

SOUTH AFRICA / JUDGMENT

Koch & Kruger Brokers CC and Another v Financial Sector Conduct Authority and Others (48799/19) [2021] ZAGPPHC 755 (3 November 2021)

[2021] ZAGPPHC 755

COURT

North Gauteng High Court, Pretoria

BEFORE

PM Mabuse

CASE / FILE NUMBER

48799/19

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 48799/19

DATE:

3 November 2021

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES / NO

(3)

REVISED

DATE: 2024.11.03
SIGNATURE
KOCH
& KRUGER BROKERS
CC
First Applicant
DEON
KRUGER
Second Applicant
V
THE FINANCIAL SECTOR
CONDUCT AUTHORITY
First Respondent
THE OMBUD FOR
FINANCIAL SERVICE PROVIDERS
Second Respondent
HER LADYSHIP MRS
JUSTICE OF APPEAL
YVONNE MOKGORO
N.O.
Third Respondent
THE FINANCIAL SERVICES
TRIBUNAL
Fourth Respondent
GEORGE
BABEN
Fifth Respondent
LUCILLE MIRIAM
BABEN
Sixth Respondent

JUDGMENT

MABUSE J

- [1] This is an application to judicially review and set aside the determination and or decisions of the Second and Third Respondents in accordance with the provisions of s 6 of the PAJA read with s 235 of the Financial Sector Regulation Act 9 of 2019 (FSR Act). This application is opposed by the Second Respondent on whose behalf Adv Sydwell Shangisa SC (Mr Shangisa) appeared with Adv Sthando Kunene (Ms Kunene). Basically, the Second Respondent only opposes the application on the question of costs. It is also opposed by the Fifth and Sixth Respondents on whose behalf Adv F Botes SC (Mr Botes) appeared.

OVERVIEW

- [2] Through the advice of the Applicants, who acted in their capacities as the Financial Service Providers, the Fifth and Sixth Respondents invested their money in Sharemax Investments (Pty) Limited (Sharemax). The money was used by Sharemax for the construction of The

Villa Retail Park (The Villa), which was promoted by Sharemax. The South African Reserve Bank regarded such investments as taking deposits. It issued a directive in terms of which it ordered Sharemax to refund all the money Sharemax had received from investors to the investors. At the material of the directive, Sharemax did not have any money to pay back to the investors. It could therefore not refund the investors their money. The scheme collapsed and the Fifth and Sixth Respondents lost their investments.

THE ISSUE TO BE DETERMINED

[3] At the commencement of the application both counsel Advocate Geyer (Mr Geyer), for the Applicants and Adv Botes asked the court to determine first a point in limine which, in their unanimous view, would truncate the proceedings. That point in limine involved causation. The court was asked to determine whether the loss suffered by the Fifth and Sixth Respondents, under the circumstances set out in the overview, was caused by the breach of agreement occasioned by the Applicants, as it was contended by the Fifth and Sixth Respondents, or by the intervention of the South African Reserve Bank, as it was contended by the Applicants.

[4] THE PARTIES

[4.1] The First Applicant, Koch & Kruger Brokers CC, is a close corporation duly registered and incorporated in accordance with the laws of this country, initially having its principle place of business within the area of jurisdiction of this Court at Suite 3[...], M[...] Building, H[...] Street, Secunda. This application is predicated on the founding affidavit deposed to by Deon Kruger, a financial service provider, who practises as such from Suite 3[...], M[...] Building, H[...] Street, Secunda. Deon Kruger ("DK") is the Second Applicant in this application and is also a member of the First Applicant.

4.2 The First Respondent, the Financial Sector Conduct Authority, is a juristic person duly established as such in accordance with the provisions of the FSR Act, having its principle place of business within the area of jurisdiction of this Court at Riverwalk Office Park, Block B, [...] M[...] Road, Ashley Gardens, Extension 6, Menlopark, Pretoria.

4.3 The Second Respondent is the Ombud for Financial Services Providers, duly appointed in accordance with the provisions of s 21(1) of the Financial Advisory And Intermediary Act 37 of 2002 (FAIS Act), carrying on business as such within the area of jurisdiction of this Court at Kasteelpark Office Park, Orange Building, Second Floor, corner of Nossom and Jochemus Street, Erasmuskloof, Pretoria.

4.4 The Third Respondent is Ms Justice of Appeal, Yvonne Mokgoro N.O., who is cited herein in her official capacity as the chairperson of the Financial Services Tribunal, constituted in accordance with the provisions of the FSR Act, conducting its business within the area of jurisdiction of this Court, at Riverwalk Park, Block B, [...] M[...] Road, Ashley Gardens, Extension 6, Menlopark, Pretoria.

4.5 The Fourth Respondent is the Financial Services Tribunal, a tribunal established in accordance with the provisions of s 219 of the FSR Act, conducting business at Riverwalk Park, Block B, [...] M[...] Road, Ashley Gardens, Extension 6, Menlopark, Pretoria.

4.6 The Fifth Respondent is George Baben, an adult male, residing at 3[...] L[...] Street, Secunda, formerly within the area of jurisdiction of this Court and represented herein by attorneys Cronje, De Waal, Skosana Inc, Cronje, De Waal and Van der Merwe Building, Lurgi Plaza, Central Business District, Secunda.

4.7 The Sixth Respondent is Lucille Miriam Baben, an adult female, residing at the same address as the Fifth Respondent. For purposes of brevity, the Fifth and Sixth Respondents shall be referred to as “the Babens”.

[5] The active parties in respect of the point in limine raised in this matter are the Applicants, the Second Respondent only on the question of costs, and the Babens.

THE

BACKGROUND

[6] According to the Applicants’ chronology, during 2008, the Sixth Respondent invested an amount of R330,000.00 in a public property syndication scheme known as The Villa Retail Park Holdings Ltd (“The Villa”) which was promoted by Sharemax Investments (Pty) Ltd (“Sharemax”). This amount was obtained by the Fifth Respondent, by withdrawing funds from an existing Investec Private Bank (“Investec”) investment, which was a money market account earning lower returns of around 6% per annum.

[7] Further according to the said chronology, during September 2009 the Sixth Respondent made a further investment in the amount of R450,000.00 into Zambezi Retail Park Holdings Ltd (“Zambezi”), also promoted by Sharemax. The funds that were invested were a combination of the Babens’ savings, inheritance, and the balance from their Investec investment. It is the Babens’ case that they entered into a written agreement in terms of which DK advised them in respect of the investments and advised them to invest their money in the form of an investment in Sharemax in respect of the Schemes described as The Villa and Zambezi. These property syndication schemes were both promoted by Sharemax. This Sharemax was an unlisted company. In return for their investments, Sharemax had contractually agreed to pay to the Babens interest at the rate of 12.5% per annum monthly. What happened in 2008 has not been distinguished from what happened in 2009. The events of both years have been lumped together.

[8] Until September 2010, the Sixth Respondent received the promised returns on the investments, but thereafter, due to the intervention of the South African Reserve Bank (“SARB”), the Sixth Respondent did not receive any further payments and, the Sixth Respondent could not withdraw the capital amount invested by her in Zambezi and The Villa. According to the Applicants the Sixth Respondent, however, to this day, retains the

investment, as restructured in terms of the s 311 compromise in terms of the Companies Act 61 of 1973 (“the Companies Act”) which it is submitted retains a substantial commercial value.

- [9] On 12 December 2012, and in accordance with the provisions of the FAIS Act, the Babens lodged a complaint with the office of the Second Respondent. In their letter of complaint, the Babens had complained that for the past 24 months they had not received any income from their investments in Sharemax. They had noticed on 7 August 2010 that the problems in Sharemax were becoming massive and gigantic and had complained to the Applicants on 31 August 2010. The Babens’ complaint to the Second Respondent against the First and Second Applicants, was essentially the following –

“1. The Sixth Respondent states –

We were totally unaware of the existence of Sharemax until we were approached by Mr Deon Kruger to investment (sic) in Sharemax. We were convinced by him that the investment was sound with no risks attached. Amount of R450,000.00 and R330,000.00 invested in the Villa and Zambezi Retail Park respectively.

Alas since 2010 all interest payments were stopped.

Initially Mr Kruger stated that we must not be concerned and that the matter was unnecessarily blown up by the Press and Media.”

“3. The Fifth Respondent states –

Daar is groot wardering vir jou raad en ondersteuning met my beleggings en jou insette oor my finansiële beplanning vir die afgelope 15 jaar plus ek het nog nooit oor jou integriteit of eerlikheid getwyfel nie. Ons het soveel vertroue in jou dat ons ons dogter na jou verwys het vir finansiële raad en advies. Sy het in elk geval dan ook R68,000.00 van haar spaargeld in Sharemax belê.”

“Ek en my eggenote het na deeglike beraadslagging (our emphasis) met julle wel besluit om geld te belê in Sharemax en PIC om die volgende redes wat aan ons voorgehou is.”

The Babens confirmed that they received approximately R7000.00 per month income or return on their investments, commencing in April 2008 until August 2010.

THE BABENS’ COMPLAINT

- [10] The Second Respondent duly notified DK on 11 January 2013 about the complaint. A copy of the Babens’ complaint was sent to DK for his comments. Attached to the written complaint that the Babens had sent to the Second Respondent was a copy of the complaint that the Babens had already sent to the Applicants on 12 October 2012. The Second Respondent requested the Applicants:

10.1 to respond to the complaint within two weeks of its letter dated 11 January 2013;

10.2 to provide the second respondent with all relevant documents in support of their version;

10.3 to furnish the second respondent with documentation that proved the Applicants' compliance with the FAIS Act and the General Code of Conduct for Authorized Financial Service Providers at the time the financial services were rendered;

10.4 to furnish the second respondent with certain listed documents.

[11] The Second Respondent requested the Applicants to furnish it with.

11.1 a copy of the disclosure letter used at the point of sale;

11.2 proof that DK was licensed to sell shares and debentures at the time (license categories 1.08 and 1.10);

11.3 copies of all the quotes to the complainants at the point of sale;

11.4 the second respondent wanted to know whether the complainants were placed in a position in which they could choose between unconventional products or asset classes;

11.5 copies of documentary proof that all fees and commission were shown together with proof that the complainants agreed to all fees and commissions.

[12] The Applicants submitted in total four responses, two in respect of the complaint and two in respect of the Second Respondent's recommendation.

THE APPLICANTS' RESPONSE

[13] In his letter of reply to the Second Respondent dated 8 February 2013, Deon Kruger stated that:

"Ek, Deon Kruger, en Koch Makelaars Bpk, is nie gelisenseerd vir kategorie 1.08 en 1.10 nie, daarom het ek as teenwoordiger van USSA opgetree onder hulle supervisie. Sien aanhangsel B- Gert Booysen".

In response, the Applicants contend that DK informed the Babens, at the material time he rendered financial services to them, that he was acting in the representative capacity of the USSA and was thus authorized, in terms of FAIS Act, to render the services to them. It is furthermore the Applicants case that, although this was "a single need" investment by the Babens, DK discussed with them whether to retain their funds in an investment with Sanlam, Glacier or Momentum Wealth or investments on the Johannesburg Stock Exchange, now called Johannesburg Securities Exchange, alternatively to invest some funds in the property syndication.

[14] The Applicants state that they were satisfied when the Babens signed their documents. They interpreted that as a clear sign that the Babens had understood their explanations; and that when they decided to invest, the Babens had made an informed decision to invest. According to them, up to that stage the Babens had made their own investment decisions and had managed their investments themselves. They were knowledgeable themselves. In support of their contention DK relied on the response by the Babens dated 3 June 2016 and

28 August 2015 to the Second Respondent's questions.

"It is important to further indicate to you that investment of our available funds was made by ourselves, without any real contribution/advice from Mr Kruger. We invested our money in:

- (i) low risks classes, e.g., Sanlam Effective Trust, fixed deposits in banks.
- (ii) higher risk investment in shares on the JSE."

[15] In a letter dated 28 August 2015 in which the Babens in fact confirmed that they did not truly intend to complain against the applicants and in which they stated that:

"In our correspondence with your office, since initiation of the complaint, we also continuously expressed our viewpoint that these

parties should be held accountable and responsible for the situation."

[16] According to the Applicants, the following documents were placed before the Babens, the prospectus, the client advice record, the USSA declaration and the client mandate forms. Thereupon they claim that the Babens made informed decisions based, inter alia, on the contents of the documents they had signed. The Applicants then concluded that they accepted, based on their substantial

investments on the Stock Exchange, that the Babens were not averse to risk and particularly market fluctuations with the possibility of losing their income. For that reason, so contend the Applicants, the Babens were happy to invest in Sharemax. They

therefore contend that the Babens knowingly decided to invest in Sharemax while they had been made aware through the prospectus of Sharemax of the inherent risks in the unlisted shares of Sharemax. This they did by referring to the contents of the prospectus.

THE APPLICANTS' CASE

[17] During April 2008 and September 2009, the Babens invested the amounts of R330,000.00 and R450,000.00 ("the investment") into a public property syndication scheme known as Zambezi Retail Park Holdings Limited ("Zambezi") and The Villa Retail Park Holdings Limited ("The Villa"), respectively.

[18] According to the Applicants the elephant in the room in the entire Sharemax Property Syndication Scheme was the conduct of the Reserve Bank. It is common knowledge that in August 2010 the Reserve Bank directed Sharemax to refund to the investors all the monies they had invested in Sharemax Syndication Schemes. Sharemax was at that stage unable to refund to all the investors all the monies invested in it because such monies had been used for the construction of projects, in other words, Sharemax did not have any money that it could repay to the investors. As a result, the constructions of both Zambezi and The Villa projects were ended before completion of the buildings.

[19] The directives by the South African Reserve Bank to the directors of both Sharemax and The Villa were contained in a letter dated 14 September 2010. The main reason the Reserve Bank issued the said directives was that Sharemax had contravened the provisions of s 18 of the Banks Act 94 of 1990 (“the Banks Act”) in that while not registered as a Bank in terms of the said Act, Sharemax had illegally taken or accepted deposits from the investors and thereby conducted business as a bank. The directive was issued in terms of s 83(1) of the Banks Act read with s 84. Section 83(1) states that:

“[83.1] If as a result of an inspection conducted under section 12 of the South African Reserve Bank Act, 1989 (Act 90 of 1989), the Authority is satisfied that any person has obtained money by carrying on the business of a bank without being registered as a bank or without being authorized, in terms of the provisions of section 18A(1), to carry on the business of a bank, the Authority may in writing direct that person to repay, subject to the provisions of section 84 and in accordance with such requirements and within such period as may be specified in the direction, all money so obtained by that person insofar as such money has not been repaid, including any interest or any other amounts owing by that person in respect of such money.”

And Section 84 states:

“[84.1] Simultaneously with the issuing of a direction under section 83(1), or as soon thereafter as may be practicable, the Authority shall by a letter of appointment signed by him or her appoint a person (hereinafter in this section referred to as the repayment administrator), to manage and control the repayment of money in compliance with the direction by the person subject thereto: Provided that the Authority may afford the person subject to the directive a reasonable period of time to devise and implement an alternative plan of action that is in the interests of the investors and to which the Authority has no objection.”

[20] Following the complaint and investigations, the Second Respondent made an adverse determination against the Applicants during October 2018. The determination by the Second Respondent was made in terms of s 28(1) of the FAIS Act. In terms of the determination, the Applicants were ordered to repay the Fifth and Sixth Respondents R330,000.00 and R450,000.00 respectively. Subsequently, the Applicants exercised their rights in terms of s 28(5)(b)(ii) of the FAIS Act and applied for leave to appeal the Second Respondent’s determination. The Applicants’ application for leave to appeal was refused and the Applicants exercised their rights in terms of s 28(5)(b)(ii) by requesting leave from the chairperson of the board of appeal, the Third Respondent.

[21] The Third Respondent declined to grant the Applicants leave to appeal. The Third Respondent held that there are no reasonable prospects that the Second Respondent’s determination would be overturned.

THE BABENS’ VERSION

- [22] The Babens' version is set out in the answering declaration of facts of Lucille Miriam Baben, (Ms. Baben), the Sixth Respondent, supported by the supporting declaration of facts of the Fifth Respondent. The Babens oppose the Applicants' application. They contend that the factual allegations made by the Applicants in relation to their dealings with DK are neither true nor are the legal conclusions based on such allegations. According to Ms. Baben, relationship between the Babens and Deon Kruger was founded on a contract. It was an express, alternatively tacit, and further alternatively implied term of the contract that DK would act with the necessary skill, care, and diligence in providing the Babens with financial service. According to the Babens it was an express, alternatively tacit term of the agreement that they wanted to invest in the low to no risk investment, alternatively, medium to minimal risk investment.
- [23] It is the Babens' case that DK incorrectly and in breach of his duty of care recommended that they invest in the so-called Sharemax Scheme which amounted to a public property syndication. This statement contradicts the Applicants' version that the Babens knowingly decided to invest in Sharemax. It seems highly unlikely that the Babens knowingly decided to invest in Sharemax on their own or by simply looking at the prospectus of Sharemax, as the Applicants contend. The Babens are not experts in the financial markets. It is for that reason that they needed experts or people who called themselves experts for guidance. It will be recalled that DK portrayed himself to be a good hand at investments. It will also be recalled that in a letter dated 17 April 2013 DK described himself as an expert in the said letter. It is Babens' case that DK incorrectly and in breach of his duty of care recommended that they invest in the so-called Sharemax, which was explained to them was public property syndication. He reassured them by explaining that investment in the Sharemax Syndication Scheme was a no-risk investment scheme because they were investing in "bricks and mortar."
- [24] According to them, the Babens were convinced by DK to invest in Sharemax Syndication Scheme. This is contrary to what the Applicants contend that the Babens were aware of the inherent risks involved in the unlisted shares. Whether DK was selling the Babens listed shares or not, which I doubt they could distinguish, the fact of the matter is that the agreement between them, that is the Babens, and DK was that there was a specific mandate from the Babens to DK that the Babens wanted to invest in low-risk investments.
- [25] When DK wooed the Babens to invest in Sharemax, they became gullible. He could not have thought that they knew what they were investing in an unlisted company; the Applicants could not have thought that the Babens were aware of the inherent risks involved in investing in unlisted companies. He could not have thought that investing in Sharemax was like investing in Sanlam, Momentum Wealth, Glazier, or the Johannesburg Securities Exchange. Extraordinarily little was to them known about Sharemax. They therefore needed someone to supply further details about investing in Sharemax. That information was therefore provided by DK. He was able to convince them to invest in Sharemax by:

25.1 representing to them the return of their capital after five (5) years. The Babens were therefore gullible;

25.2 that once they invested in Sharemax they would be guaranteed monthly interest payments. Mr Kruger made the Babens to believe that with the proceeds of their investments they could live on the fat of the land;

25.3 he led them by their nose into investing in Sharemax when he convinced them that an investment in Sharemax was a low-risk investment. He made them believe that the moon was made of green cheese when he told them that they are investing in “brick and mortar”;

25.4 by stating with reference to Sharemax that:

25.4.1 the South African Reserve Bank had approved Sharemax;

25.4.2 the Department of Commerce and Industry had approved the prospectus of Sharemax;

25.4.3 the Board of Financial Services had approved Sharemax;

25.4.4 repayment of their capital after 5 years. In this manner he threw dust in their eyes;

25.4.5 they were investing in buildings “fisiese entiteit nl. bakstene en sement”;

25.4.6 he made them believe that the moon was made of green cheese when he reassured them that he had invested all his father’s money in Sharemax. He threw dust in their eyes.

[26] According to them, they did not start the investment by approaching DK and by requesting him to invest their money in Sharemax Scheme. That is clear from their complaint to the second Respondent dated 12 December 2012 where they said that:

“We were totally unaware of the existence of Sharemax until we were approached by Deon Kruger to invest in Sharemax.”

[27] According to them it is DK who approached them and recommended that they invest in the scheme on his own and without prior prompting. This testimony contradicts the Applicants’ testimony that the Babens made their own investment decisions and managed their own investments. If the Babens made their own investment decisions at all-material investments, it would not have been necessary for them to be given so many assurances as appear in the preceding paragraphs. It would still have not been necessary to be educated on low-risk investment. The fact that there had to be so many assurances is indicative of the fact that they were not knowledgeable, as contended by the Applicants. One of the factors that played a role in convincing the Babens to accept DK’s persuasion is the fact that at that stage the DK had been known to them for some 15 years. DK had helped them with various matters which included life insurances, wills, and many other things. Based on the said period and the type of services that DK had made to them in the past, DK was in the position of trust. The Babens were entitled to rely on his knowledge and advice.

[28] Blaming the Reserve Bank for the misfortunes that had befallen the Babens, was in my view, akin to barking up a wrong tree. Although he portrayed himself to be a good hand at investments, he misled them and caused them a loss of their money.

[29] It is the Babens' case that the applicants' verbal advice contradicted the contents of the documents DK made them sign on a short notice. In that regard the Babens refer to the following instances to which they regard as contradictions:

29.1 In DK117 DK wrote in his own handwriting that the Babens required "laag/medium" risk investment. This is contradicted by the contents of the document marked DK114, where it is stated that the repayment of the capital is not guaranteed and that the investment should be considered: 'n riskante kapitaal belegging.' In DK116 it is stated that the property syndication investments should be considered "a risk capital investment." The Registrar of Companies, having perused the prospectus of Sharemax had observed that the shares on offer were unlisted and should be considered a risk capital investment.

29.2 In DK118 DK stated in his own handwriting that the Babens obtained "eienaarskap dmv. Ongenoteerde aandele in 'n fisiese gebou." This contradicts directly DK's version in DK90 where DK stated that the company does not directly own property; that the funds amassed from investors are used by the investment company to buy shares in the company that will ultimately own the property. The investment company does not take investments from the public for the purpose of buying property directly. Instead, it only indirectly owns property through its 100% shareholding in the property owned by the company.

29.3 In DK118 DK wrote that column "By verkope word dit soos by 'n huis wat verkoop word, dws, prys wat verkoper beryd (sic) is om te betaal vir eindom." This contrasts with the contents of the document marked DK115 which states that a property syndication investment is not liquid as the ability to transfer the units is restricted by the absence of the market for those units. It states furthermore that there is no established market for the sale of the shares or units or debentures and that investors have no right to require the product supplier to purchase their shares or to have their shares redeemed.

29.4 Quite clearly DK had not read the documents himself before he made the Babens sign them, or, if he had read them, he did not understand their contents. If he had understood them there is no reason, he did not iron out these contradictions. If he had not read them or had read them but did not understand them, it is highly unlikely that he gave the Babens a true picture of their meaning. He therefore failed to make sure that the Babens made any informed decision when they decided to invest in Sharemax or made those decisions on a correct basis. He therefore failed in his duty to ensure that Babens made their decision based on the correct comprehension of the documents. This contradicts the Applicants' contention that the Babens were able to decide.

THE INTERVENTION OF THE SOUTH AFRICAN RESERVE BANK

[30] As already pointed out somewhere supra, it is the Applicants' case that the Babens lost their investments because of the intervention of the Reserve Bank in issuing directives, at an inopportune time, to Sharemax to refund all the investors their money. In this regard the Applicants were buoyed by the judgment of Symons NO And Another v Rob Roy Investment CC t/a Assetsure 2019 (4) SA 112 KZP. In considering whether the Defendants in that matter were liable for the plaintiffs' loss, the Court stated in paragraph [58] that:

"The cause of the loss was the intervention of the Reserve Bank and not any breach on the part of the defendant."

Because of the reasons that follow hereunder, I hold the view that the intervention of the Reserve Bank constituted one of the risks that the Applicants should have investigated.

[31] The Applicants failed to thoroughly investigate Sharemax and its business dealings. Sharemax was taking deposits from investors. This is not in dispute. The Applicants knew it. There was a duty on the Applicants as financial advisors to investigate the activities of Sharemax and to establish whether in law Sharemax was entitled to take deposits from investors. Investigating whether Sharemax had the right to take deposits includes, inter alia, in the words of Daffue J in Oosthuizen v Castro and Another 2018 (2) SA 529 FB:

"The defendant should have spoken to the independent auditors, attorneys or financial analysts. He should have insisted on financial

statements, such as income and expenditure accounts, cash-flow analysis, and a balance sheet. He should have inspected the

shopping complex but if you had done that, he would have known that the investment could not possibly have an income stream at that stage or even in the foreseeable future."

These words only emphasize the thoroughness with which the Applicants should have investigated Sharemax activities. The Applicants could still have tried to obtain the relevant information from Sharemax itself, such information as to whether Sharemax had any proof of registration in terms of s 11 of the Banks Act. If Sharemax would not have been prepared to disclose such information, they had an option to approach the Reserve Bank for verification. Although the Applicants claimed to experts in this field, they failed dismally and negligently to investigate whether Sharemax has been given an authority in terms of s 13 of the Banks Act to establish a bank. By taking deposits from investors Sharemax was acting as a bank. Failure to investigate the legal standing of Sharemax amounted to negligence on the part the Applicants. Sharemax received deposits from investors in contravention of the provisions of the Banks Act 94 of 1990.

[32] Section 11 of the Banks Act provides that:

"Subject to the provisions of the obstruction 18A, no person shall conduct business of a bank unless such person is a public company and is registered as a bank in terms of this Act."

Firstly, Sharemax is not a public company. It was a private company at the time it took deposits from investors. Under those circumstances it could not be registered under the provisions of the Banks Act as a bank. Secondly no evidence has been placed before this court that it had been registered as a bank in terms of the Banks Act. This is the information that the Applicants should have investigated because the consequences of contravening the provisions of the Bank Act are profoundly serious. Taking deposits from the investors contrary to the provisions of the Banks Act, apart from anything else, constitutes a criminal offence. A financial service provider should not advise an investment in something which he is not himself able to fully understand.

[33] This is the risk that DP negligently failed to investigate and warn the Babens about accordingly. If the applicant had acquainted themselves with the provisions of the Banks Act, as they should have done so, they could or should have become aware of the sanctions ordained by the said Act and the risks involved for the investors investing in Sharemax which operated like a bank while it was not one. They would have been aware of the crucial sections 83 and 84 of the Banks Act. The intervention by the Reserve Bank was, in my view, foreseeable and the Applicants were negligent in not guarding against it.

[34] The major differences between the current matter and Symons, was that the investors in the Symons case were left with some documents for two weeks to study before they decided to invest in Sharemax. From reading such documents they understood the risks set out in the prospectus. The investors in Symons' case chose to invest in Sharemax with full knowledge of the risks involved. It was for that reason that the court in Symons stated that:

"[51] It seems to me that on the information which had been given to Symons he was able to make an informed decision. He took a week or two to make up his mind, and it is probable in my view that he substantially understood the nature of the investment, and went into it with his eyes open. He knew about the upfront commission; he knew the mall in the process of being constructed; he knew further prospectuses would be issued in order to finance the completion of the mall and he knew there would only be a rental income once the mall was occupied."

In the present matter the Babens were not given an opportunity to study the documents. This accounts for the Babens' statements that they did not rely on the prospectus of Sharemax but on the advice of DK and that it was in the contemplation of the parties that they would rely on DK's advice and professed knowledge. They contend furthermore that they relied exclusively on the advice and representations made by DK. This means that it was DK and not any documentation of Sharemax that influenced them to invest in Sharemax.

[35] According to the Babens when DK handed them all the documents to sign, he stated that they did not have much time to consider them because the shares were selling quickly. They were afraid that they might lose their chance to invest. DK did not give them the prospectus and other documents to study beforehand. They only had half an hour in DK's offices to sign the documents. This statement seems, on probabilities, to be true. DK did not, in his testimony, explain how he gave the Babens the paraphanelia; when he gave them the documents; whether he saw them read the documents and whether they asked him any

questions based on what they had read while he was watching them. He did not state that he gave them a week or two to study the documents before he went to make them sign them.

The probabilities are that the documents were only given

to the Babens the day on which they signed them. They signed the documents without having fully read and understood them because they relied entirely on the advice of DK.

[36] There was a negligent failure on the part of the Applicants to carefully consider the risks profile of an investment in Sharemax. The Applicants advised the Babens to invest in the Sharemax syndication scheme when they knew or ought to have known that it was a high-risk investment. The Applicants do not deny the Babens' version that:

36.1 the Babens required a low-risk investment;

36.2 because of their long-standing relationship the Babens relied on his advice and expertise;

36.3 the Babens would have acted on his advice; and

36.4 more importantly he was required to investigate and explain fully all the risks involved in the Babens' investment in the Sharemax scheme.

[37] If DK had explained to the Babens the risks involved in investing in Sharemax, he would certainly not have written in his own writing what he wrote in DK117 and DK118.

[38] The Applicants do not deny that:

38.1 there existed a contractual relationship between them and the Babens;

38.2 based on the said contractual relationship, the Applicants owed the Babens a duty of care to act with the necessary care, skill, and diligence of reasonable financial service provider under similar circumstances;

38.3 because of the long-standing relationship the Babens relied on the advice of DK;

38.4 DK was required to investigate and explain all the risks involved in the Babens' investment in the Sharemax Scheme.

THE CASE FOR THE FIFTH AND SIXTH RESPONDENTS

[39] The relationship between the Babens on one hand and the Applicants, on the other hand is based on a contract. According to the Babens, it was an express term of the contract that the Baben's funds should be invested in a low-risk investment. The Applicants breached the terms of the contract by placing the funds in a high-risk investment. It is inherent that in a high-risk investment there exists a greater possibility that the funds will be lost. The Babens' damages flow naturally from the Applicants' breach of their mandate, the higher probability of losing funds associated with the high-risk investments became a reality.

- [40] It was argued by Adv Botes, in his heads of argument, that because the Babens' damages flow naturally from the breach of the mandate, foreseeability is implied by law. If foreseeability is implied by law, there was no need for the Second Respondent to investigate, with specific reference to expert evidence or opinion, whether the collapse of Sharemax should have been anticipated or should have been foreseen by the Applicants. In principle, the fact that the funds were invested in Sharemax, specifically, is relevant. What is of crucial importance and relative is the fact that the funds were invested in a high-risk investment while the mandate specified that the funds should be invested in a low-risk investment.
- [41] Therefore, this application concerns the principle pertaining to consequences of a breach of an express term of mandate. This principle is simple. By implication, the risk of losing funds in a high-risk investment is probable and foreseeable. The determination made by the Second Respondent is predicated on the abovementioned principle and cannot be faulted. Even if it is found that there were some irregularities in the procedure adopted by the Second Respondent it cannot be argued that they were material or would have resulted in a different outcome. Because the Second Respondent's outcome cannot be faulted, this Court's powers to upset or overturn their determination is limited.
- [42] According to Mr Geyser, counsel for the Applicants, it is common cause that since the commencement of the investment during April 2008 and September 2009 respectively until August 2010, the Babens received the agreed monthly returns on their investments. It is furthermore common cause that Sharemax later did not pay the Babens the agreed returns two and in fact all the other investors who had invested their monies in this property syndication schemes only since or after the Reserve Bank intervened during or about September 2010 by ordering Sharemax to refund the investors all the monies invested in Sharemax Syndication Schemes.
- [43] DK states that at the time the investments were made, he could not foresee that the Reserve Bank would bring the complete process of Sharemax Syndication Scheme to a halt. When the Reserve Bank started investigating Sharemax, this was subject to the legislative secrecy provisions, breach of which would attract criminal sanctions.
- [44] In conclusion I find that the Applicants were negligent when they advised the Babens to invest their money in Sharemax. They failed to exercise the degree of skill, care, and diligence which one is entitled to expect from a financial service provider.
- [45] As pointed out earlier, the Second Respondent participated in these proceedings simply because the Applicants sought an order of costs against her. The costs, in my view, were sought against the Second respondent had the main application proceeded. As I pointed out earlier the current proceedings did not involve the Second Respondent but the Applicants on one side and the Babens on the other side. The argument that the applicants raised did not involve the Second Respondent. There are therefore no grounds upon which this court made consider an order of costs against the Second Respondent.

[46] Although the Applicants could have indicated to the Court that, in circumstances where the only issue was an issue that involved only the Applicants and the Babens, they would not persist with their order of costs against Second Respondent so that the Second Respondent did not have to incur costs. As matters stand, the Second Respondent unnecessarily incurred costs and is entitled to recoup them from the losing party. The order of costs includes the Second Respondent's costs.

Therefore, the following findings are made:

- [1] The loss of investments suffered by the Fifth and Sixth Respondents is attributed to the breach of contract caused by the Applicants.
- [2] The Applicants are hereby ordered to pay the costs of this application.

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants: Adv HF Geyer SC Instructed by: Bieldermaans Inc c/o Couzyn Hertzog & Horak Counsel for the Second Respondent: Adv SL Shangisa SC Adv T Kunene Instructed by: RMT Attorneys Counsel for the Fifth & Sixth Respondents: Adv FW Botes SC Adv DD Swart Instructed by: Cronje, De Waal, Skhosana Inc c/o HW Theron Inc Date on the roll before Mabuse J: 18 August 2021 Date of Judgment: 3 November 2021

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