where the Applicant's version is supported by documents signed by the Respondents;

12.6 Ignoring documentary evidence which contradicted the version of the Respondents, without requesting Respondents to offer any explanation for repudiating the contents of the documents which they signed;

12.7 Concluding that the Applicant did not explain the risk associated with the investments to the Respondents, even though it is common cause that the risk is clearly set out in the prospectus;

12.8 Ignoring the fact that these investments were single need investments and that the Applicant complies with the provisions of section 8(4) of the General Code of Conduct for Authorised Services Providers and their Representatives ("the Code"), with the Respondents waiving full investigation and needs analysis of their circumstances; and

12.9 Concluding that the prospectus/Sale of Business agreement illustrated that the interest payments promised by Sharemax were not achievable.

13. The Applicant seeks a relief of setting aside the Determination and the complaints of the Respondent be set aside.

The Determination

14. We do not intend to repeat the content of the Determination herein, but to provide what appears to be the crux of same. In brief the Determination states that:-

14.1 In advising clients to invest in property syndication, FSPs are obliged to point out that either the promoter did or did not comply with Notice 459. Failure to do so amounts to negligent conduct;[11]

14.2 The Applicant did not appreciate the risk inherent in these investments;[12]

14.3 By Applicant's own admission, the Respondent were lending their money to a company that did not own property yet, and further, the Respondents' money was lent to the developer to build the property. In this regard there is no indication in the advice records that this was explained to the Respondents;

14.4 A signature by an investor does not equate to an understanding of risk in the investment and that they were willing to invest from a position of being able to make an informed decision;

14.5 In respect of the principle of *pacta sunt servanda,* the Ombud states that the same is misplaced in that the Respondents are not disputing the validity of the contract entered into to make the investments, but rather the appropriateness of the advice that persuaded them to conclude the contracts;

[11] Records, part A, page 10
[12] Records, part A page 11

14.6 The Applicant makes unsubstantiated submission that section 8(1) of the Code did not apply, since the Respondent had a "single need". The concept of a single need does not exist and is not defined in the Code;[13]

14.7 The Applicant did not understand the intricacies of the products as there were warnings contained in the prospectuses. Therefore the Applicant's advice was negligent and in violation of his duty as set out in section 2 of the Code. The Applicant could not have advised the Respondents appropriately, in contravention of section 3(1)(a)(i) – (iii) and section 8(1) (a) and (b) of the Code;[14]

14.8 The Applicant should not have recommended the Pacific Investment for number of reasons which relate to good governance practices[15] and is at odds with section 8(1) of the Code;[16] and

14.9 It does not assist the Applicant that the Respondents wanted investments that would render a higher return. There is nothing in the documentation before the Ombud which will suggest that the Respondents' needs could not be satisfied with any other products.

15. The Ombud therefore concluded that in light of his findings in the recommendation,[17] the Applicant has failed to appropriately advise the Respondents and appraise them of the risks in the respective investments, in violation of section 7(1) of the Code. The Respondent could not have made an informed decision.

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[13] Records, Part A, page 13
[14] Records, part A, page 31
[15] Records, Part A, page 30
[16] Records, Part A, page 30
[17] The recommendation are confirmed in the Determination, Part A, page 14

16. Consequently, the Applicant has breached the Code and for that reason he has committed a breach of his agreement with the Respondents in that he failed to provide suitable advice.

Respondents' version

17. It appears from the records that the Respondents lodged their respective complaints with the office of the Ombud at the same time.[18] The version of the First Respondent is recorded as follows:

> *"Pieter Cronje persuaded us on ongoing basis to invest all funds in Sharemax as our capital will be secured without any risk.*
> *He never proposed a distribution of investments.*
> *The detail of our negotiations is contained in our letter to Pieter Cronje Brokers of 24 January 2011."*[19]

18. It is the First Respondent's version that there were meetings that were held in respect of Sharemax and Pacific (Propspec). It is recorded that the Applicant never convened any direct meetings with his investors.[20]

19. Further, according to the content of the letter from First Respondent dated 24 January 2011,[21] the Respondents were no longer satisfied with the earnings of Sanlam glacier investments and the Applicant invited them to his office to give them an overview of safe investments. In the meeting the Respondents had with

[18] Records, Part B, pages 5 and 25
[19] Records, part B, page 5
[20] Records, part B, page 5
[21] Records, part B, page 10

Applicant, the latter convinced them to invest in Sharemax.

20. The Respondents records that they repeatedly informed the Applicant that they could invest if their capital is safe. They alleged that the Applicant assured them. The Respondents further alleged that the Applicant never advised them to spread their investments.

21. The Respondents further record that the Applicants approached them to invest in Pacific for six months and throughout the process the Applicant informed them that their capital is safe and they have nothing to worry about.

22. A common thread throughout the version of the Respondents is that they repeatedly wanted safe investments and were assured of same.

Applicant's version

23. On or about 14 April 2011 the Applicant responded to the complaints lodged by the Respondents[22] and further made submissions in response to the Ombud's recommendation dated 13 April 2018. In essence, the Applicant's version reflects the following information hereunder.

24. The Respondents were dissatisfied with the performance of their investments and required a higher rate of return. The Respondents at that time had their investment with Sanlam glacier which was in a conservative portfolio.

25. Records of advice for both Respondents were kept and made available for consideration.[23]

[22] Records, part B, page 41
[23] Records, part b, pages 66 and 71

26. According to the Applicant, all subsequent investments in Sharemax were done on or per instructions of Respondents as they were satisfied with it and interest they received.

27. In respect of performance of a due diligence, the Applicant stated, amongst other things, that:

27.1 for a period of previous 10 years not a single investor failed to receive his income as promised in the prospectus;

27.2 The FSB website was checked and ascertained that Sharemax was registered;

27.3 All previous syndications resulted in positive outcome for every investor;

27.4 Attorneys and Auditors both of Sharemax indicated that the structure was legal and audited respectively; and

27.5 Attended to the head office of Sharemax to ascertain if it is functional and systems are in place.

28. In respect of the Propspec Investment, the Applicant stated that he approached the Respondents with an offer from a client who needed to sell her shares and that resulted in Second Respondent investing R15 000.00.

D ISSUES

29. The Applicant's appeal turns on assessing whether the Applicant has provided inappropriate advice as stated in the Determination[24] or failed to provide suitable

[24] Record, part A, page 8

advice as stated in the Recommendation[25] and consequently breached the Code. In other words, had the Applicant conducted himself negligently in providing the financial advice?

30. If it is found that the Applicant has indeed acted negligently, the next part of assessment is whether there is a sufficient link between the inappropriate advice and the loss suffered by the Respondents.

D STATUTORY FRAMEWORK AND ANALYSIS

Reconsideration being another appeal route

31. The Applicant approached this Tribunal after having been granted leave to appeal by the Ombud. It is not surprising because a party challenging Ombud's determination is enabled by section 28(5)(b) of the FAIS Act to lodge an application for leave to appeal and if granted, to lodge notice of appeal to a board of appeal.

32. In a recent decision of this Tribunal, namely *Vivian Cohen v Pension Funds Adjudicator and Others*,("*Vivian Cohen*") it was noted that:

"*The Financial Sector Regulation Act 9 of 2017 ('the FSRA'), which came into effect on 1 April 2019, provides for another (new) 'appeal' route for an aggrieved party, namely reconsideration by this Tribunal.*"[26] (own emphasis)

33. The *Vivian Cohen* decision, in our view, provides direction on the nature of the powers of this Tribunal. Further, *Vivian Cohen* states the following in respect of

[25] Record, part A, page 32
[26] *Vivian Cohen*, par 6

the nature of this Tribunal's function and duties :

"9 *Apart from the fact that we are concerned with a reconsideration with its own procedural rules (sec 232) and not an appeal in the ordinary sense of the word, the powers of the Tribunal in the case of a reconsideration of a determination by the Adjudicator are more limited than in matters concerning other decision makers: Tribunal may only (i) set aside the decision and remit the matter to the Adjudicator for reconsideration or dismiss the application (see section 234(1)(a) and (c). We may not under paragraph (b) set the decision aside and substitute it with our own decision.*

10 *Any party to reconsideration proceedings who is dissatisfied with an order of the Tribunal may, in terms of sec 235 of the FSRA, institute proceedings for a judicial review of the order in terms of the Promotion of Administrative Justice Act or any applicable law."* (own emphasis)

34. Further, we are of the view that a determination of Ombud falls to be considered in light the approach as reasoned in *the Vivian Cohen* decision.

Code of Conduct

35. The FAIS Act in section 16 provides for principles underpinning the Code. According to the FAIS Act, the Code are to ensure that:-

35.1 the clients being rendered financial services will be able to make informed decisions;

35.2 their reasonable financial needs regarding financial products will be appropriately and suitably satisfied; and,

for those purposes, FSPs and their Representatives are obliged by the provisions of the Code to act in specified manner.

36. Section 2 of the Code provides that an FSP must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and integrity of the financial services industry.

37. In respect of specific duty of FSP, section 3 of the Code states, amongst other things, that when an FSP renders financial services, representation made and information provided *(i)* must be factually correct; *(ii)* must be provided in plain language, avoid uncertainty or confusion and not being misleading; and *(iii)* must be adequate and appropriate in the circumstances of the particular financial services, taking into account the factually established or reasonably assumed level of knowledge.

38. The suitability of advice furnished is dealt with in section 8 of the Code and touches on the steps to be taken by FSP prior to providing advice. Section 8(2) of the Code reiterates the principle stated in section 16 of FAIS Act by stating that the provider must take reasonable steps to ensure that the client understands the advice and is in a position to make an informed decision.

39. Section 8(4)(b) of the Code states, amongst other things, that where a client elects to receive limited information or advice than the provider is able to provide, the provider must alert the client as soon as reasonably possible of the clear existence of any risk to the client, and must advice the client to take particular

care to consider whether any product selected is appropriate to the client's needs, objectives and circumstance.

40. We share the view that the provisions of the Code, apart from anything else, can be considered to be implied terms of the mandate.[27]

Liability of an FSP

41. The liability of an FSP is usually based on a breach of contract.[28] The rule is that failure to execute a mandate with necessary diligence, skill and care required of a reasonable professional person has to be resolved on the principles of contract, not delict.[29] This Tribunal stated in *the CS Brokers CC* decision that:

"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 is it was bad advice, and that it caused loss. And 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."[30] (own emphasis)

42. It is worth noting that the test for negligence must inevitably be grounded upon the factual matrix of the dispute requiring adjudication.[31]

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[27] CS Brokers CC and Others v Ian Marais and Others Case No. FAB5/2016 ("CS" Brokers")
[28] CS Brokers CC, par 23
[29] Vivian Cohen , par 27
[30] CS Brokers CC, par 23
[31] Atwealth (Pty) Ltd and Others v Kernich & others (116/2018) [2019] ZASCA 27 (28 March 2019), at par 46

Analysis

43. We have considered the record and the submissions made by the Applicant and Respondents during arguments and observed the following:

43.1 All parties in this matter are in agreement that the reason why the Respondents contacted the Applicant is that the Respondents were not satisfied with the performance of their investment and required a higher rate of return.[32] According to the submissions of the Applicant, the investment was with Sanlam glacier in a conservative portfolio.[33]

43.2 The Respondents (Mr van Zyl and Ms van Zyl) acknowledged that they were provided with prospectus documents regarding the investments containing information.[34] Although during arguments before this panel, the Respondents submitted that they did not have documents on the investments, this panel finds it difficult to reconcile the conduct of admitting receipt of prospectus and the submission made.

43.3 The Second Respondent acknowledges that they both attended two meetings or workshops on the Sharemax investments and one meeting on Propspec investments.[35]

43.4 The Respondents entered into an Advice and Intermediary Service Agreement for Investments with the Applicant ("the Mandate"),[36] and the following clauses appear to be pertinent:

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[32] Records, part B, page 10, letter dated 24 January 2011, first paragraph
[33] Records, part B, page 41
[34] Records, part B, pages 63, 83 and 252
[35] Records, part B, page 24
[36] Records, part B, pages 66 and 71

43.4.1 Cancellation of conducting financial analysis;[37]

43.4.2 Acceptance of the advice by the First Respondents;[38]

43.4.3 Income and/or capital growth retirement;[39]

43.4.4 Cancellation of the part referring to investment capital guaranteed over the investment term;[40]

43.4.5 Cancellation of "*the investment guaranteed" part*;[41] and

43.4.6 Cancellation of "*guaranteed over the investment period term*" in respect of capital[42]

44. It is to be accepted that investments carry risk and that the risk as the rule to be borne by investors. But some investments carry a higher risk than others and the function of an FSP is to disclose the reasonable foreseeable risks of the particular investment to the client.[43] In this case the parties have appended their signatures next to each insertion or cancellation in the Mandate. It is probable, in our view, that the Respondents substantially understood the nature of investments, and went into them with their eyes open.

45. The parties, including the Ombud, acknowledge the high risk nature of the investments as covered in their respective prospectus. The Applicant denies that he never discussed the risk with the Respondents.[44] It is probable in our view that the Respondents understood or were aware of the high risk of the investments for the reason that they attended meetings relating to the investments in question and acknowledged having been provided with relevant

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[37] The Mandate, page 71, clause 1.1 thereof
[38] The Mandate, page 71, clause 1.3 thereof
[39] The Mandate, page 72, clause 2.2.2 thereof
[40] The Mandate, page 73, clause 3.9 thereof
[41] The Mandate, page 73, clause 3.10 thereof
[42] The Mandate, page 73, clause 4.9 thereof
[43] CS Brokers CC, par 28
[44] Records, part B, page 340

prospectus and/or information on each investment.

46. The First Respondent (Mr van Zyl) was at time of taking the investments a registered intermediary in terms of FAIS Act. It is therefore probable that he would understand the importance of information provided in respect of the investments and essence of appending his signature to the documents.

47. The Ombud took effort to analyse the content of prospectus on aspects relating to Notice 459 and maintained that the Applicant has an obligation to point out to Respondents where there is contravention. Failure to do so amounts to negligent conduct.[45] The fact that the promoters did not comply with the requirements of Notice 459 did not have effect in the whole scheme or any part thereof being unlawful.[46] It appears that the Minister concerned was satisfied that severe criminal sanction be the only consequences of contravention of the provisions of Notice 459.[47]

48. In respect of not conducting analysis before investments, it appears that clause 1.1 of the Mandate demonstrates that the parties, including the Respondents, agreed not to do financial analysis. This conduct is, in our view, in line with the provisions of sections 8(4) of the Code.

49. In respect of the due diligence, the Applicant submitted that he has, amongst other things, contacted and relied on responses obtained attorneys and auditors who worked on the Sharemax investments documents. Further, the Applicant submits that he has relied on a 10 year record without failure of Sharemax investments.

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[45] Records, part B, page 10
[46] Dulce Vita v Chris van Coller (192/12) [2013] ZASCA 22 (22 March 2013) ("Dulce Vita"), par 33
[47] Dulce Vita, par 33

D CONCLUSION

50. In conclusion, we find that the Respondents were aware of the high risk nature of the investments they took and were informed of same for the reasons that *(i)* they attended meetings in respect of the investments, *(ii)* they acknowledged receipt of documents including prospectus of each investment, *(iii)* elected to seek better rate of return as their needs and *(iv)* elected to cancel the need to conduct financial analysis as part of the mandate to the Applicant.

51. Further, we find that the needs of the Respondents, being higher rate of return or earnings, were met as they repeatedly made more investments in Sharemax scheme to get better returns. We further find that the Respondents voluntarily accepted risk as they, amongst other things, invested more than five (5) times over a period of more than 12 months, collectively on Sharemax investments in the face of information available to them.[48]

52. We therefore conclude that the Applicant's version is probable and therefore he did not conduct himself negligently in proving the financial advice.

53. In the premises, the following order hereunder is made.

E ORDER

(a) The Determination of the Ombud dated 6 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;

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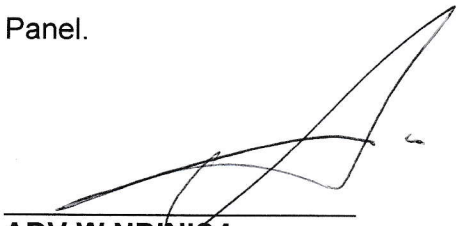
[48] Wanadoo 30 CC t/a Martin Holtzhausen Financial Services and Another v Ombud for FSP and Others (case no. FAIS 01444/11-12-WC1 & FAIS 02545/11-12/WC1, par 24

SIGNED at PRETORIA on this 9th day of August 2019 on behalf of the Panel.



ADV W NDINISA