FAISOmbud
Office of the Ombud for Financial Services Providers

OUR REFERENCE: FAIS 09769/12-13/ WC 1

24 October 2017

ATTENTION: Mrs Anna Van Strijp

Van Strijp Financial Advisors CC

Per email: anne@vanstrijp.co.za

Dear Mrs Van Strijp

MISS SKYE RYALLS V VAN STRIJP FINANCIAL ADVISORS CC (FIRST RESPONDENT) AND MRS ANNA VAN STRIJP (SECOND RESPONDENT). RECOMMENDATION IN TERMS OF SECTION 27 (5) (c) OF THE FAIS ACT, (ACT 37 of 2002)

A. INTRODUCTION

1. On 25 March 2013, Miss Skye Ryalls filed a complaint with this Office against Van Strijp Financial Advisors CC and one of its key individuals, Mrs Anna Van Strijp. The complaint arose from a failed investment made on behalf of complainant in 2007 on the advice of the second respondent, into a public property syndication scheme, namely, Waterfall Estate Limited promoted by Sharemax Investments (Pty) Ltd (hereinafter referred to as "Sharemax").

2. During 2011 complainant became aware of news that Sharemax was experiencing financial troubles; there were also claims that the South African Reserve Bank had launched an investigation into Sharemax's affairs that were doing its rounds. Complainant concluded she had lost her capital and subsequently filed the present complaint.

Delays in finalizing this complaint

3. I find it important to address the delay in finalising this complaint. Sometime in September 2011, after the Office issued the *Barnes* determination[1], respondent in that matter brought an urgent

[1] See E Barnes v D Risk Insurance Consultants FAIS-06793-10/11 GP 1

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application to set aside the determination[2]. Before the fate of the application could be known, respondents sought an undertaking from this Office that it would not proceed with any other property syndication related complaints involving them.

4. Since no legal basis existed for respondent's demands, the Office proceeded to determine further property related complaints, to which respondents responded with an urgent application for an interdict to stop the Office from filing the determinations in court and issuing further determinations against them. The decision, favouring the Ombud, was finally delivered in July 2012. See in this regard *Deeb Risk v FAIS Ombud & Others*[3].

5. The Office continued to determine complaints involving property syndications after the High Court decision[4]. However, in 2013, following the *Siegrist* and *Bekker* determinations[5] and the relevant appeals, a decision was taken by the Office to halt processing property syndication related complaints. The decision was not taken lightly, but was a precautionary and necessary risk management step, as the Office had for the first time sought to hold the directors of property syndication schemes liable for complainants' losses. The said appeal was finally decided in April 2015[6], after which the Office resumed processing complaints involving property syndications with due regard to the decision. As many as 2000 complaints had to be shelved during this period, pending the Appeals Board's decision.

B. THE PARTIES

6. Complainant is Miss Skye Ryalls, an adult pilot, of 28 years of age. At the time the transaction was concluded complainant was 18 years old. Complainant's full details are on file in this Office.

7. First respondent is Van Strijp Financial Advisors CC, a close corporation duly incorporated in terms of South African law, with registration number (1995/005017/23). The first respondent is an authorised financial services provider (FSP) (licence number 11088), with its principal place of business noted in

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2 Respondent claimed that section 27 of the FAIS Act was unconstitutional
3 Gauteng High Court Division, case number 50027/2014
4 Referred to in paragraph3
5 See in this regard FAIS-00039-11/12 and FAIS-06661-10/11.
6 See in this regard the decision of the Appeals Board date 10 April 2015.

the Regulator's records as No. 4 Flaming Rock Crescent, Mooikloof, Pretoria, 0081. The licence has been active since 15 December 2004.

8. Second respondent is Anna Van Strijp, an adult female, key individual and representative of the first respondent. The Regulator's records confirm her address to be the same as that of first respondent. At all times material hereto, second respondent rendered financial services to complainant.

9. It appears from the Regulator's records that first respondent was not licensed to render financial services in connection with unlisted debentures, categorised as 1.10 in the FAIS Act, when the investment into Waterfall Estate Limited was recommended to complainant during March 2007. Whilst respondent acquired licence category 1.8 (described in the FAIS Act as Securities and Instruments: Shares) on 29 July 2005, it was only registered for debentures in terms of category 1.10 (described in the FAIS Ac as Securities and Instruments: Debentures and Securitised Debt) on 11 March 2009.

10. I refer to respondents collectively as "respondent". Where appropriate, I specify which respondent is being referred to.

C. THE COMPLAINT

11. At a meeting held on 2 March 2007, complainant together with her mother, met with the second respondent to discuss financial planning solutions with regards to life cover, medical aid and, possible savings options. The meeting which had been at complainant's instance, was also to seek advice with regards to investing an amount of R25 000.

12. Complainant claims that whilst the choice of investment had been greatly influenced by her mother who had previously invested successfully into Sharemax, she did communicate to respondent that she was nervous about losing her money and that she wanted a safe investment that would guarantee her capital. Respondent, in the presence of complainant's mother, recommended that complainant invest into Sharemax Investments (Pty) Ltd, in Waterfall Estate Limited, (Waterfall Ltd) based on the assurance that it was an absolute no risk investment.

13. Subsequent to this meeting and as a result of respondent's recommendation complainant invested R25 000 into Waterfall Estate Limited on 17 April 2007. The funds had been the proceeds of complainant's accumulated savings.

14. Complainant confirms having been provided with a copy of the prospectus although respondent had failed to adequately explain the contents, despite the fact that complainant was in no position to interpret or understand the contents thereof.

15. Complainant describes herself as a novice investor, who had just left school and had never previously invested. She claims that she had relied entirely on the advice of respondent.

16. During 2011, complainant became aware of the concerns surrounding Sharemax, and that numerous efforts to resolve the matter with respondent proved futile.

17. Complainant charges that respondent had failed to take into account her level of knowledge and financial product experience, and that respondent had failed to provide material disclosures with regards to costs and, risks associated with the investment as well as the lack of liquidity. Complainant is of the view that her losses are attributable to the inappropriate and negligent advice provided by respondent.

D. RESPONDENT'S VERSION

18. Respondent's reply was received on 22 August 2013 following our Rule 6 (b) letter of 4 July 2013.The salient features of respondent's response appear in the paragraphs immediately here below:

    18.1 Respondent confirmed that complainant was introduced to her by her mother, Mrs Karen Ryalls. The first meeting held on 2 March 2007 had been to provide advice with regards to the procurement of life cover, medical aid and to consider various savings options, in addition to the request made by complainant to invest an amount of R25 000 into Sharemax.

    18.2 Respondent claims that complainant's mother had been receiving a good income for a number of years, since 2003 in fact, and that she was in the process of receiving a healthy capital gain on the sale of the underlying properties of her previous Sharemax syndication. As

a result complainant's mother had sung the praises of Sharemax and that she had recommended the investment to friends and family alike.

18.3 Respondent claims that it was complainant's mother who had recommended that she invest her savings in Sharemax, and that it was complainant's mother who had brought complainant to her with the intention of assisting her to invest in Sharemax.

18.4 Respondent claims to have discussed the prospectus in detail with complainant and that specific reference had been made to issues regarding the risk involved, the restrictions regarding liquidity, as well as the duration, nature and style of the investment. Complainant had also been aware that the investment comprised unlisted shares and debentures. No documentation has been provided by respondent in support of these claims.

18.5 Respondent makes reference to a 'Needs Analysis and Client Risk Profile Questionnaire', where it is claimed shows that complainant was aware that the investment was for a period longer than 3 years, and that it indicates that she had required an investment with a moderate risk profile. Respondent was, however, very selective in what she chose to highlight in this document as it also records that complainant selected answers on the document that she cannot afford to lose any capital and in fact viewed herself as conservative.

18.6 It cannot therefore be disputed that the parties had an agreement that respondent would render financial services to complainant. The specific form of financial service this complaint is concerned with is advice. This advice, without doubt, had to meet the standard prescribed in the FAIS Act and the General Code.

18.7 The documentation provided by respondent indicate that respondent saw this investment as a moderate risk.

18.8 Respondent claims to have explained to complainant the workings of both a guaranteed product and a unit trust, and that both these instruments had been contrasted with that of the Sharemax model. Complainant, it is claimed, always returned to the 18.5% return

provided by Sharemax and the previous success enjoyed by her mother. No documentation has, however, been provided to support these claims.

18.9 Respondent claims to have conducted due diligence into the proposed investment, which included; considering the proposed investment vehicle and the promoter, by investigating the information provided by the promoter inclusive of the prospectus issued; analysing any established track record of the promoter and/or the investment and determining whether the proposed investment was properly licenced by the FSB. The claims made by respondent in this paragraph must have illuminated some light about the risks that were posed by the Waterfall Estate Limited investment.

18.10 Respondent remained adamant that complainant required a high return and that she understood the correlation between risk and return. In addition respondent was satisfied that the risk in investing in Sharemax fell within complainant's risk profile considering her needs and circumstances.

18.11 In summary respondent reiterated that it had been complainant's decision to invest in Sharemax and that if an investor, with full knowledge and understanding , selects a product (Even though it may not correspond with his/her/their risk profile) then she would not be failing in her duties as an FSP to assist an investor. This, respondent claims is exactly what occurred in this matter.

18.12 Respondent reiterated in its response that there were material disputes of fact between her version and that of complainant, and called upon the Ombud to refer the matter to a civil court. Whist respondent refers in both responses provided to this Office to material disputes of fact, these disputes of fact or never provided, and the only disputes of fact between the two versions would appear to be with regards to the complainants alleged insistence on a guaranteed investment, and to the apparent failure of the respondent to provide complainant with material disclosures pertaining to the nature, and risk associated with the investment. None of the claims made by respondent in defence of the allegations raised by complainant are supported by any documentation provided by respondent.

E. INVESTIGATION

19. On 16 July 2015 and 13 May 2016, this Office sent notices to respondents in terms of section 27 (4) of the FAIS Act, (the Notice) informing respondents that the complaint had not been resolved and that the Office had intentions to investigate the matter. The letter reads (omitting for now words not material to the essence):

19.1 Property syndications are high risk investments for a number of reasons, because they are structured as unlisted companies, and the basis upon which the properties are valued are never fully disclosed.

19.2 Investors such as complainant are at risk as unlisted shares and debentures are not readily marketable; the value is also not readily ascertainable, and should the company fail, this may result in the loss of the investor's entire investment.

19.3 Was your client properly appraised of these risks? Please provide evidence to this effect. Only information provided to your client at the time of advice will be acceptable. In other words, we are looking for a record of advice, which must have been provided to your client at the time of rendering the service. A post facto account of what was said, will not be acceptable.

19.4 What information did you rely on to conclude that this investment is appropriate to your client's risk profile and financial needs? In this regard your attention is drawn to the provisions of section 8 and 9 of the General Code.'

20. Respondent was invited to substantiate her answers with documents compiled at the time of providing advice to her client.

21. Respondent provided a response to the Section 27(4) Notice on 2 September 2015 and on 30 May 2016. The response is summarised below:

21.1 Respondent referred to her initial response provided on 22 August 2013 which she described as a comprehensive and proper response. Notwithstanding this, respondent did reply to the specific questions raised in the above- mentioned notice.

21.2 Respondent reiterated that there were material disputes of fact between her version and that of complainant, and called upon the Ombud to refer the matter to a civil court.

21.3 Respondent claims to have provided and explained to complainant the prospectus of Waterfall Estate Limited and that complainant had also signed the application form, which formed part of the prospectus. Respondent then refers to a number of extracts from the prospectus to illustrate that complainant had been aware of the structure of the investment.

21.4 Respondent also disputes that this was a high-risk investment. Respondent claims to have been aware that this was not a risk free investment, but that the question of risk must be considered in the context of the investor's needs and circumstances.

21.5 Respondent remained of the view that it had been complainant's decision to invest in Sharemax and that she had complied with her duties and functions in terms of the FAIS Act and the General Code of Conduct.

F. ANALYSIS AND RECOMMENDATION

22. I have noted the statements by respondent that there are disputes of fact in this matter. However, there remains substantial common ground with undisputed facts to assist in determining this matter. Furthermore, it must be borne in mind, that the Code in section 3 (2) demands that providers maintain a record of all verbal exchanges with the client in relation to the financial service rendered. I have not found such a record in respondent's response.

23. In addition, the Code in section 9 further enjoins providers to maintain a record of advice which shall set out the products considered and the product/s recommended to the client, including reasons the recommended product is likely to meet the client's circumstances. The records called for by the Code are not only for the benefit of clients but for the providers rendering financial services. In circumstances such as these, the records would assist the provider.

24. I note that, despite respondent's statements, upon meeting complainant, she realised that complainant had been influenced by her mother to invest in Sharemax and that a specific request

had been made for the investment into Sharemax; she, on her own version, decided to carry out a risk profile analysis and in fact advised complainant about the product.

25. It is as a result of respondent's risk profile analysis that complainant was identified as a moderate investor. The subsequent recommendation of Waterfall Estate Limited therefore could have only meant that it was suitable for complainant's circumstances and risk capacity and tolerance[7]. In other words, despite respondent's claims that complainant had requested to invest in Sharemax, on her own version, she recommended an investment in Waterfall Estate Limited following the risk analysis.

26. Quite apart from the risk analysis, there is ample ground in respondent's version to demonstrate that she advised complainant about the Waterfall Ltd investment. The advice provided by respondent therefore had to meet the standard prescribed in the FAIS Act and the General Code. For the purposes of this case, the following sections of the Code are germane.

27. Section 2, part II of the General Code of the Conduct (the Code), states that 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. I note that respondent, on her own version, had carried out a due diligence exercise.

28. Section 8 (1) (a) to (c) of the General Code states that:
"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…"

[7] Section 8 (1) (c) of the General Code

29. Section 8 (4) (a) and (b) of the General Code states that:

'Where a client-

(a) has not provided all information requested by a provider furnishing advice, as part of the analysis referred to in subsection (1) (b), or where the provider has been unable to conduct such an analysis because, in the light of the circumstances surrounding the case, there was not reasonably sufficient time to do so, the provider must fully inform the client thereof and ensure that the client clearly understands that-

(i) a full analysis in respect of the client referred to in subsection (1) (b) could not be undertaken;

(ii) there may be limitations on the appropriateness of the advice provided; and

(iii) the client should take particular care to consider on its own whether the advice is appropriate considering the client's objectives, financial situation and particular needs;

or

(b) elects to conclude a transaction that differs from that recommended by the provider, or otherwise elects not to follow the advice furnished, or elects to receive more 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 advise the client to take particular care to consider whether any product selected is appropriate to the client's needs, objectives and circumstances.'

30. I refer to the attached annexures, being summaries of the Waterfall Estate Limited, and Government Notice 459 (Notice), as published in Government Gazette 28690. With these documents, I demonstrate that, despite respondent's claims of disclosing the risk, there was no basis for her to have recommended the high-risk Waterfall Ltd investment. In this regard, I note that I have not found any record of the type anticipated by section 8 (4) (b) of the Code.

31. The requirements of this section were not meant to benefit complainants but respondents as well. All that was required of respondent following the risk analysis and the alleged pre-conceived idea to invest in Sharemax on the part of complainant, was a note warning complainant of inherent risks in this investment. Respondent was obliged to note that the investment was simply not consistent with complainant's risk profile as a moderate investor. Even if one forgets the label of moderate investor, respondent was obliged to note in her records that complainant had been warned that because of

the high-risk nature of the investment, she could lose all her capital. Respondent's records demonstrate objectively that this was not done. I note again that there is no dispute in this regard.

The Waterfall Estate Limited Prospectus

32. From the onset, the prospectus made it clear that the directors of Sharemax (the promoter), had no intention to comply with Notice 459. (See Annexures A1, and note the paragraphs of the prospectus that made provision for the payment of funds well before transfer of the immovable properties). The movement of the funds was illegal and a direct affront to the very legislation that was meant to protect investors. I conclude that respondent must have been oblivious to the risk and could not have appropriately advised complainant in that case.

33. The prospectus does not hide the ubiquitous role of the promoter (in this regard, the directors of the promoter were the same as the directors of all the Sharemax companies mentioned in the respective prospectuses), highlighting that the investors would have no protection whatsoever as the directors would only be accountable to themselves. In simple terms, the investors were at the mercy of the directors. This risk also, does not appear to have caught respondent's eye.

34. I refer also to the conflicting provisions of the prospectus with regards to investor funds which provide that all funds received from investors of the Company will be deposited in a trust account, managed and controlled by the attorneys, until such time as the share and claim certificates are issued**.** This is not what is envisaged by Notice 459. It further provides that interest earned on invested funds will be retained by the Company. Interest earned on funds in the trust account belongs to investors, and it is a blatant contravention of the Attorneys Act for the Company to retain it.

35. The prospectus is, nonetheless, unequivocal that the funds would not stay long enough in the trust account to accumulate any significant interest as they were withdrawn, firstly after seven days to fund commissions and subsequently thereafter, to fund the acquisition of the immovable property.

36. There are serious red flags (as comprehensively noted in the annexures) that were apparent from the start and should have led a reasonable person in the position of respondent to foresee the harm and take steps to mitigate it accordingly[8].

37. It was evident from the onset that the directors were accountable only to themselves given that there was no evidence of the existence of an independent board of directors not independent audit and risk and remuneration committees. For example, despite the several roles played by the promoter as evident from the prospectus, there is no indication that the promoter would render the services free of charge, there is also no evidence that respondent cared to establish the cost of rendering the additional services. I conclude that the harm to investors was not only foreseeable, but was inevitable.

G. FINDINGS

38. On the basis of the reasoning set out in this recommendation, the risks in the investment were not disclosed, violating Section 7 (1). The section calls upon providers other than direct marketers to 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*".

39. Respondent further violated the Code in terms of section 8 (1) (a) to (c) and section 2.

40. Respondent failed to provide complainant with a recommendation that was appropriate to her needs and circumstances. There is therefore no indication that respondent had adhered to the provisions of section 8 (4) of the Code.

41. The representations made to complainant were incorrect and in violation of section 3 (1) (a) (vii) of the Code.

[8] Van Wyk v Lewis, Durr v ABSA, case number 424/96, SCA

H. CAUSATION

42. The question must still be answered whether respondent's inappropriate advice caused the loss. I note that from the facts of the case, respondent recommended an investment in Waterfall Ltd. That recommendation was accepted and acted upon by complainant. In other words, complainant must have relied on the advice of respondent when she made the investment.

43. The inappropriate advice was a breach of the Code and consequently, a breach of respondent's duty to appropriately advise in terms of her agreement with complainant[9].

44. There is no doubt that had complainant been made aware of the risks involved in this investment, she would, in all likelihood, not have invested.

I. RECOMMENDATION

45. The FAIS Ombud recommends that respondent pay complainant's loss in the amount of R25 000.

46. Respondent is invited to revert to this Office within TEN (10) working days from date hereof with a response to this recommendation. Failure to respond with cogent reasons will result in the recommendation becoming a final determination in terms of section 28 (1).

47. Interest at the rate of 10.25 % shall be calculated from a date TEN (10) days from date of this recommendation.

Yours sincerely

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MARC ALVES
TEAM RESOLUTION MANAGER

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9 See in this regard Robert Ludolf Prigge v J & G Financial Services Assurance Brokers (PTY) LTD and James Wright Case No FAB 8/2016 paragraphs 43-44