IN THE FINANCIAL SERVICES TRIBUNAL

CASE NUMBER: FAB 38/2020

In the matter between:

JOHANN NELL FINANCIAL SERVICES CC	First Applicant
JOHANN NELL	Second Applicant

And

HELOISE ALETA STEPHINA JACKSON	First Respondent
HAROLD SYDNEY JACKSON	Second Respondent
THE OMBUD FOR FINANCIAL SERVICES PROVIDERS	Third Respondent

Tribunal: Mr. JM Damons (chair), Mr. W Ndinisa and Mr. E Piyega
For the Applicant: J Nell (appearing in person)
For the First & Second Respondent: D Myburgh Attorneys
For the Third Respondent: Observing the proceedings

Hearing: 11th August 2021
Decision: 28th September 2020

Summary: Appeal against determination by the FAIS Ombud – duties of an FSP – fairness of procedure – negligence and causation

DECISION

INTRODUCTION AND FACTUAL BACKGROUND

1. This is an appeal against two determinations issued by the Ombud for the Financial Services Providers (Third Respondent in this matter) and dated 24th November 2016[1]. The determination was issued by the Ombud in terms of section 28(1) of the Financial Advisory and Intermediary Services Act 27 of 2002 (the FAIS Act). For completeness, there are two determinations in these proceedings. One included a complaint by the First Respondent and the other involved a compliant that was filed by the Second Respondent.

2. The First Applicant is Johann Nell Financial Services CC a licensed financial services provider, with its key individual being Mr. Johann Nell. The latter is cited herein as the Second Applicant. In the determination, the Applicants were ordered to pay an amount of R107 000-00 (One Hundred and Seven Thousand Rands) and R180 000-00 (One Hundred and Eighty Thousand Rands) in respect of Sharemax Liberty Mall Holdings and Sharemax The Villa Retail Holdings 2 Investments. The two respective amounts were due and payable to the First and Second Respondents including interests at 10.25% per annum. I must state that although the determination does indicate the amounts payable, they do not necessarily state the date on which the said payments were due.

3. The Applicants were granted leave to appeal the determination by the Deputy Chairperson of this Appeal Board, Honorable LTC Harms on the 14th September 2020[2].

4. We must state that the reconsideration application has been drafted but same appears very confusing from the papers. The Tribunal notes that the Applicants are represented by the Second Applicant. This matter, at the main deals with the issue of liability and negligence. Furthermore, this matter also

[1] See record of the proceedings, part A pages 76 - 118
[2] See record of the proceedings, part A pages 146

raises questions around the duties of a financial services provider or representative when rendering financial advice to clients.

5. As stated above, the First and Second Respondents made two separate investments of R107 000-00 (One Hundred and Seven Thousand Rands) and R180 000-00 (One Hundred and Eighty Thousand Rands) in respect of Sharemax Liberty Mall Holdings and Sharemax The Villa Retail Holdings 2. These investments were made with the assistance and advice of the Applicants. Subsequent, the collapse of Sharemax, the First and Second Respondents filed complaints with the office of the Third Respondent, i.e. the Ombud.

6. From the record, it appears that parties agree that there was never a record of advice given to the Ombud or even presented to the First and Second Respondents. The Applicants also stated before the Ombud that he (the Second Applicants) did not deem it critical to have a record of advice when advising the Respondents to invest into Sharemax. The Applicants went further and stated that the Respondents had experience from previous investments. The complaint that was before the Ombud was premised on the fact that the Applicants failed to advise them of the risk associated with the investments. Based on this, the First and Second Respondents believed that the Applicants were responsible for the loss suffered.

AD CONDONATION AND APPLICATION TO ADMIT NEW EVIDENCE

7. The record as filed contains an application to this Tribunal to admit new evidence. After considering same on papers and the fact that there was no objection to the application, the Tribunal deemed it necessary to admit the new evidence. A ruling was issued during the hearing admitting the said new evidence as contained and provisionally accepted in the record.

8. There was also an application for condonation. It is interesting that both the reconsideration application and the response thereto were filed late. Accordingly, there are two different applications for condonation. This Tribunal

deems it necessary and in the interest of justice to condone the non-compliance with the rules and deal with the dispute on the merit. Accordingly, condonation for the late filing of the reconsideration application and the late filing of the response is granted.

9. We will now turn to deal with the matter on the merits.

GROUNDS FOR THE APPEAL

10. Although in a confusing manner, the Applicants raised numerous grounds of appeal / reconsideration. The grounds can be summarized as follows:

(a) The Applicants submitted that they did what was required of them. Therefore, there was no fault on their part (both the First and Second Applicants);
(b) The Applicants submitted that if they had submitted a record of advice, would same have changed the dispute or the decision of the Ombud?
(c) He (Second Respondent) argued that, he accordingly advised the First and Second Respondents and they (particularly the Second Respondent), had a decision on what to do with the funds that had accrued from a previous investment.
(d) To an extent, the Ombud failed to deal with a jurisdictional challenge as there was no proper complaint filed with the office that was raised with her office (in that the matter had prescribed and thus there was no proper complaint before the Ombud); and lastly,
(e) It was submitted that the First and Second Respondents were happy with the investment, they received proceeds, but they only started complaining when they stopped receiving proceeds as from 2012.

11. The Applicants also referred the Tribunal to the decision in **Symons N.O and Another v Rob Roy Investments CC t/a Assetsure (4827/2013) [2018] ZAKZPHC 71; 2019 (4) SA 112) (KZP) (10 December 2018).** According to them , the High Court in KZN found no fault on advisors who also advised other people to invest in the same / similar product, and thus this Tribunal should take that into account. As stated by the High Court therein, there was

no way that another person could foresee that their investment could fail in the manner which it did.

12. As contained in the record, the Applicants stated that the First and Second Respondent voluntarily accepted the risk of the investments and thus same cannot be blamed on him.

13. This application was opposed. Ms. Myburgh from D Myburgh Attorneys (who is the attorney and a daughter to the First and Second Respondents) stated that in 2007 the government warned against property syndications but despite these warnings, the Applicants went and advised that people should continue investing in such products. She submitted that the First and Second Respondents were not advised that the investment was a high-risk investment. There was no risk assessment done and so there was never any record of advice.

14. It was submitted that the First Respondent has since passed. However, there are issues of whether there was proper advice given prior the investments in question. According to the Applicants, they did not see the prospectus as at the time of making the investment. According to her, the loss came from the poor advice they received.

15. In reply, it was submitted that the Applicants only acted on the instructions of the clients (First and Second Respondents). He only facilitated the transaction, and it was up to the clients satisfy themselves of the risk. Moreover, the Respondent had experience from previous investments they had. He submitted that there were other options presented to the applicant but involving the same product i.e. Sharemax.

LEGAL FRAMEWORK AND DUTIES OF AN FSP / FSR

16. Like other financial services matters, this dispute raises the question surrounding the duties of and FSP / FSR when rendering financial services to clients. What is expected from the FSP / FSR when advising clients on particular investments. The FSP / FSR is required amongst other to act honestly, fairly, with due skill, care and diligence. The FSP / FSR is also

required to comply with the provisions of section 2, 7 and 8 of the General Code of Conduct for Authorised Financial Services Providers and Representatives (the Code) and to disclose all the material information about the product to enable the client to make an informed decision. The code provides amongst others the following issues:

"General duty of provider

2. A provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry."

"INFORMATION ABOUT FINANCIAL SERVICE

7(1) Subject to the provisions of this Code, a provider other than a direct marketer, must

(a) 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;
(b) whenever reasonable and appropriate, provide to the client any material contractual information and any material illustrations, projections or forecasts in the possession of the provider;
(c) in particular, at the earliest reasonable opportunity, provide, where applicable, full and appropriate information of the following:
(i) Name, class or type of financial product concerned;
(ii) Nature and extent of benefits to be provided, including details of the manner in which such benefits are derived or calculated and the manner in which they will accrue or be paid;
(iii) *Where the financial product is marketed or positioned as an investment or as having an investment component- ...."*

"Suitability

8(1) A provider other than a direct marketer, must, prior to providing a client with advice

(a) 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 provider to provide the client with appropriate advice;
(b) conduct an analysis, for purposes of the advice, based on the information obtained;
(c) 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 provider under the Act or any contractual arrangement; and
(d) where the financial product ("the replacement product") is to replace an existing financial product wholly or partially ("the terminated

product") held by the client, fully disclose to the client the actual and potential financial implications, costs....."

17. We will deal with the with the provisions and implications thereof hereunder.

ANALYSIS OF THE ARGUMENTS

18. As stated as well in this decision, the manner the reconsideration application was draft is confusing. To this end, the Tribunal will try and deal with the arguments that were raised. However, the analysis will only be limited the main issues. The analysis will not necessarily deal with end and every argument as raised. This analysis will only be limited to the arguments that are crucial to this decision.

19. One of the main issues raised was that there was no proper compliant before the Ombud. It is worth recording that this Tribunal does not share the same view with the Applicants regarding the issue of whether there was a proper compliant before the Ombud or not. It is the view of this Tribunal that complaints that are filed with the office of the Ombud also encompass the conduct of the FSR / FSP, what they did or did not do. If a client is unhappy, he/she can file a complaint with the Ombud for investigation. This is what happened in this matter. The First and Second Respondents were unhappy with the conduct of the Applicants, and they accordingly filed complaints. The Ombud was duty bound to investigate the complaint.

20. Secondly, it is surprising that the Applicants would argue that they did what was required of them. To start off with, the Applicants failed to show a record of advice to the Ombud, when same was of necessity. The Second Applicant even went on to state that he, didn't consider the record to be necessary. The Code is clear regarding this, the FSR / FSP is required to have a written record of advice, do a proper risk analysis to ensure that the service and advice given to the client is proper. In this case, no such records were provided when the Applicants advised the First and Second Respondents to invest in Sharemax.

21. The argument that the Respondents (First and Second) knew what they were in for, cannot be sustained. Each client must be advised accordingly, regardless of what is said they know or don't know. The Tribunal also notes

that the Applicants stated that the record of advice is contained in the record of these proceedings. However, the Second Applicant, Mr Nell did not take into his confidence the Ombud, showing that indeed he provided such a record of advice to the two Respondents and they elected to invest in such a product. No such information (let alone allegations) was made available before this Tribunal. Mr. Nell did not refer this Tribunal to the said record of advice. He just stated that there is a record of advice. As to what advice was given to the Respondents, what options were presented to them and what they ultimately chose, such is left for this Tribunal to speculate. It is the view of this Tribunal that the Applicant has failed both before the Ombud as well as in the current proceedings to show that there was a proper record of advice. On this alone is fatal to the application.

22. The Applicants also referred this Tribunal to **the Symons N.O and Another v Rob Roy Investments CC t/a Assetsure** decision. This Tribunal has had the luxury of time to consider this judgment together with other judgements. However, after considering the said decision, it was the view of this Tribunal that the Symons case is distinguishable from the current matter. Firstly, in the Symons matter, the Court was dealing with a case where the client was given the prospectus ahead of time. He left with the said documents for a period of two weeks, considered them and only after, proceeded to invest as per the financial advice he had received. In this matter, there is nothing shown regarding the record of advice. Therefore, it would be very difficult to state that the Symons decision applies to this case as well.

23. To take this further, there is nothing presented before this Tribunal that suggests that Respondents was also afforded this opportunity to leave with the prospectus for purposes of perusing same and making up their mind on the investment. There was nothing showing that the Applicants went through the documents with the First and Second Respondents (respectively) and explain the risks properly. This Tribunal is of the view that such a matter is different to the facts in the Symons matter and cannot be authority herein.

24. This Tribunal also takes guidance from the views and findings made by the Supreme Court of Appeals in **Centriq Insurance Company Limited v**

Oosthuizen and Another (237/2018) [2019] ZASCA 11; 2019 (3) SA 387 (SCA) (14 March 2019) the Court expressed views as was held by the High Court and stated amongst other the following:

"[14] The scheme required investors to transfer their money to Sharemax's chosen company. The company or Sharemax would then pay their investors interest on this investment without the underlying investment – the property development – having earned anything – and where it was unlikely to do so for years, pending the purchase of the land and the construction of a shopping centre. Only upon the completion of the construction centre would rental income be realised. Yet the prospectus previously mentioned held out to investors a projected rate of return equal to a 10 per cent after tax dividend from the date of full subscription to the occupation date in September 2011. The 'investment' in fact had all the hallmarks of a Ponzi scheme in which money placed by later investors pays artificially high interest or dividends to the original investors, thereby attracting even larger investment. When there are no longer new investors, which inevitably happens, the scheme collapses. Mrs Oosthuizen was one of the later investors. On any objective analysis the investment was not viable; certainly not having regard to her needs.

[15] As the learned Judge trenchantly observed:

'It is amazing that [Mr Castro] could think for one moment that interest could lawfully accrue from the investment from the first month. I wonder where he thought the magical origin of the income stream would derive from . . . [A] simple investigation or even an inspection of the half-built shopping complex would have been an eye-opener. He would have realised that enormous costs would have to be incurred to complete the project [and that the] . . . half-built shopping complex could not earn any income for some time . . . but the investment provided for income to be paid to investors from the start.'

*[16] It was, to be kind to Mr Castro, an investment that he himself did not properly understand. He dismissed the adverse criticism circulating in the media without satisfying himself as to whether there was any substance in it. He quite clearly failed to explain the risks of the investment to allow Mrs Oosthuizen to make an informed decision. **The finding by the court a quo that Mr Castro was in breach of his fiduciary duty to his client because he had not taken reasonable steps to satisfy himself of the safety of the investment and to give her adequate financial advice to meet her needs is therefore unassailable"** (own emphasis).*

25. The SCA decision referred to above was not opposed but still makes factual findings which this Tribunal cannot just simply overlook. This Tribunal must also determine if the Applicant satisfied himself of the viability of the investment. Where the alleged interests the Respondents were going to receive were coming from? Similarly, to the findings and views of the SCA, the investment was hopeless from the onset[3]. The advice alleged to have been rendered should have made the clients realize the risks involved, and there is nothing before this Tribunal that shows that such risks were properly dealt with, or the Respondents having being made aware of such adequately.

26. It is the view of this Tribunal that the Applicants did not properly advise the First and Second Respondents of the risk involved in such investment and thus the Ombud was correct in concluding that the Applicants were not able to appreciate the risk involved in the said investment.

27. Lastly, this Tribunal has noted the arguments surrounding the quantum as raised in the application. The Tribunal has also noted that the Ombud made findings on the loss, but the record does not show any investigation into the value of the investment (if any). It appears, in our view, that the Ombud relied on the initial invested amounts to arrive at what represents value of loss. . Further, it appears that a fair manner of dealing with same is to order payment of the invested amount against cession or transfer of the investment, which is what the Ombud did. This Tribunal cannot fault the investigations and findings made by the Ombud. Consequently, this application should fail.

28. Based on the analysis above, the Tribunal makes the following orders:

33.1 The appeal is dismissed;

33.2 No order as to costs

Signed at PRETORIA on the 28th day of September 2021 on behalf of the Tribunal

[3] See paragraph 7 of the Centriq Insurance Company Limited v Oosthuizen and Another decision.

CHAIRPERSON
JM DAMONS