IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NO: FOC1807/05/KZN (5)

In the matter between:

SELWYN COMRIE **1st Complainant**

CHRISTINE DENISE CAROLINE COMRIE **2nd Complainant**

and

EWING TRUST COMPANY LIMITED **Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) (a) of the FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS Act')

A. INTRODUCTION

[1] This is a determination relating to an investment made in the failed and now defunct forex services scheme known as Leaderguard Spot Forex. I shall, together with this determination, issue a further three determinations, relating to similar investments in the Leaderguard scheme.

They are the matters of:-

- Ludewig & Another vs Van der Merwe & Another FOC 661/05/GP (1);
- George Pickup vs Johann de Klerk & Another 937/05/WC (5); and
- Riana du Plessis vs Wilma Willemse & Another FOC 1176/05/GP (1).

I set out hereunder the complaint under consideration.

The Parties

[2] 1st Complainant is Selwyn Comrie, a retired adult male, residing at 4 Georgia Boulevard, Gillitts, Kwa-Zulu Natal.

[3] 2nd Complainant is Christine Denise Caroline Comrie an adult female housewife, married to the 1st Complainant and residing at 4 Georgia Boulevard, Gillitts, Kwa-Zulu Natal.

[4] Respondent is Ewing Trust Company Limited, an authorised financial services provider ('FSP') in terms of the FAIS Act and a duly registered company in terms of the company laws of the Republic of South Africa and having its principal place of business at Mafavuke House, 28 Old Main Road, Hillcrest, Kwa- Zulu Natal.

[5] 1st Complainant, acting in his personal capacity as well as in a representative capacity on behalf of 2nd Complainant, at all material

times dealt with an authorised representative of Respondent, one Michael John Shacklock, ('Shacklock').

B. THE COMPLAINT

[6] Complainants' case is that during the month of October 2004 and on the advice of Shacklock, they invested for their retirement an amount of 28 477.43 Euros in Leaderguard Spot Forex, ('LSF'), an entity which was incorporated and registered in Mauritius. LSF together with its South African marketing arm, Leaderguard Securities (Pty) Ltd ('LS') have since been liquidated. Complainants submit that prior to making the investment they had expressed concerns about the international stock markets. They were however informed by Shacklock that the investment could perform even if stock markets rose or fell. In addition to this they were advised that any loss sustained would be limited to 20 % of their investment. Complainants submit that they have lost their entire investment and are seeking to recover same. In their letter of complaint the Complainants' claim 80% of the capital invested together with interest. However, and for reasons that will emerge later, I decided to consider the claim based on 100% of the investment.

[7] The Complainants have alleged that:-

7.1 Shacklock brought the LSF investment to their attention and notice and recommended it;

7.2 In recommending the investment, Shacklock inter alia advised that Leaderguard was now ‘approved’ by the Financial Services Board (‘FSB’); this, according to Complainants was ‘a significant factor’ which influenced their decision to make the investment;

7.3 Shacklock further assisted them in effecting the investment;

7.4 Complainants have now approached this Office to seek assistance in recovering their losses from the Respondent, whom, they submit should be held liable to compensate them for such loss.

[8] At the outset, I want to make it clear that my findings and comments regarding LS as stated in this determination does not mean that the Respondent, or any other FSP is absolved from carrying out their functions and duties as providers as contemplated in the FAIS Act, its Regulations and the Codes of Conduct to which they are bound.

[9] Regarding this complaint, our investigations have revealed that Shacklock, at the time of rendering the financial service, did not mention to the Complainants:

9.1 That the Respondent had not obtained approval of LSF from the FSB, contrary to the provisions of the FAIS Act, in particular Regulation 14;

9.2 That Respondent had no authority to render financial services in forex in terms of Respondent's own licence;

9.3 That LS was operating under an exemption and that its license application was still pending with the FSB.

Unaware of the non-approved status of LSF, the license status of LS, or the authorisation of Respondent to render financial services in forex, the Complainants made their investment following Shacklock's advice.

The background and undisputed facts

[10] 1st Complainant and Respondent met on 24 August 2004 to discuss investments. At the meeting, they discussed various issues relating to 1st Complainant's financial status and investment strategies wherein certain

information was shared. Emanating from this meeting was a financial plan, prepared by Shacklock, wherein certain options were set out. These options were discussed with the 1st Complainant in a further meeting held on 2nd September 2004.

[11] Respondent sent a letter to Complainants, dated 9 September 2004 wherein certain products, which included an investment in LSF were recommended. In the letter it was pointed out to Complainants that LSF had the approval of the FSB.

[12] On 4 October 2004, documents to effect the investment were completed by Complainants, with the assistance of Shacklock. This was done in Respondent's office.

[13] On 15 November 2004, Respondent sent a letter to Complainants signed by Basie Venter and Emmy Sam confirming their investment in LSF in the amount of 28 477 Euros.

[14] On 24th March 2005, Leaderguard Securities, ('LS'), filed for liquidation in the Transvaal Provincial Division of the High Court of South Africa under case number 9118/2005.

[15] On 4 April 2005, Respondent sent a letter to Complainants referring to a recent meeting in which Complainants were informed of a sudden turn of events which Respondent described as ‘a bolt out of the blue’. In the same letter, Respondent states:

> ‘Please rest assured that we will remain pro – active in this matter and take whatever steps are necessary in our efforts to recover your investment….Finally, I assure you that I will maintain regular contact with you in order to keep you abreast of developments.
> Kind Regards
> Mike Shacklock.’

[16] This letter was followed by another letter to Complainants dated 12 April 2005 in which Respondent enclosed a cheque for R 4014.18 which Respondent stated is for ‘adjustment of fees’.

[17] On 15 November 2005, Complainants filed a complaint in this office. On the same day, the complaint was referred to Respondent in terms of Rule 6 (b) of the Rules on Proceedings of the Office. On 14 December 2005, Respondent wrote to this Office advising that the complaint could not be resolved.

[18] A letter dated 16 January 2006 from Complainants was received confirming that Respondent refused to compensate them.

[19] This Office wrote a letter dated 23rd January 2006 to Respondent advising that the matter was to be referred for investigation. The letter further called upon Respondent to respond to the complaint and furnish all documents that would support their case. The response was received on 21 February 2006.

C. RESPONDENT'S RESPONSE

[20] Respondent filed a comprehensive response to the complaint consisting of several annexures and affidavits. I set out hereunder material aspects of the response, which I shall deal with later on in this determination.

[21] Respondent submits that:-

21.1 1st Complainant managed his own investments;

21.2 On 4th October 2004, 1st Complainant called to see Shacklock to seek his 'administrative assistance' in completing the application forms for the investment in LSF;

21.3. Such 'administrative assistance' does not constitute advice in terms of section 1(3) of the FAIS Act;

21.4 For these reasons the FAIS Ombud lacks jurisdiction to entertain this complaint as any advice given terminated when Shacklock reduced his recommendations to writing by way of a letter dated 9 September 2004. The reasoning applied is that this was before the jurisdiction date of this Office of 30 September 2004.

[22] Respondent also deals with the issue of license in its reply and argues that at the time advice was given the FAIS Act had not come into effect. As such, 'the issue of license in terms of this Act is irrelevant'.

[23] A further submission made in relation to the license is that 'the exemption in respect of certain applications for authorisation, 2004, provides that any applicant whose application has not been finally granted or finally refused by the Registrar before 29 September 2004 and is on that date still pending in the Office of the Registrar, may carry on with such current business activities relating to the rendering of financial services until such finalisation of its applications.' According to Respondent, as the registrar had not finally refused its application in respect of the rendering of financial services relating to forex investment business, the Respondent could carry on with current business up until Respondent's application had either been finally approved or finally rejected.

[24] Respondent further submits that Complainant has not set out any cause of action in his complaint. Respondent also considers the complaint to be premature, as the liquidation of LS & LSF had not been finalised.

[25] According to Respondent not only did Shacklock conduct an 'in depth analysis' of LSF prior to furnishing advice, he also relied on and accepted in 'absolute good faith' certain representations made by one Rod Lowe, ('Lowe'), then a consultant in the employ of LS; and on his own research came into contact with information in the form of a letter sent by Chris dela Guerre, ('Dela Guerre') dated 3 July 2003 on behalf of the Forex Investment Association ('FIA') confirming various issues relating to the licensing of LS in terms of the FAIS Act.

[26] An alternative submission made by Respondent is that if indeed its contentions are not correct, the question of approval of LSF was in any event not material to the Complainants' decision to invest.

[27] Dealing with the issue of the appropriateness of the advice, Respondent maintains that Shacklock's letter of the 9 September 2004 had made five recommendations including the investment in LSF. Complainants then made the decision to invest in LSF and were not interested in other funds. In Respondent's view, at no stage was inappropriate advice given as at all stages of the financial planning process, 1st Complainant's needs, risk

profile and investment objectives were taken into account. In addition, 1st Complainant was given all the information he needed and had sufficient time to make an informed decision; and chose on his own into which fund he wanted to invest.

[28] Respondent confirms that in its letter of recommendation dated 9 September 2004, Shacklock mentioned the fact that the Financial Services Board ('FSB') had approved LSF. This, Respondent maintains was based on information given to Shacklock by Lowe that Leaderguard Securities had been granted approval to market LSF's products in South Africa. Respondent also attached three documents to its response to support its interpretation of the position.

They are:

28.1 A copy of an e-mail dated 1 November 2004 sent by Lowe in which he announced that LS had been approved by the FSB;

28.2 A copy of an e-mail dated 11 October 2004 from FIA confirming that LS was allowed to continue business until the FSB has granted or refused its licence; and

28.3 A copy of a letter from the FSB which bore a FSP Number 17073, apparently for Leaderguard Securities.

[29] Shacklock's interpretation of events in the light of the annexures referred to in paragraphs 28.1, 28.2 & 28.3 above was that 'the FSB had approved the business activities of Leaderguard Securities SA (Pty) Limited, the marketing arm of LSF and this obviously meant an endorsement of the product of LSF, the sale of which constituted the sole business activity of Leaderguard Securities SA (Pty) Limited.'

D. THE EXEMPTION

How & on what basis in law did the FSB grant Leaderguard Securities (Pty) Ltd an exemption from the provisions of the FAIS Act?

[30] In the light of what Respondent says in paragraphs 28 & 29 above as well as what Complainant viewed as 'a significant factor', which contributed to his decision to invest in LSF, it was necessary for me, in order to properly and fairly adjudicate this complaint, to investigate the alleged approval and licensing of LS. In particular, it was necessary for me to determine the legal basis on which LS was allowed to continue to provide financial services in forex to the public.

[31] Upon investigating the matter, I discovered the following:

31.1 LS filed its application for a licence in terms of section 8 on the 29 September 2004;

31.2 The application was submitted through the office of the FIA;

31.3 FIA was and is a recognised body in terms of section 6 of the FAIS Act;

31.4 FIA acknowledged receipt of LS's licence application and informed LS that their application was received in time and that LS may continue business. The said correspondence from the FIA did not state on what basis they were authorised to inform applicants that they may continue with business;

31.5 On 23 September 2004, by Board Notice Number 94 the Registrar granted an exemption from the provisions of Section 7(1) to certain applicants for authorisation ('the exemption');

31.6 I was compelled to assume that the only legal basis for LS to continue to provide services in forex was in terms of the exemption, the legality of which, I deal with elsewhere in this determination;

31.7 It appears from the records of the Registrar that as at 29 September 2004, LS's application for a licence was still pending;

31.8 On the 18 April 2005 and in writing LS was informed that their application was finally refused. This happened after LS was placed into provisional liquidation on the 24 March 2005;

[32] In order to investigate this matter, I had to start by considering the adequacy or otherwise of the legislative framework within which financial services providers must operate.

The legislative framework

[33] The main purpose of the FAIS Act is described as 'to regulate the rendering of certain financial advisory and intermediary services to clients; (own underlining)….' The legislative framework or architecture of the FAIS Act provides protection, checks and balances in the interests of the investing public and with the objective of strengthening our financial markets.

[34] Fundamental to any regulatory framework is the concept of, application and administration of licensing. It is through licensing that the regulator sets the standards and criteria for those who have to be regulated and controlled in the interests of the public. The FAIS Act recognizes this and

sets out provisions for the application, approval and disapproval of licenses for Financial Services Providers, (FSPs).

[35] The authorization of FSPs is dealt with in section 7 to 12 of the Act. For the purposes of this determination I will concentrate on sections 7, 8 and 44. Section 7 is clear and requires no analysis. In terms of section 7 and with effect from a date to be determined by the Minister, a person may not act or offer to act as a FSP unless such person is licensed in terms of section 8 of the Act.

[36] Section 8 deals with authorization of FSPs. This section goes to the heart of licensing and licensing requirements for FSPs. This section is crucial to the proper application of the FAIS Act and is central to the achievement of the purposes of the FAIS Act, namely, to regulate the rendering of financial services to clients. Everything should begin with a license. It must be accepted that licensing and the administration of licenses is the first step towards effective regulation and control. Equally one must then accept that application for licenses by would be FSPs must be treated carefully and seriously and the criteria set out in section 8 must be strictly applied. Failure in this will immediately undermine the very purpose of the FAIS Act.

[37] Accordingly, I find it necessary to comment briefly on the provisions of section 8.

Section 8(1) provides:

'(1) An application for an authorisation referred to in section 7 (1), including an application by an applicant not domiciled in the Republic , must be submitted to the registrar in the form and manner determined by the registrar by notice in the *Gazette*, and be accompanied by information to satisfy the registrar that the applicant complies with the requirements for fit and proper financial services providers or categories of providers, determined by the registrar by notice in the *Gazette*, after consultation with the Advisory.

Committee, in respect of –

(a) personal character qualities of honesty and integrity;

(b) the competence and operational ability of the applicant to fulfil the responsibilities imposed by the Act;

(c) the applicant's financial soundness:

Provided that where the applicant is a partnership, a trust or a corporate or unincorporated body, the applicant must, in addition, so satisfy the registrar that any key individual in respect of the applicant complies with the said requirements in respect of –

(i) personal character qualities of honesty and integrity; and

(ii) competence and operational ability, to the extent required in order for such individual to fulfil the responsibilities imposed on the key individual by this Act.'

[38] The purpose of section 8 is to license or authorize as FSPs, only those who are fit and proper financial services providers. To this end the following is noteworthy:

38.1 An existing or would be FSP must make an application to the registrar in a form and manner determined by the latter. An application form was approved by the registrar and duly published in the Government Gazette;

38.2 The form requires the applicant to provide comprehensive information both of a personal and professional nature. The information sought is meant to provide the registrar with the kind of information that will help him decide if the applicant is 'fit and proper' to provide financial services as contemplated in section 8;

38.3 Thus the Act makes it clear that the registrar must be 'satisfied' that the applicant complies with the criteria or standards set out in section 8;

38.4 In making a decision, the registrar is expected to apply his mind carefully and thoroughly to all information presented to him in the application form. The registrar is also not confined to the information contained in the application form.

[39] The use of the words, ‘any other information, derived from whatever source’ confirms the seriousness of the intention of the legislature to ensure that relevant and pertinent information is unearthed when the registrar considers whether or not to grant a license to an applicant. Note that after consideration of all facts and information derived from whatever source, the registrar has the sole discretion in granting or declining an application for authorisation to act as an FSP.

[40] Indeed, the section further appears to be giving the registrar unusually wide powers. However, when one examines the mischief aimed at, it is necessary that the registrar be clothed with such wide powers, if protecting the consumer is to be a reality. The registrar has powers to probe and to seek clarity where information exists which would negate or impact upon the personal character qualities of honesty, integrity and competence.

[41] The importance of the registrar’s functions in granting authorization is emphasized by the fact that the FAIS Act requires him to consult with the Advisory Committee on the fit and proper requirements as contemplated in Section 8. The Act further requires the registrar to be satisfied that an applicant for authorization in terms of Section 8 meets the basic standards or criteria.

The requirements are as follows:

41.1 The applicant must be a person of sound integrity and honesty. An applicant who has a conviction for an offence involving dishonesty will not comply. Nor will an applicant with a known reputation for dishonest conduct comply. The registrar must take into account all known facts relating to the general character of the applicant. This includes historical facts and in particular the applicant's conduct within the financial services industry. An applicant who was previously associated with a failed or fraudulent financial scheme will obviously not be suitable, unless necessary information has been unearthed to prove the contrary;

41.2 The FAIS Act through its provisions and regulations places amongst others, an onerous administrative burden on FSPs. The applicant must satisfy the registrar that he has the capacity and competence to provide financial services to the public. The applicant must also show that he has the necessary infra – structure to provide financial services to the public;

41.3 The registrar must be satisfied as to the applicant's financial soundness. An unrehabilitated insolvent will not do. An applicant is expected to show that he is not a man of straw and has well

established financial soundness and independence. Nor must the applicant be associated with any form of financial mismanagement;

41.4 Where the applicant is not a natural person, the FAIS Act demands that in addition (own underlining) to the applicant, the key individual/s must then comply with the criteria set out in section 8. This ensures that inappropriate individuals do not hide behind the corporate veil. In Government Gazette 25446 as amended by GG 26844 the registrar published a comprehensive set of requirements as contemplated in section 8. Would be applicants will therefore be left in no doubt as to what is required of them;

41.5 The required standard of 'fit and proper' is not unique to the FAIS Act, nor is it unique to South Africa. 'Fit and proper' as a standard has become universally accepted or generally accepted within the international regulatory framework. The purpose of the standard is to ensure that only persons of sound integrity and competence are allowed to conduct business as FSPs. Thus it is crucial to the achievement of the purpose and objectives of the FAIS Act that the provisions of section 8 are strictly complied with.

It appears from records kept by the Registrar that LS was the recipient of an exemption from the application of Section 7 (1) in terms of Section 44 (1) of the FAIS Act.

I now deal with the provisions of Section 44 (1):

[42] FSPs who had submitted their applications for license on or before 30th September 2004 were granted an exemption. LS is one such entity which was granted an exemption. The exemption is said to have been granted in terms of section 44 (1) (b) and (c) of the FAIS Act.

Section 44 (1) reads as follows:

'(1) The registrar may on or after the commencement of this Act, but prior to the date determined by the Minister in terms of section 7 (1), exempt any person or categories of persons from the provisions of that section if the registrar is satisfied that –

(a) the rendering of any financial service by the applicant is already partially or wholly regulated by any other law; or

(b) the application of the said section to the applicant will cause the applicant financial or other hardship or prejudice; and

(c) the granting of the exemption will not –

(i) conflict with the public interest;

(ii) prejudice the interests of clients; and

(iii) frustrate the achievement of the objects of this Act.'

[43] The clear wording of Section 44 (1) requires an application, in writing, for a specific exemption namely an exemption from the provisions of Section 7 (1) of the FAIS Act. Section 44 (1) refers to 'the applicant', in the singular and not 'applicants' in the plural. Clearly blanket exemptions in the absence of an application by individual applicants were not contemplated in the FAIS Act. This is confirmed by the registrar's own application form FSP 12, published in Government Gazette Number 25523 dated 3 October 2003. I refer to the form and draw attention to the fact that the form is headed 'Application for Specific Exemptions'. The form advises applicants that 'the Registrar will consider the exemptions sought on a case by case (own underlining) basis, provided that full motivation for the exemption is furnished.'

An exemption from Section 7 (1) is a specific exemption dealt with in the FAIS Act and therefore requires an application from an individual FSP.

[44] Section 44 (4) (a) therefore is of no application to any exemptions from Section 7(1) of the FAIS Act. Section 44 (4) reads as follows:

> '(a) The registrar may in any case not provided for in this Act, on reasonable grounds, on application or on the registrar's own initiative by notice in the *Gazette*, exempt any person or category of persons from any provision of this Act.

(b) The provisions of subsections (1), (2) and (3) apply with the necessary changes in respect of any exemption contemplated in paragraph (a).'

Accordingly, the Registrar may not on his own initiative grant any exemptions whatsoever from Section 7(1). The exemption is mentioned specifically in Section 44 (1) and therefore calls for an application from an individual FSP.

According to the registrar's records no application for such an exemption was received from LS.

[45] A superficial reading of section 44 (1) may create the impression that the section might be in conflict with the provisions of sections 7 and 8. Section 44 empowers the registrar to exempt certain parties from the application of certain provisions of the Act and in particular the provisions of section 7 (1). Section 7 (1) clearly provides that any person who renders financial services must do so only after obtaining a license in terms of section 8. This is with effect from 30 September 2004.

[46] In fact, section 44 (1) is not in conflict with section 7 or any other provision in the FAIS Act relating to licensing and authorization. The following is noteworthy:-

46.1 Section 44 (1) does not provide the registrar with an unfettered discretion to grant an exemption from section 7 (1). In fact, any exemption so granted must be in terms of section 44 (1). Section 44(1) is in fact a mirror image of section 8 as it requires that those who may be granted exemption must satisfy the registrar of the existence of certain requirements and standards. These standards appear in section 44 (1) (a) (b) and (c);

46.2 The purpose of section 44 (1) was to assist applicants for a licence during the transition period from pre FAIS to after 30 September 2004. An exemption will avoid a situation where post 30 September 2004, the business became illegal for failing to obtain a license in terms of section 8. The clients of such a business and the business of the applicant itself might suffer harm. An exemption, pending the process of license application will avoid this situation;

46.3 Thus an applicant for a license who was late or who did not expect its application be finally approved before 30 September 2004 could apply to the registrar for an exemption in terms of Section 44 (1);

46.4 The registrar could in terms of Section 44 chose to grant the exemption in terms of section 44 (1) (a) or, (b) and (c). It would

appear from the wording of the exemption that the registrar chose to make available the exemption in terms of Section 44 (1) (b) and (c). The objective of the exemption is set out in paragraph 2 of Board Notice 94:

'The objective of the exemption is to accommodate late applicants **for authorization in terms of section 8 of the Act**, (own emphasis) whose applications may not be finalised as on 30 September 2004, on which date the Act becomes fully operative…….. The exemption in effect permits them to carry on with **current business activities** (own emphasis) relating to the rendering of financial services until such finalization of their applications. Where their applications are then finally granted, they will be able to carry on such business activities as licensees under the said Act without any further need for an exemption. But in the case of a final refusal of applications, the carrying on of their current business activities as regards the rendering of financial services will have to cease, just as in the case of other persons who need such authorizations in terms of the said Act but who have not applied for a license at all.

The registrar is satisfied that such an exemption under section 44(1) of the Act will comply with the requirements of paragraphs (b) and (c) of that section.'

[47] The mere submission of an application for license in terms of section 8 does not qualify an applicant whose application is still pending as at 30 September 2004 for an exemption in terms of section 44 (1). Section 44 (1) provides no scope for the interpretation sought to be imposed by the registrar. The FAIS Act did not intend nor provide for any 'blanket exemption' from the provisions of Section 7 (1). If this was the case then it

would certainly defeat or frustrate the achievement of the objects of the Act. Moreover, unscrupulous individuals would take advantage of what would be an obvious loophole in the regulatory framework.

[48] I now deal with the wording of the exemption. The said Board Notice clearly states that 'the exemption in effect permits them to carry on with current business activities relating to the rendering of financial services'.

The FAIS Act however does not define the phrase 'current business activities'. It would be wrong to define current business as any business providing financial services, which was a going concern at the time of lodging application for license. Reference to 'current business activities' can only mean legal and/or regulated business activities. Such meaning would of course accord with the objectives of the FAIS Act. In my view 'current business activities' would not include businesses like forex intermediaries which, at the time, were unregulated. There simply would not be the necessary protection for investors if unregulated businesses would be granted exemptions and in particular, an exemption from Section 7 (1). The meaning of current business must be sought from the wording of the Act, in particular section 44 (1). In terms of section 44 (1), the registrar may grant an applicant an exemption from compliance with any of the provisions of the FAIS Act provided:

'(a) The rendering of any financial service by the applicant is already partially or wholly regulated by any other law; or…'

[49] The reason the legislature would have required that the rendering of the financial services by the Applicant be partially or wholly regulated by an existing law is for no other reason than to afford protection to the consumer. This accords with the purpose and intention of the FAIS Act. The choice provided between 44 (1) (a) on the one hand, and (b) & (c) on the other, does not imply that protection measures for consumers had to be ignored.

[50] I now analyse the requirements of section 44 (1) (b) and (c). I have already pointed out that the registrar had clearly indicated that he is satisfied that the exemption granted would satisfy the provisions of section 44 (1) (b) and (c). These sections provide as follows:-

'(b) the application of the said section to the applicant will cause the applicant or clients of the applicant financial or other hardship or prejudice; and

(c) the granting of the exemption will not-

(i) conflict with the public interest;

(ii) prejudice the interests of clients; and

(iii) frustrate the achievement of the objects of this Act.'

[51] Section 44 (1) (b) provides for exemption from the application of section 7(1) to the applicant which would cause the applicant financial or other

hardship. It could never have been the intention of the lawmaker that the interests of the applicant FSP be considered in isolation, without any measure of protection of the interests of the consumer. Such interpretation would of course be absurd. This can be seen from the way in which subsection (b) is coupled with (c) to ensure that some balancing of the two interests is addressed.

[52] Section 44 (1) (c) provides that the registrar must satisfy himself that the granting of the exemption does not conflict with the public interest; does not prejudice the interests of clients and must not frustrate the achievement of the objects of the Act. It is common cause that LS's sole business was to market investments offered by its offshore sister organization, LSF, a foreign forex services provider. This is evidenced in LS's application for its licence. LS was neither involved in Long Term or Short Term Insurance nor doing business with any locally regulated provider.

[53] A very specific provision in the Financial Advisory and Intermediary Services Regulations, 2003 as amended by Government Notice 297 of 2004, published in Government Gazette 26112 of 12 March 2004, ('the regulations') in Chapter VI, Section 14 provides:

'**Approval of foreign entities**

Procedure

14. A forex services provider seeking, in accordance with the provision of the Forex Code, an approval by the registrar of a clearing firm or a foreign forex service provider, must submit an application for approval to the registrar in accordance with section 3 (2) of the Act, containing at least the following information:

(a) full particulars as regards the name and physical location and all other identification particulars of the relevant clearing firm or foreign forex service provider;

(b) full particulars as regards any authorisation required by such firm or provider for the conduct of business in the country in which it is located, and of the terms of any such authorisation so granted; and

(c) full particulars as regards the nature of the regulatory environment under which the firm or provider operates in the country concerned.

[54] I can find no authority both from the wording of the exemption or from section 44 to support that the exemption also covered regulation 14.

Recognition of FIA in terms of Section 6 of the FAIS Act

[55] It is important for me to deal with the provisions of Section 6 of the FAIS Act. It appears from the records of the registrar that certain powers and functions relating to licensing were delegated to Recognised Bodies. This was done in terms of Section 6 (4) of the FAIS Act. The section reads as follows:

'(4) For the purposes of recognition by the Board of a body contemplated in subsection (3) (a) (iii), the following provisions apply:

(a) Any body of persons which represents a group of persons falling within the ambit of this Act, may apply to the registrar for recognition by the Board by notice in the *Gazette* as a representative body for the purpose of performing the functions determined by the registrar, after consultation with Advisory Committee and the Board;

(b) an application for such recognition –

(i) must be made in the manner determined by the registrar by notice in the *Gazette;*

(ii) must be accompanied by the fee determined in terms of this Act;

(iii) must be accompanied by information proving that the applicant has sufficient financial, management, and manpower resources and experience necessary for performing the functions determined by the registrar, and that the applicant is reasonably representative of the relevant group of persons which it purports to represent;

(c) if the registrar is satisfied that the applicant has complied with all requirements, the application must be submitted by the registrar to the Board for consideration;……

[56] Section 6 effectively permits delegation of any power which the FAIS Act confers upon the registrar. This includes the powers and functions related to the processing, approval or disapproval of licence applications in terms of Section 8. As I have repeatedly stated, licensing is central to the FAIS Act and is a crucial element within the regulatory framework contemplated in the FAIS Act. This is a power that cannot be lightly and easily

delegated. The provisions of section 6 recognises this and requires proper and full consideration by the Board, Advisory Committee and the registrar of an application by a person or representative body for recognition in terms of Section 6(4).

[57] In order to obtain recognition a person or body must satisfy the requirements of Section 6(4) (b) (i) (ii) and (iii). This means that the Board and the Registrar and the Advisory Committee must apply their minds carefully to each application in order to satisfy themselves that such person or body is fit and proper for the purposes of recognition in terms of Section 6. This includes a full consideration of the key individuals who make up the relevant body applying for recognition.

[58] In terms of Government Notice 24794 of 2nd May 2003, an application form was published by the registrar, which those wishing to be recognized as representative bodies could use. The application form invites the applicant to set out information in response to a number of fundamental questions. I must assume that FIA, by virtue of being granted the status of being a recognised body satisfied the requirements set out in GG No. 24794.

The LS Application for a license

[59] In the light of the legislative provisions as set out above, I now consider what happened in the case of LS.

[60] This Office has had sight of the actual application papers lodged by LS for their FAIS license. Upon examination of the papers and other records, the following was noted:-

60.1 The application for the license was lodged through FIA and not directly to the registrar;

60.2 The prescribed application forms used by LS carried no FSP number. A requirement contained in the FAIS Regulations is that in order to apply for a license, one must first obtain an FSP number from the Office of the Registrar;

60.3 The application indicates Dela Guerre as compliance officer for LS; incidentally, the same individual was CEO of FIA at the time of LS lodging its license;

60.4 At the end of the application the same Dela Guerre signs a certificate confirming that the information is true. This time however, he signs as director of LS;

60.5 The application forms require that a person signing as director of a corporate entity like LS annexes a resolution to the papers to confirm his or her authority to act. No such resolution could be found attached to the application forms;

60.6 In form FSP 3, pages 1 to 3, names of directors, officers and applicable shareholders of the applicant are required. The following names appear:

- Maria Jocoba Fryer;
- Hermanus Stephanus Pretorius; and
- Jacobus Venter.

There are no documents attached to the application to support the authenticity of the information provided;

60.7 I note that the name of Jacobus Venter appears in the licence application. He is also known as 'Basie Venter'. In this regard I refer, further in this determination, to an organogram , indicating the involvement of Basie Venter in the various entities associated with

Leaderguard. His physical address in the application papers is set out as Grand Baie Mauritius;

60.8 What particularly stands out in this application is that there is no registration documents of the company to support the information included in the application form;

60.9 The application form FSP 8 calls for information of a financial nature, e.g. assets, liabilities and net value of the business of the applicant. The following appears in form FSP 8:

> 'A detailed breakdown of assets and liabilities must be provided. Provide the details as requested. If this is the first year of business, indicate as such. Attach a copy of your latest financial statements.'

According to the form, LS was not in their first year of business and were therefore required to attach their latest financial statements. It is common cause that LS had been in business since 2001. No financial statements were attached to the application and the following financial information is provided.

Date of latest available financial statements – 28/02/03;

Assets and liabilities:

Fixed Assets	-	4 015 089
Current Assets	-	393 113
Long Term liabilities	-	1 569 239
Short Term liabilities	-	1 131 735
Total	-	1 707 228

60.10 The figure 1 707 228 is said to represent assets, excluding intangible assets and goodwill less liabilities excluding subordinate loan agreements. As I have indicated, no financial statements were attached to the application and certainly no other supporting documents appear to have been attached to this section of the application form. A cursory glance at these figures, bearing in mind that the business that LS was conducting, namely collecting monies from the public, shows that the information is both vague, inadequate and misleading. Had financial statements been provided as the application demands, then greater scrutiny would have been required of the registrar. I also note with concern that this particular application was submitted to the registrar via the FIA. The FIA were functioning in this capacity in terms of their

recognition under Section 6 of the FAIS Act by the FSB. It therefore appears that the then CEO of the FIA received and 'considered' his own company's licence application for and on behalf of the registrar.

60.11 As an entity receiving funds from the public, LS had to appoint an external auditor. We note from the application that Johan Zwarts and Associates were appointed. The date of their appointment is indicated as 23 January 2004. Whether or not LS was subject to the regulation of an external auditor between 2001 and 2004 is unanswered.

60.12 According to the records in the registrar's office, I note that LS made no application for any exemption in terms of Section 44 of the FAIS Act.

Conflict of interest

[61] I noted when I perused the application of LS that Dela Guerre had a position as compliance officer at LS. Indeed the application also seeks confirmation of his appointment as such. In response to question 3.3 of the application form which seeks details of how the applicant has gained

sufficient and appropriate knowledge of the provisions of the Act, the following is set out:-

61.1 'CEO of the Forex investment Association, (FIA) a recognized representative body in terms of the FAIS Act';

61.2 'Drafted the Code of Conduct for Forex Investment Industry';

61.3 'Extensively involved in the regulation of Forex Industry, FAIS Act, and liaising with the FSB'.

[62] There appears to have been no prior experience in the field of forex on the part of Dela Guerre from the above. The claim that he drafted the Code of Conduct for Forex Investment Industry is, at best, laughable as this is a function of the regulator. At best he may have contributed to the process.

[63] What I find disturbing is that a conflict of interest was allowed to come about by the registrar in so far as it relates to Dela Guerre. Dela Guerre was the CEO of FIA, a recognised body. He also was in constant liaison with the FSB and engaged in correspondence with applicants for licences on behalf of the FSB. At the same time, Dela Guerre had signed the application for and on behalf of LS as director. He is also set out as the key individual of LS and had applied to be recognised as compliance

officer for LS. It is not in dispute that Dela Guerre had an interest in LS and 'the Leaderguard group of companies'. In effect, LS was allowed to make application for their license to be 'considered' on behalf of the registrar by their own would be compliance officer, director and key individual. It is self-evident that the objectivity to consider the license application could not therefore exist. It comes as no surprise, therefore that FIA, in fact recommended that LS's license be finally approved.

[64] It is equally disturbing that Dela Guerre was placed in a position not only to influence his own company's application, but also to influence the applications of other would be FSP's who intend to trade in competition.

[65] After LS submitted their application for a license through FIA, the following e-mail dated 11 October 2004 was received by LS from Dela Guerre.

Effectively Dela Guerre had e-mailed himself.

The e-mail reads as follows:

'Dear Forex Participant

This communiqué is confirmation that your FIAS (sic) applications have been submitted to the FSB before the required date of 29 September 2004.

You are therefore allowed to continue business until the FSB has granted or refused the relevant license applications. The FIA will inform you in due course of the results of your application and provide you with the necessary FSP reference number.

FIA greetings

CHRIS DELA GUERRE'

[66] I note that Dela Guerre states that FIA will provide the necessary FSP reference number. In fact the FSP Number had to be obtained by an applicant from the Office of the Registrar before an application for a licence is filed.

[67] The FAIS Act places a duty on providers to inform the public that they are operating in terms of an exemption, where this is the case. This, LS failed to do. Instead they projected themselves as being licensed. An e-mail from Rod Lowe ('Lowe'), then an employee of LS dated 1st November 2004 to one Schoeman Botha, states the following:

'Leaderguard Securities Pty Ltd – attains FSB Approval – License No. 17073.

Hi there everyone,

Fantastic news!!!!

Leaderguard Securities (Pty) Ltd – the SA marketing entity for Leaderguard Spot Forex (Mauritius) has been FSB approved.

Our license number is 17073.

Congratulations to the Directors and Compliance team at Leaderguard for their hardwork (sic) and perseverance – to **ensure that Leaderguard Securities (Pty) Ltd is the first FSB approved Managed Forex Company in South Africa.**

I will be away in Mauritius at the Leaderguard Spot Fore Christmas function and opening of their new offices in Grand Baie from 3rd – 7th November. All those Brokers who have

been waiting for our FSB approval before marketing LSF will receive broker contracts by email on my return from Mauritius…….our promise to you has finally come through….

Regards

Rod Lowe

B Com (Hons.) CFP

Leaderguard Securities'

The same e-mail was widely circulated amongst all of LS's representatives and agents.

[68] Lowe, a B. Com graduate and CFP™ and a responsible employee of LS would have known or ought to have known that LS's application for a licence had never been approved. He would have known that the number 17073, which he holds out as a licence number was in fact an FSP number and not a license number. Lowe knew for a fact as at 1 November 2004, LS was not licensed or finally approved by the FSB in terms of Section 8 of the FAIS Act.

[69] It is the handling of this matter by the registrar that created the opportunity for Dela Guerre and Lowe to mislead the public into believing that LS was licensed. Statements like these would have served LS's objectives of continuing to take public funds for an unauthorised entity, whose very solvency may have been in doubt.

[70] I am satisfied that had any representative of LS informed the investing public that LS was operating under an exemption, it is highly unlikely that any prudent member of the public would have invested in an entity which was under a risk that their application for a license could be refused at any time and without notice.

[71] I draw attention to the fact that Dela Guerre, as CEO of the FIA and positioned as he was, in all probability, kept track of the progress of the license application of LS. He would know, in advance, whether or not the application was going to be 'finally refused' or 'finally approved'. It is interesting to note that a mere three weeks prior to the license being declined, LS brought an urgent application for its liquidation. The consequence of a final refusal is that LS would have had to cease trading and return all funds to investors.

[72] According to the application for liquidation, as at 24 March 2005 LS had 1600 clients who invested approximately R300 million.

[73] Upon a proper interpretation of the relevant legislation discussed above, the exemption granted to LS in terms of Board Notice Number 94 of 2004 was both *ultra vires* and illegal. It is as a consequence of this exemption that LS continued to mislead innocent investors and in the result continued to take money from them.

[74] I am concerned, that the registrar at all material times, had access to at least the following information:

74.1 LS's registered address at the time was 1531 Waltham Avenue, Hertford Village, Dainfern, Johannesburg. LS ran operations in Pinmill Farm, Sandton and in Cape Town. At the time of the application for authorisation in terms of the FAIS Act, LS had four directors, namely, M.J. Fryer, one Stefan Pretorius, Basie Venter and Dela Guerre, although the latter's appointment was not formalised. Juan Venter ('Venter Jnr.) and Renso du Plessis who were once directors of the now defunct forex investment company, Prozet, which swindled investors of millions of rand, were at one stage also directors of LS. They resigned as directors of LS on 1 May 2001 and on the same day, Basie Venter became sole director of LS. Renso du Plessis moved on to become a trader and risk manager of LSF, while Venter Jnr. became the marketing head of the Leaderguard group. The Steven du Plessis Trust, of which Renso du Plessis was beneficiary, held a 37% shareholding of LS. Basie Venter, Venter Jnr's father, is recorded as being a director and shareholder of LS.

74.2 Consumers who invested in LSF either had to go through LS or Hamilton Solutions' ('HS'). Thus only these three companies were

known to the public. Very little was known of LeaderGuard Limited, ('LL'); Leaderguard Worldwide (Pty) Ltd; Leaderguard Asset Management; Leaderguard Properties Investments (Pty) Ltd; and Leaderguard Game Farm (Pty) Ltd, yet they formed part of the Leaderguard group;

74.3 It is interesting to note that the *modus operandi* of Prozet, through which South African investors also lost millions of rand was similar to that of LS;

74.4 The shareholders of LS at the time were one Gavin Bagley and Heine Venter, both of whom owned 10% of the shares in LS. The other two shareholders were the Steven du Plessis Trust and Basie Venter. The latter two shareholders owned between them 90% of the shares in LS. LSF's major business activity was currency spot trading using local investor funds. Recruited investors would give LSF a 'mandate' towards this end;

74.5 It is to be noted that neither was LSF approved as a foreign forex service provider as is required in part II section 3(m) of the Code of Conduct for Authorised Financial Services Providers and their representatives involved in Forex Investment Business, ('the Forex

Code') nor was the mandate used by LSF approved as is required in Part III section 5 (2) of the Forex Code;

[75] LSF was a private company incorporated in Mauritius. It was initially registered as a protected cell company. In October 2003, LSF ceased to be a protected cell company when Category One Global Business License status was granted to them by the Financial Services Commission, ('FSC'), Mauritius. The directors of LSF were Basie Venter, the same one, Stefan Pretorius, (also directors of LS), one Warren Luyt, and one Amanda Ramburuth. The shareholders of LSF were Basie Venter who held 50 % of the shares and Stefan Pretorius, also with 50%. LL was registered in Mauritius in February 2002. LL had one shareholder, Fidei Business Trust which held the shares in favour of Basie Venter.

The same people, the same *modus operandi*, different legal personae.

[76] There can be no doubt that LS and LSF were not at arms length. Indeed the record shows that they were controlled by the same people. Long before LS had applied for its license, LSF was already in trouble with the FSC, in Mauritius. Indeed as far back as 2 July 2003, the FSC had written to Stefan Pretorius, one of the directors of LL instructing him, 'not to conduct any transaction through Leaderguard Limited' and reminding him of an undertaking given to repay clients of LL. Note that LL was a part of

the same Leaderguard Group being run by the same people and LL had no authority to accept monies from the public and received its funds from LS.

[77] On the 26 February 2004, well before LS applied for its license, Stefan Pretorius, also director of LS, wrote to the FSC on behalf of LL as follows:

> Attention: Mrs Savrimootoo
>
> Dear Mrs. Savrimootoo
>
> Please find attached the final list of clients that have been repaid from the Leaderguard and Hamilton Worldwide Solutions accounts to date.
>
> 1. LL - $ 8,606,810.00 representing all clients of Leaderguard Ltd.
> 2. HWS - $ 4, 444, 929, 56 representing all clients of Hamilton Worldwide Solutions.
>
> Please note that the four last repayments for Leaderguard Ltd (i.e. $ 14,000.00, $ 5,000.00, $ 10,000.00 and $ 6,595.32) and the two last repayments for Hamilton Worldwide solutions (i.e. $ 7,500.00 and $ 108,945.77) will be processed by the end of today's working day and we are applying for all LL and HWS accounts to be closed as soon as possible.
> All other requirements to wind up both these Companies are being attended to, and we will notify the FSC once all requirements have been fulfilled.
>
> Kind Regards,
>
> Stafan Pretorius
>
> c.c The Director, Fidei Finance International Limited

According to information available to us, not all the promised repayments were made. It is also important to note that although Hamilton Worldwide Solutions is a separate entity, it was controlled by the same persons. It is interesting to mention that although the FSC required of Pretorius that he

disclose the ‘current status of Hamilton Worldwide Solutions (Mauritius) Ltd’ there is no indication that he ever did so.

[78] It is apparent that even before LS applied for their license, the whole scheme was in trouble. This to the knowledge of its directors and officials, including Basie Venter, Dela Guerre, Pretorius and Venter Jnr.

[79] It is evident that the Leaderguard group in Mauritius enjoyed a less than harmonious relationship with the FSC due to the illegal nature of their operations. These were not people who were merely new in their business and needed legal assistance with their operations. They were experienced business people who knew how to circumvent the law. This information no doubt would have been critical in any decision to either grant a license or any exemption of LS from the provisions of the FAIS Act. Indeed the histories of the moving spirits behind these entities would have warranted a heightened awareness of the need to ensure that any application to which they were associated in the financial services industry had to be really carefully scrutinised.

[80] To illustrate how the Leaderguard group and its officials operated, I prepared an organogram which is annexed hereto marked ‘Comrie 1’. I also attach as annexure ‘Comrie 2’ an explanatory note to the organogram.

The South African Investor

[81] If one looks at pertinent historical information, it is fair to say that South African citizens have repeatedly fallen prey to various bogus investment schemes. Tragically investors in many of these schemes, many of whom are pensioners, lose their life savings and are very often left destitute with only promises of attractive returns in their hands and nothing more. The perpetrators of these schemes usually get away and no money is ever recovered. It is unfortunate that in South Africa we have a long history of such schemes emerging from time to time. I mention in this regard Masterbond, Prozet, Platinum Asset Management, Chinza and now Leaderguard. It is interesting to note that the latter four entities were in some way or the other related. Loss to investors occasioned by the Leaderguard scheme is largely estimated around R300 million. I refer to an annexure attached hereto as 'Comrie 3', which details the list of complaints received by this Office in connection with the Leaderguard investment, most of which could not be entertained owing to lack of jurisdiction as some investments were sold prior to 30 September 2004. In respect of the complaints falling within the jurisdiction of this Office, the total amount calculated at the current rate of exchange is in the region of R 5 467 404,94 and for those complaints falling outside the jurisdiction of this Office, the total amount is R 6 113 198.02. In all, at date hereof, complaints totalling losses to approximate value of R11 580 602.96 were

submitted to this Office, none of which, to date, has been returned to or recovered by innocent investors.

[82] Following losses occasioned as a result of Masterbond, the Nel Commission of Inquiry into Masterbond ('the Nel Report') was appointed. (The Final Report of the Commission of Enquiry into the affairs of the Masterbond Group and Investor Protection in South Africa can be viewed on http://www.doj.za/commissions/nel.htm). I set out some observations made in the Nel Report, which are material to the comments that I make in this determination. It is unfortunate that these comments by the Honourable Mr Justice HC Nel remain valid even today.

They are:

'In South Africa, the rights granted by the Companies Act to minority shareholders, holders of debentures and other stake holders, are more illusory than real. This is evident from everyday experience of the luckless South African investor who more often than not is treated with contempt by controlling shareholders, directors, management and the external auditors,'

'In many respects the typical South African investor is also worse off than his counterparts in many other jurisdictions. He labours under the attentions of vast hordes of unregulated, unsupervised, unethical and unqualified intermediaries, whose sole purpose in life seems to be to part him from his money,

- Ineffective supervision by entities such as the Registrar of Companies and the JSE Securities Exchange SA, neither of whom seems to play any discernable role in the protection of investors;'

- The often illusory protection entrusted to other regulatory and supervisory authorities who lack the resources or the will to carry out the functions assigned to them by the legislature,'

- Directors, managers, issuers of securities, intermediaries and auditors who operate with very little fear of personal repercussions in the event of fraud, negligence or incompetence;'…….
  (ref. Par. 1.12, Chapter 1: Introduction to the Nel Report);

'The typical investor is thus in an invidious position. Encouraged and even compelled by circumstances to save and invest, the investor has little control over the investment and is completely at the mercy of the regulating and supervising authorities, the issuers of securities, intermediaries, auditors, and the directors and officers of corporations and other entities. If one or more are incompetent or dishonest, financial security is at risk'. (ref. 1.13, Chapter 1: Introduction to the Nel Report);

'It is axiomatic that the primary functions of securities regulators and supervisors are the protection of investors and the promotion of stability and integrity of financial markets. This is recognized in virtually every country in the world and also the expressed objectives of many of these entities.' (ref. Par. 5.1, Chapter 5 to the Nel Report).

[83] What I find deeply disturbing is that the South African public are consistently exploited and defrauded of their savings notwithstanding that we have a regulatory framework in this country within the financial services industry.

[84] Public confidence and investor confidence is recognised globally as the driving force behind economic growth and financial stability. In the developing world, South Africa is recognised as having one of the most sophisticated and developed financial systems. In recent years, this has been strengthened through the promulgation of laws to support regulation, economic growth and financial stability.

[85] It is critical to understand that regulatory failure undermines public confidence and investor confidence. Such failure goes to the root of our financial services industry. Regulatory failure should be avoided and prevented at all costs to ensure present and future financial stability in this country.

[86] The question we must now face squarely is why does this happen and continue to happen. Why is regulation not preventing the problem? Why has the regulator been ineffective in this regard? In carrying out my duties as FAIS Ombud, I felt compelled to investigate this problem. It is within my statutory mandate to investigate such matters and report my findings to the FSB. I am required to do so in the best interests of the public and the integrity of our financial markets.

[87] I am compelled to conclude that the registrar granted an exemption from Section 7 (1) of the FAIS Act to LS; an entity which had no financial

soundness; an entity which was intimately associated with another entity that was flouting the law in its country of origin to the detriment of South African consumers; an entity whose corporate veil was used to hide individuals who had been associated with previous bogus investment schemes such as Prozet and Chinza, through which investors lost millions of rand; an entity whose directors traded recklessly without any regard for the interests of its clients. In other words, LS was granted an exemption under circumstances where, in truth and in fact it was an entity which was not fit and proper as contemplated in Section 8 of the FAIS Act. This comment is also valid for the key individuals and directors of LS.

[88] I am satisfied that the legislative framework was adequate, but that its application by the regulator was wanting. In particular, they failed to strictly apply the licensing provisions of the FAIS Act, in this instance.

E. RECOMMENDATIONS

[89] In the light of what I have stated above, I would like to make the following recommendations:

89.1 A thorough enquiry be conducted by the executive authorities into the activities of the Leaderguard group, its officials and directors which led to the loss of millions of rand, money which, in all

probabilities, left the country. I note in this regard that these individuals and their companies do not appear to be the subject of any criminal investigation;

89.2 There must be strict compliance with the provisions of the FAIS Act, in so far as it relates to licensing. These provisions must never be compromised;

89.3 At no time must there be a delegation of authority regarding the core functions of the Registrar, such as licensing;

89.4 Section 44 of the FAIS Act must be revisited with the intention of either amending it or deleting it in its entirety. It is my view that section 44 in its present form has served the purpose for which it was initially intended and its continued presence in the FAIS Act merely serves to undermine the purposes of the Act. The treatment of LS's license application is an example;

I turn now to deal with the complaint at hand.

F. DETERMINATION AND REASONS

[90] In respect of this complaint, the following are the pertinent issues:

90.1 Whether this office has jurisdiction to handle the complaint at all as the advice terminated before 30 September 2004 and actions taken thereafter amounted to an administrative function as contemplated in Section 1 (3) of the FAIS Act;

90.2 Whether or not Respondent had authority to provide financial services in forex;

90.3 Whether Respondent's conduct violated the FAIS Act;

90.4 Whether such conduct caused the Complainants to suffer financial prejudice or damage?

90.5 The Quantum.

Whether this office has jurisdiction to handle the complaint at all as the advice terminated before 30 September 2004 and actions taken thereafter amounted to an administrative function as contemplated in Section 1 (3) of the FAIS Act;

[91] Respondent's argument, broadly, is that this Office does not have jurisdiction to deal with this complaint by virtue of the fact that the act of providing advice had taken place prior to the Office being seized with jurisdiction to deal with complaints. The date of which the Office became

empowered to deal with complaints was 30 September 2004. That meant that the Office could only deal with a complaint in respect of a financial service that was rendered on or after the 30 September 2004. Respondent further argues that its actions on 4 October 2004 in completing various documents to effect the investment was merely an 'administrative act' that fell to be covered under the definition of what is not advice.

[92] In terms of Section 1 (3) of the FAIS Act:

> ' (a) advice does not include-
>
> (i) factual advice given merely:-
>
> (aa) on the procedure for entering into a transaction in respect of any financial product;
>
> (bb) in relation to the description of a financial product;
>
> (cc) in answer to routine administrative queries;'

[93] There is no merit in this argument. The process of giving advice, it is acknowledged commenced at some stage before 30 September 2004. The letter containing the recommendations is dated 9 September 2004, which clearly is before this Office was seized with jurisdiction.

[94] However, it cannot conceivably be argued that the giving of advice and the completion of the forms to put that advice into effect are two separate and distinguishable events. In my view they are simply steps in one process. When Respondent gave advice, he not only knew that Complainant was going to act on that advice but he put that advice into effect by assisting to

complete the forms necessary to give effect to that advice. A basis had been laid already and therefore it would be artificial and nonsensical to distinguish these two steps as being distinct and separate.

[95] In any event, the definition of financial service does not only envisage advice, as Respondent seems to believe. It also encompasses intermediary service, which in my view is, *inter alia* what Respondent did on 4 October 2004, when Complainant called at his office.

[96] The definition of intermediary service in the FAIS Act means;-

'….any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier-

'the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or…'

[97] Advice as defined in the FAIS Act is broad and incorporates 'any recommendation, guidance or proposal of a financial nature furnished by any means or medium, to any client or group of clients-

(a) In respect of the purchase of any financial product; or

(b) In respect of the investment in any financial product; or

(c) On the conclusion of any transaction, including a loan or cession…'

[98] The following documentation was completed on 4 October 2004:-

(a) Application Form;

(b) Client Questionnaire (risk profile);

(c) Foreign Exchange Risk Disclosure Notice;

(d) General Terms and Conditions;

(e) Trading Mandate;

(f) Bank Instruction Letter.

[99] The Application Form; Client Questionnaire; Foreign Exchange Risk Disclosure Notice; General Terms and Conditions and Trading Mandate were all signed by Mr Shacklock in his capacity as a '**advisor**' (own emphasis).

[100] The Client Questionnaire on its own is a necessary component of advice and required of the adviser in terms of Section 8. (1) of the General Code of Conduct for Authorised Financial Services and Representatives (the Code) as well as Section 5 (c) of the Code of Conduct For Authorised Financial Services Providers, and Their Representatives, Involved in Forex Investment (the Forex Code).

[101] The very nature of the forms is such that they form an integral part of the advice process and not merely an answer to a routine administrative query.

101.1 The fact that the advisor has affixed his signature to the documentation is evidence of the confirmation of the advice;

101.2 Respondent's conduct on its own version clearly falls within the parameters of advice and/ or intermediary services;

101.3 On the available evidence, it is highly improbable that Complainant would have of his own bat, sought, found and entered into the transaction with LSF without the assistance and guidance of Respondent. The various references to research and in depth analysis referred to by Shacklock in his statement bear this out;

I therefore have no hesitation in concluding that Advice and Intermediary Service was rendered by Respondent in relation to this investment subsequent to 30th September 2004 and hence falls within the jurisdiction of this office.

Whether or not Respondent had authority to provide financial services in forex;

[102] The following provisions of the FAIS Act are relevant:-

102.1 Section 7. (1) states 'a person may not act or offer to act as a financial services provider unless such person has been issued with a licence…'

102.2 Section 8.(1) 'An application for authorization …..must be submitted….in the form and manner determined by the registrar.'

102.3 Section 8.(4) (a) 'Where an application is granted the registrar may impose such conditions and restrictions on the exercise of the authority granted by the licence,..'

[103] As has been stated, in terms of Board Notice 94 of 2004 as published in the Government Gazette an extension was granted in order, 'to accommodate late applicants for authorization in terms of section 8 of the Act, whose applications may not be finalised as on 30th September 2004,…'

[104] Respondents licence authorising it to render financial services effective 30th September 2004 was finally granted on 22 July 2004. It is clear therefore that Respondent's application for authorisation was received by the registrar in good time, so that the application was processed well before the 30 September 2004. This argument therefore is not sustainable. The exemption did not apply in respect of Respondent. In fact Respondent was bound by the terms set out in its licence, which terms precluded it from dealing in forex. The Respondent, unlike many others abided by the registrar's recommendation that licence applications be filed timeously. Other late applicants, like LS were rewarded with an exemption.

[105] Respondent has provided copies of the Application Forms submitted to the registrar in support of its application for authorization. It is clear that Respondent made application for authorisation to provide advice and intermediary services on foreign currency denominated investments.

[106] This office has been provided with a copy of both the representative register and Licence by the FSB. Neither Respondent nor its

representative Mr Shacklock were granted authorization by the registrar to act or offer to act as financial services providers for foreign currency denominated investment instruments.

[107] A further argument raised is that Respondent's activities in rendering this financial service is covered 'under and in terms of SECA (Act No. 1/1985), FMCA (Act No.55/1989)'. Nowhere in the FAIS Act is there any reference to the Respondent's activities being exempted in these circumstances. The very fact that Respondent applied for a licence under and in terms of the FAIS Act is an acknowledgment that in order for them to lawfully render financial services they would have to be licensed in terms of the FAIS Act. Respondent is governed by the FAIS Act and hence must conform to its requirements.

[108] Therefore Respondent's contention that its activities were covered under either of the two aforementioned acts has no merit.

Whether Respondent's conduct violated the provisions of the FAIS Act

[109] Respondent's rendering of financial services in forex, without being authorised to do so in terms of the FAIS Act is, in and of itself, a violation of the provisions of the FAIS Act. Although the Respondent asserts that it had authority to render financial services in forex, the records of the

Registrar show no such authorisation. I note that the license issued by the Registrar to the Respondent specifically excludes rendering of financial services in respect of forex.

[110] For the purposes of completeness, I deal hereunder, very briefly with some further apparent violations of the FAIS Act.

NON-DISCLOSURE OF FEES

[111] In terms of Section 3. (1) (vii) of the Code a provider:-

> 'must as regards all amounts, sums, values, charges, fees remuneration or monetary obligations…….. and payable to the product supplier or provider be reflected in specific monetary terms: Provided that where any such amount….is not reasonably determinable, its basis of calculation must be adequately described;'

[112] It must be noted that this section requires disclosure of all costs not only of the provider but the supplier as well. Respondent states that it advised Complainant that it would charge a fee of 1% per annum, but that it did not advise him on the manner and process that these fees would be rebated.

[113] In what appears to be Respondent's handwriting on a letter from Respondent to Complainant dated 9th September 2004 is written 'Pretty passive investment so 1% management fee'.

[114] Shacklock states, 'LSF paid a commission of 0.5% (nought point five per centum) per month to financial advisers….. The Respondent believed this commission to be higher than our normal rate and spoke to Mr. Rod Lowe to adjust this amount so that it could be in line with our normal rate.'

[115] Shacklock further states, 'The advice received from LSF was that the commission structure could not be altered and they suggested that those amounts of the commission be accumulated and be rebated after the end of the financial year which in the case of the complainant amounted to R4 018, 18'. Whilst there is no reason to question Respondent's intention with respect to the rebate, it is immediately apparent that full disclosure was not made in accordance with the Code.

[116] The actual commission earned by Leaderguard Securities (LS) was in fact 1.85% per month of the total funds initially invested. This amounts to 22.2% per annum.

[117] Out of the 1.85% per month the Broker Consultants were paid 0.5% per month and the Representatives 0.5% per month.

[118] It is inconceivable that had any reasonably educated investor been fully aware of the exorbitant fee structure that they would have invested in LSF.

[119] If one also considers the promised 20% 'stop-loss', it will also become obvious to any reasonably skilled financial advisor that the LSF product simply made no financial or economic sense and was entirely unsustainable. This, bearing in mind that the funds were being invested in the highly volatile forex market.

APPROPRIATENESS OF ADVICE

[120] Complainants asset allocation spread, as set out in the Respondent's affidavit based on the exchange rate at the time of the investment into LSF was approximately as follows Guaranteed Equity Linked Investment 11.947%; Equity 12.04%; Cash 55.017%; Property 19.91% and Other 1.07%. It is clear that at the time of the investment into LSF Complainant was conservatively invested.

[121] In completing the LSF Client Questionnaire, Complainant ticked Moderate Capital Growth over 3 – 5 Years with a percentage risk of 0% to 20%.

[122] The letter from Respondent to Complainant dated 9th September 2004 states, 'You are familiar with the risks associated with equity investments

and are prepared to adopt a relatively “aggressive” approach to the investment of your funds.’

[123] The facts on file clearly indicate that Complainant was in fact concerned about capital loss as the invested funds were required for retirement. There is no factual basis for the Respondent to conclude that the Complainants wanted to adopt an ‘aggressive’ approach to investment. The facts support the contrary approach.

[124] Much can be said about the manner in which Respondent had disclosed risk to Complainants. It would appear that Respondent, instead of first acquainting itself with the product was merely complacent with the information set out in the marketing brochures provided by LS. The truth is, there was far more risk than what was disclosed to Complainants. The product carried no guarantees and there was no such thing as risk being limited to 20 %. Here again, Respondent’s conduct violated the provisions of the FAIS Act.

[125] The stated returns were impossible given the level of protection apparently afforded by the product and Respondent, in particular Shacklock, should have known this.

[126] Section 7 (1) (a) of the Code requires that a provider must 'provide a reasonable and appropriate 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.'

[127] Whilst Complainants signed the risk disclosure note which sets out the risks the glossy marketing brochure paints a very different picture and there is no evidence that Complainants were made aware of the inherent risks in the product by Respondent and Shacklock in particular. In fact, nowhere in Respondent's response does it claim to have properly disclosed risk.

[128] The record reveals that a copy of performance data figures for the moderate growth option was provided by Respondent to Complainants.

[129] The indicated performance is indeed impressive and as Respondent has stated 'the returns from the Moderate Growth Fund had been more than satisfactory' and were material to Complainants decision to invest.

[130] The indicated performance is even more impressive when viewed in the light of the fact that not only had the fund never experienced a negative return year but that it had obtained such impressive performance in the

highly volatile world of forex trading. Nowhere in Respondent's reply does it allude to having complied with the provisions of Part VI, section 7 (1). (c) (iii) (cc).

[131] The fact that it had supposedly delivered such impressive returns whilst paying extraordinarily large commissions is beyond belief. It makes no commercial sense. In fact indications are that the product was unsustainable. A service provider with Shacklock's experience must have realised this.

[132] The performance data, when examined on its own gave away the secret behind LS and LSF. Performance data dated back from 1997 when LS had only been in operation since 2001 and LSF since 2003. Clearly the tendered data was false and designed to mislead.

[133] It is therefore difficult for me to believe Respondent's contention in the affidavit of Shacklock that 'prior to furnishing advice to the Complainant in respect of LSF I analysed in depth the fundamental aspects of LSF,' (whatever that might mean).

[134] It is clearly apparent that Complainants were led to invest in LSF in large part due to both the impressive performance and level of protection apparently afforded. There is further no dispute that the Respondent is

responsible for communicating erroneous information which made the Complainants to invest in LSF. Complainants were thus not placed in a position where they were able to make an informed decision as the Code demands in Part II section 3 (1) (a) (iv). At worse they were positively misled into making this investment.

[135] If the Respondent and in particular Shacklock, acted with the degree of skill, care and diligence required of a financial services provider, they would have discovered that:-

(a) LS was operating under an exemption only;

(b) LS's license application was still pending at the time of this transaction;

(c) LSF was not approved as a foreign forex services provider;

(d) Respondent itself, in terms of its own license was not authorised to sell forex;

(e) The commissions promised were all above industry expectations;

(f) The performance figures provided by LS and LSF were false;

(g) The investment itself was entirely unsustainable and made no economic sense.

[136] I have no difficulty in concluding that Respondent's advice to Complainant was inappropriate under the circumstances.

Whether Respondent's conduct caused the Complainants to suffer financial prejudice or damage

[137] On the Respondent's own version it recommended the investment and assisted the Complainants in making same. It is not difficult to conclude that had Complainants known that no portion of their capital was guaranteed; that LS was trading in terms of an exemption with the attendant risk of the license being finally declined at any time; that they were dealing with a provider who was not authorised to render financial services in forex; or that the investment itself was unsustainable, they would not have invested in LSF.

[138] Respondent has further raised the point that the complaint is premature owing to an investigation of LS and LSF's financial affairs. The fact is on

the 21 July 2005 LS was finally liquidated. LSF was also placed under final liquidation by the Mauritian Court. There are no facts before me to suggest that there is any prospect that the liquidators will pay a distribution to the investors. Accordingly, the complaint is not premature.

Quantum of damages

[139] The amount invested by Complainants is 28 477.43 Euros. There has been no challenge of this amount from Respondent. Although the Complainants submitted that they were prepared to risk 20% of their investment, it is my finding that 100% of the loss was caused by the conduct of the Respondent. Therefore, the Complainants are entitled to be compensated for 100% of their loss.

The complaint is upheld.

In the circumstances I make the following order in terms of Section 28 of the FAIS Act.

Order

[1] The Respondent is hereby ordered to compensate Complainants in the amount of 28 477.43 Euros, which amount must be converted into rand value as at the date of payment;

[2] Respondents are to pay interest on the aforesaid amount at the rate of 15.5 % SEVEN (7) days from date of this order to date of final payment;

[3] Respondent is to pay case fees to this Office in the amount of R1000;

I deem it necessary that a copy of this determination be delivered to:

1. The Minister of Finance;

2. The Minister of Trade and Industry;

3. The Financial Services Board;

4. The Chairperson of the Policy Board for Financial Services and Regulation;

5. The Advisory Committee of the FSB;

6. The Office of the Governor of the Reserve Bank;

7. The National Prosecuting Authority.

DATED AT PRETORIA ON THIS THE 20th DAY OF MARCH 2007

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CHARLES PILLAI

OMBUD FOR FINANCIAL SERVICES PROVIDERS

COMRIE 1

SEE ATTACHED DOCUMENT

COMRIE 2

EXPLANATORY NOTES

The following are explanatory notes on the pertinent aspects only of the relationship between the various entities listed on the Schedule marked 'COMRIE 1'

1. PROZET (Pty) Ltd

PROZET was a forex business which was declared insolvent prior to the coming into effect of the FAIS Act. An investigation into the reason for the failure of this entity concluded that an offshore company, namely Hedley Finance Limited in Greece was to blame.

Directors Robert Linkmeyer and Andrew Botha later created another forex investment entity called PLATINUM ASSET MANAGEMENT (PAM). It would appear that investigations into this entity are continuing.

Directors Renso Du Plessis & Venter Jnr. created a forex investment intermediary business called LEADERGUARD SECURITIES (PTY) LTD ('LS'). This business became one of the largest forex intermediaries in South Africa.

The former compliance officer of PROZET, Ms Brenda Jansen, started another forex investment business called CHINZA. This entity has also been liquidated. Directors of this entity were SJ Proudfoot and Brenda Jansen.

In order to start up LS, a loan was apparently secured from CHINZA.

2. LEADERGUARD SECURITIES (Pty) Ltd (LS)

LS's main business was to market forex investment products to the South African public. It is believed that Renso du Plessis & Venter Jnr resigned as directors of LS due to the possible reputation damage associated with the failure of Prozet. On the same day as Renso du Plessis and Venter Jnr. Resigned, Basie Venter, the father of Venter Jnr, joined LS and became its sole director. Basie Venter also owner 53% of LS.

The following directors later joined LS:

- Stefan Pretorius;
- MJ Freyer, financial director;

- Dela Guerre who was also compliance officer. Although his directorship was not finalised, the application for authorisation of LS was signed by him as 'director'.

2.1 LEADERGUARD LTD (LL)

LL was incorporated in Mauritius on 19-02-2002. LL acted as a conduit between the South African and Mauritian entities.

Directors of LL:

- K Gokilsing;
- A Abidallatiff;
- Pretorius.

Shareholder of LL:

- The sole shareholder was Fiduciary Business Trust and the sole beneficiary of the trust was Basie Venter.

2.2 LEADERGUARD SPOT FOREX (LSF)

Directors of LSF:

- Basie Venter;
- Pretorius;
- Warren Luyt;
- Amanda Ramburuth.

Note: Warren Luyt was the Managing Director of Federal Trust which was the administrator of LSF. Amanda Ramburuth was a manager of Federal Trust Ltd.

Shareholders of LSF:

- Basie Venter 50%
- Pretorius 50%

Risk Manager:

- Renso du Plessis

2.3 LEADERGUARD PROPERTIES INVESTMENTS (Pty) Ltd

The sole purpose of the company was to speculate, own and invest in property. This company was dormant.

Shareholders:

- Basie Venter 20%
- Stefan Pretorius 20%
- Renso Du Plessis 20%
- Venter Jnr 20%
- Dela Guerre 20%

3. HAMILTON SOLUTIONS (Pty) Ltd (HS)

HS was LS's largest single distribution arm within South Africa. HS supplied LSF's products under a white label agreement. LS was said to own 20% of HS.

Note: The relationship between the Leaderguard Group and HS was never fully disclosed to the public, as required under the FAIS Act.

3.1 HAMILTON WORLD WIDE SOLUTIONS (HWWS)

Incorporated in Mauritius on 02-2002. It served as a conduit between South Africa & Mauritius. In communication addressed to Stefan Pretorius it is clearly indicated that HWWS was under control of LL.

COMRIE 3

LIST OF LEADERGUARD COMPLAINTS AS AT 20 MARCH 2007

FOC	COMPLAINANT	STATUS	PRE FAIS	POST FAIS
MK 1035	E Moraka	Out of jurisdiction	R 200,000.00	
MK 1041	LD Bosenger	Out of jurisdiction	$196,032.24	
EO 1109	WJ De Lange	Investigation		€ 39,420.62
EO 1109	EC De Lange	Investigation		€ 34,493.90
EO 1599	E de Wet	Pending settlement		$11,745.06
EO 1599	JS de Wet	Pending settlement		$28,986.65
MK 1254	CD Pretorius	Out of jurisdiction	$33300 & £20 000	
MK 1455	SC Hibbert	Out of jurisdiction	$54,958.43	
JM 1457	SB van der Merwe	Withdrawn		$50,140.00
NM 1488	JH Lenz	Investigation		R 60,000.00
MK 1679	Edward	Out of jurisdiction	R 436,044.00	
MK 1772	HJ du Plessis	Out of jurisdiction	R 120,000.00	
NM 1784	P Swanepoel	Investigation		£2,800.00
MK 1882	H Pearson	Out of jurisdiction	R 250,000.00	
DD 1883	AC Lindeque	Investigation		R 650,000.00
EO 2049	ACF Campher	Investigation		R 60,000.00
NM 961	B Taylor	Investigation		R 65,000.00
EO 1639	AJJ Fourie	Withdrawn by Complainant		R 70,000.00
EO 1176	CJ du Plessis	Determination –On appeal	$10,000.00	$92,135.11
NNB 938	D Luyt	Out of jurisdiction	R 190,000.00	
NM1807	S Comrie	Determination		£20,000.00
EO 2009	Strumpher	Withdrawn by Complainant		R 60,000.00
TT 2442	B Morton	Investigation		R 220,000.00
TT 656	IPA Smit	Withdrawn	$12,077.29	$36,139.84
EO 658	JHP Lategan	Investigation		£22,473.33
EO 659	I Viljoen	Matter settled		R 300,000.00
MK 661	JBR Zulch	Out of jurisdiction	$107,574.00	
	DE Zulch	Out of jurisdiction	$50,185.00	
TM 662	M Pretorius	Out of jurisdiction	R 60,000.00	
EO 778	SCJ Bronkhorst	Investigation		€ 6,500.00
DD	O Redivo	Out of jurisdiction	$4,980.00	
EO 1174	R du Plessis	Determination	$33,870.68	R 60,000.00
EO 1660	Beukes	Draft Determination	$55,973.47	
TT 752	HPC/AJ Stephan	Determination- On appeal	$28,052.14	£59,919.46
TT 914	MD Mackrory	Determination – On appeal	R 231,000.00	R 60,000.00

COMRIE 3

LIST OF LEADERGUARD COMPLAINTS AS AT 20 MARCH 2007

Currency Rates as on 20 March 2007 at 14:00 on Finance 24
R/$ 7.39
R/€ 9.85
R/£ 14.41

Total **R** value of complaints **Pre FAIS**	Total **R** value of Complaints **Post FAIS**	Total **$** value **Pre FAIS**	Total **$** value **Post FAIS**	Total **£** value **Pre FAIS**	Total **£** value **Post FAIS**	Total **€ Pre FAIS**	Total **€ Post FAIS**
R 1,487,044.00	**R 1,540,000.00**	**$587,003.25**	**$219,146.66**	**£20,000.00**	**£105,192.79**	**€ 0.00**	**€ 80,414.52**

Total Estimated PRE FAIS in RAND TERMS	**Total Estimated POST FAIS in RAND TERMS**
R6 113 198.02	**R 5 467 404.94**
GRAND TOTAL	**R 11 580 602.96**