

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: FAB38/2021

In the matter between:

FREDRICK HENDRIK KOTZE

APPLICANT

and

ABRAHAM HENRY ROTHBART

FIRST RESPONDENT

THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

SECOND RESPONDENT

Property syndication – liability of broker – negligence – causation – unreasonable delay

DECISION

[1] This is another property syndication matter. The FAIS Ombud ordered the applicant to pay the first respondent (Mr Rothbart) R270 000 plus interest due to the applicant's negligent advice to invest this amount in Zambezi Retail Park, a Sharemax related property syndication scheme.

[2] The application for reconsideration is under sec 230 of the Financial Sector Regulation Act 9 of 2019. The Ombud granted leave to the applicant to apply for reconsideration in terms of sec 28(5)(b)(i) of the FAIS Act.

[3] The parties waived their right to a formal hearing and the matter will be decided on the papers.

[4] Some background: the applicant is a financial service representative. He advised the first respondent during 2006. The advice concerned a relatively small portion of the first respondent's investment portfolio. He gave the first respondent three options. The first respondent chose the third, the subject of the complaint, obviously because it presented a higher return than the other two and he invested the amount during October 2006.

[5] The investment performed as it had to until February 2009. The first respondent became aware of the problem at the time. Having heard of the demise of the Sharemax scheme and under the impression that he had invested directly into that scheme, the first respondent, informed the applicant that he held him liable for his loss.

[6] The applicant filed his complaint with the Ombud on 23 February 2011, but the Ombud asked the applicant for information on 16 March 2017. The determination was made on 5 February 2021 – 15 years after the advice and 10 years after lodging of the complaint.

[7] Two issues arise typically in these matters, namely negligence and causation.

[8] The problem with the question of negligence is that the Ombud already in the letter of 16 March 2017 made her position clear: any investment in a property syndication is high risk and any advisor who advises a client to invest in such a scheme is negligent.

[9] Having read many of these determinations, one cannot but conclude that the Ombud approaches these matters with a fixed state of mind. However, for reasons that follow, I shall assume that the applicant was negligent in advising the first respondent as he did.

[10] That brings me to causation. The Ombud in the section of the decision on legal causation conflated negligence and causation and was consequently wrong in principle.

[11] The High Court in *Symons NO v Rob Roy Investments CC t/a Assetsure* 2019 (4) SA 112 (KZP) found that the collapse of the property syndication schemes was caused by the intervention of the SA Reserve Bank and not by negligent advice. This Tribunal has followed that decision and applied it. The Ombud, without any facts showing that the judgment is incorrect, does not apply its reasoning.

[12] What the Ombud did, was to rely on “evidence” that became available ex post facto pursuant to a detailed investigation as reported in in *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO and Others* (85/2077) [2017] ZASCA 177; 2018 (4) SA 71 (SCA) and assumed that a reasonable broker would have known of those facts.

[13] Especially disconcerting is this finding of the Ombud:

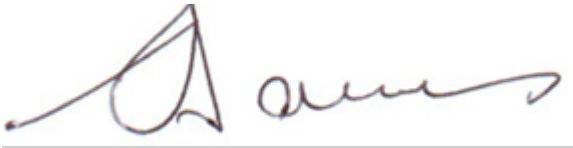
“It is apparent from the above quoted sections of the judgement of the SCA [*City Capital* at paras 12-13] that the mismanagement of the company existed before the Income, or dividends as the court referred to them, ceased to be paid to investors and in fact at the time were[when?] investments were being collected or received from members of the public, including the complainant.”

The Court did not say what I have underlined, and the applicant was not asked to comment on the statement.

[14] All this means that the determination must be set aside. This Tribunal has a discretion to refer the matter back to the Ombud for reconsideration. The Office of the Ombud failed in its statutory duty to determine the complaint in a procedurally fair and expeditious manner. Fairness has two sides: being fair to the complainant and being fair to the ‘defendant’. Considering the lapse of time, it would be unjust to refer the matter back.

ORDER: The order of the Ombud is set aside.

Signed on behalf of the Tribunal on 5 July 2021.

A handwritten signature in dark ink, enclosed in a thin black rectangular border. The signature is written in a cursive style and appears to read "LTC Harms".

LTC Harms (deputy chair)