



CONSTITUTIONAL COURT OF SOUTH AFRICA

Koch & Kruger Brokers CC and Another v Financial Sector Conduct Authority and Others

CCT 229/2022

Date of Judgment: 15 August 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 15 August 2023 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the High Court of South Africa, Gauteng Division, Pretoria, dated 3 November 2021.

The first applicant is Koch & Kruger Brokers CC (Koch & Kruger), a close corporation conducting business as a financial services provider. The second applicant is Mr Deon Kruger (Mr Kruger), operating as a financial adviser through Koch & Kruger Brokers. The first respondent is the Financial Sector Conduct Authority, an entity established in terms of the Financial Sector Regulation Act 9 of 2017 (FRS Act). The second respondent is the Ombud for Financial Services Providers (Ombud) appointed in terms of Chapter VI of the Financial Advisory and Intermediary Services Act 37 of 2001 (FAIS Act). The third respondent is retired Justice Yvonne Mokgoro cited in her capacity as the then Chairperson of the fourth respondent, the Financial Services Tribunal (Tribunal), established in terms of section 219 of the FSR Act. The fifth and sixth respondents are Mr George Baben and Mrs Lucille Miriam Baben respectively (the Babens).

In August 2008 and September 2009, the Babens, invested R780,000 in two property syndication schemes through Sharemax Investment (Pty) Ltd (Sharemax). The advice for these investments came from Mr Kruger. Initially, the Babens received monthly interest payments as per the arrangement, but starting from August 2010, they stopped receiving payments. The collapse of Sharemax's property syndication schemes was triggered by a directive from the South African Reserve Bank (SARB) in September 2010, deeming Sharemax's operations unlawful and instructing them to repay existing investors. The

Babens, who are retired and elderly, were among the many investors who suffered financial losses due to the collapse of Sharemax.

In December 2012, the Babens filed a complaint against the applicants with the Ombud alleging that the applicants had misled them about the safety and regulatory compliance of their investment in Sharemax. They claimed that the applicants had not provided them with the necessary documentation to evaluate the investment.

The Ombud upheld the complaint and awarded the Babens compensation of R780,000 with 10% annual interest from the determination date to the payment date. The Ombud's findings included the lack of a Sharemax prospectus, absence of a financial needs analysis, unsuitability of the high-risk Sharemax product, and the applicants' flawed and negligent advice regarding the investment's safety. The applicants disputed these findings, asserting that their responses and documentation were overlooked.

The applicants sought reconsideration by the Tribunal of the Ombud's determination by applying to the Ombud for leave to do so. However, the Ombud denied them leave. Subsequently, they sought leave from the Chairperson of the Tribunal, who also rejected their application. The Chairperson's decision, delivered on 12 April 2019, focused on concerns such as bias, causation, and the applicants' responsibility to ensure that the Babens were well-informed about the risks associated with the Sharemax investment. The applicants contend that the Chairperson's decision lacked elaboration on these issues and reasons, and instead summarily concluded that there was no basis to challenge the Ombud's conclusions and that the Tribunal was unlikely to arrive at a different decision.

The applicants initiated review proceedings in the High Court with two main objectives: first, to have the Ombud's determination set aside and replaced with a decision dismissing the Babens' complaint; second, to challenge the Chairperson's rejection of their application for leave to appeal to the Tribunal. The review application was based on various grounds stipulated in section 6 of the Promotion of Administrative Justice Act (PAJA). The applicants contended that both the Ombud and the Chairperson displayed bias or raised suspicions of bias, followed unfair procedural practices, were influenced by legal errors, held ulterior motives, disregarded relevant factors, considered irrelevant factors, acted in bad faith, displayed arbitrariness, and made unconstitutional and unlawful decisions.

Before the High Court hearing, the applicants' legal team proposed that a preliminary issue should be presented to the court. This issue was related to whether the Ombud's investigation into the Babens' complaint was substantiated by evidence to justify the Ombud's determination, or if the Chairperson's ruling – indicating that the applicants were responsible for the Babens' financial loss – was valid. The exact formulation of this preliminary issue as presented to High Court (Mabuse J) was not made clear in the written submissions of the applicants.

The High Court formulated the separated issue as being whether the Babens' financial loss was caused by the applicants' breach of agreement or by the intervention of SARB, and both sides in this Court accepted that this was the identified issue

The High Court held that the Babens' loss could be attributed to the SARB's intervention, but also emphasised that the applicants should have examined this risk. It criticised the applicants for failing to adequately investigate Sharemax's activities and not ensuring it was entitled to take deposits. The Court referred to another Sharemax case where a similar issue succeeded and distinguished it from *Symons N.O.*

The High Court also pointed out that the Babens had no opportunity to study documents and relied solely on the applicants' advice, highlighting a negligent lack of consideration for the risk profile of the investment.

Consequently, the High Court concluded that the applicants were negligent in advising the Babens to invest in Sharemax and failed to meet the expected standard of care for financial service providers. The High Court's ultimate decision was that the loss suffered by the Babens was due to the applicants' breach of contract.

The applicants' attempts to obtain leave to appeal were unsuccessful in both the High Court and the Supreme Court of Appeal. Their application was subsequently filed in the Constitutional Court on 17 August 17. The Babens' attorneys informed the Registrar that due to financial constraints and their age, the Babens would abide by the Constitutional Court's decision. The Chief Justice issued directions on 17 April 2023, calling for submissions on two key questions: the formulation of the separated issue and its relevance to the review application.

Submissions revealed that the separated issue was not precisely defined and the exact scope of arguments was unclear. The High Court did not formally make an order according to rule 33(4) but allowed an informal request for argument on the separated issue conveyed orally by counsel.

The applicants argue that the question of negligence was not part of the separated issue and was not argued. They complain that the High Court made a decision on negligence without considering their evidentiary material and without hearing their counsel on the matter. They suggest that this Court can decide on causation without further evidence and substitute the Ombud's decision with one dismissing the Babens' complaint.

However, the Babens contend that the separated issue inherently included the question of negligence in the context of their breach of contract claim. They submit that the issues of breach of duty of care and negligence are closely tied to foreseeability, and that damages naturally arose from the breach. They argue that the issue of breach of mandate and negligence was fully argued. If this Court disagrees, they propose that the matter be sent back to the High Court to address the issue of negligence.

In their submissions to this Court, the applicants assert that the High Court violated their right under section 34 of the Bill of Rights, which ensures the right to a fair public hearing for dispute resolution, by dealing with the entire case instead of the separated issue. They also argue that the High Court failed to apply binding legal principles to the question of negligence, further infringing their section 34 rights. Additionally, they claim that a point

of law with broader public significance has emerged due to the conflict between the High Court's ruling and the *Symons N.O.* case.

In a unanimous judgment written by Rogers J (Zondo CJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ and Van Zyl AJ concurring) the Court addressed several key issues. It acknowledged that jurisdiction is determined by the applicant's pleaded case and found that the High Court's alleged deviation from the separated issue in violation of applicants' rights engaged its constitutional jurisdiction. The Court clarified that the applicants' real complaint centered on the lack of evidence justifying the High Court's finding, notably due to the absence of expert evidence. It emphasised that this alone did not confer jurisdiction. Differing outcomes in similar cases were deemed insufficient to establish an arguable point of law. The Court highlighted that the separation of issues pursued by the parties and the High Court was fundamentally flawed, especially given the nature of the case being a PAJA review of decisions by the Ombud and the Chairperson of the Tribunal, not an action for damages. The High Court's findings were ineffective for resolving any of the grounds of review. Consequently, the Court refused leave to appeal, underscoring that its decision on causation would be no more useful than the High Court's judgment. The applicants were held accountable for proposing the misconceived issue separation. Refusing the application, the Court ordered the applicants to cover the respondents' costs of making submissions in this Court. The parties were urged to expeditiously proceed with the review in the appropriate court.