IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA **CASE NO: FOC 1176/05/GP/ (1)**

In the matter between:

R DU PLESSIS **Complainant**

and

WILMA WILLEMSE **1st Respondent**
WILLEMSE FINANCIAL SERVICES C C **2nd 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] Complainant had invested certain funds in the now defunct Leaderguard Spot Forex, ("LSF") allegedly based on the advice of the 1st Respondent, who at the time was acting as an authorised representative of the 2nd Respondent. LSF has since been liquidated. A company which was responsible for marketing LSF's products, Leaderguard Securities Pty Ltd, ("LS") has also been liquidated.

The Parties

[2] Complainant is Riana du Plessis, a female of adult age who resides at 650 Moreleta Street, Silverton, Pretoria East.

[3] 1st Respondent is Wilma Willemse, an authorised representative of the 2nd Respondent in terms of the FAIS Act.

[4] 2nd Respondent is Willemse Financial Services CC, a close corporation registered in terms of the laws of South Africa and a licensed financial services provider in terms of the FAIS Act with its registered address being 90 Aspen Cresent, Zwartkop Extension 4, Centurion, Gauteng Province.

[5] At all times material hereto, the Complainants dealt with the 1st Respondent.

B. THE COMPLAINT

[6] Complainant is claiming an amount of R60 000 plus interest from the Respondents. The amount was invested into LSF on 15 March 2005 through its South African marketing arm, LS. On 25 March 2005, LS lodged an urgent application for liquidation to the Transvaal Provincial Division of the High Court of South Africa. In the application papers, it is stated that LS was commercially and actually insolvent.

[7] It is Complainantõs case that the Respondents were negligent in rendering the financial services in that:-

7.1 They were neither aware of the financial difficulties LS and LSF had been facing, nor did they bother to establish the true state of affairs regarding the entities, prior to recommending the investment to her;

7.2 Respondents instead made positive statements about the impressive and successful track record of the performance of LSF which have since turned out to be false;

7.3 Further, notwithstanding that the LS as an entity had only been granted an exemption by the Financial Services Board (ôFSBô) to continue its operations, Respondents made a positive statement to the effect that LS had actually been licensed;

[8] Complainant further alleges that Respondents rendered the financial service in violation of the FAIS Act in that:-

8.1 They were not authorised to render financial services in respect of forex investment instruments; yet they failed to disclose this fact to her as required by the provisions of the FAIS Act;

8.2 They further failed to bring to Complainantôs attention and notice that 1st Respondent was purportedly acting as an ôagentôof Leaderguard which placed Respondents in a position of conflict of interest;

8.3 They failed to disclose costs related to the investment and further failed to properly disclose the risk inherent in the investment. In respect of risk, 1st Respondent indicated that only 20% of the investment was exposed to risk, whilst 80 % of the investment was guaranteed. In this respect, Complainant alleges that 1st Respondent knew, or ought to have known that the investment carried no guarantees whatsoever; and

8.4 They failed to reduce the investment into writing and no contract was ever furnished to Complainant in respect of the investment;

8.5 In violation of the duty placed on providers to act honestly, 1st Respondent sought a tax clearance certificate based on a fraudulent signature.

[9] There is no dispute as to whether 1st Respondent rendered the financial service to Complainant. There is also no dispute that both entities LS and LSF have since been liquidated. The only aspects that are under contention are:-

9.1 whether the 2nd Respondent is vicariously liable for the conduct of the 1st Respondent;

9.2 whether the 1st Respondentôs conduct violated the provisions of the FAIS Act and/ or was negligent;

9.3 If it is found that the 1st Respondentôs conduct violated the FAIS Act and/ or was negligent, whether such conduct caused the Complainants to suffer financial prejudice or damage; and

9.4 Quantum of such financial prejudice or damage.

Background and Undisputed Facts

NOTE: Reference to ôLeaderguardô is a reference to only one or more of the following entities, Leaderguard Securities (Pty) Ltd and Leaderguard Spot Forex. I draw attention to this due to the fact that

the parties in their dealings and even in their correspondence merely referred to "Leaderguard". I also note that the Respondents make no specific reference to which of the entities they are referring to from time to time.

[10] Respondent had rendered services as a broker to Complainant since 2000. During the period from July 2004 to August 2004, Complainant made at least three investments into LSF based on advice of 1st Respondent. During December 2004, the investments suddenly showed negative growth. This Complainant discussed with 1st Respondent. Complainant accepted assurances from 1st Respondent that the problem would rectify itself within a matter of three months. According to Complainant, the investment showed positive results for the months of January, February and March 2005. It is around March 2005 that Complainant spoke to 1st Respondent about yet another investment into LSF. On 15 March and after 1st Respondent had obtained a tax clearance for Complainant, the investment was effected. On 25 March 2005, LS filed for provisional liquidation. During July 2005 the provisional order was made final.

[11] There is also no dispute that 1st Respondent advised the Complainant that the investment came with a 20 % "stop loss", whilst 80% of the investment would be secure.

[12] With regard to the decline in performance of the investment in December 2004, 1st Respondent clearly states in her letter dated 26 August 2005 that it was nothing unusual and that she had personally discussed the matter with one Stefan Pretorius, a director in LS, who advised her that the losses suffered in December 2004 could be recovered in a space of three months.

[13] Ten days after concluding the investment with LSF, Complainant read about the application for liquidation of LS by its financial director Maria Fryer. Seeking answers as to the fate of her investment, Complainant wrote to 1st Respondent in July 2005, asking questions about how it was possible that 1st Respondent recommended an investment without first establishing information about the company. In her letter of 11 July 2005 to 1st Respondent, Complainant states:

> ôYou also mentioned that ñLeaderguard have succeeded in building sound track record in the past five years.ò Like any other investor, I accepted your (my brokerôs) word, not being aware of the fact that Leaderguard were already facing serious financial problems coupled to the fact that the directors of the mentioned company had previously been involved in controversial issues- Refer to Rapport dated 3 April 2005: ñ According to research by Mr Andre Prakke, a forensic investigator, who, among others, investigated the unsuccessful Chinza scheme on behalf of the SAPS, various directors of Leaderguard were also involved in schemes similar to Prozet and Chinza, both liquidated companies. Prakke maintains that the liquidated Chinza scheme, in which hundreds of investors lost millions of rands, is one of the claimants of Leaderguard, a company established with a R1,2 million loan from Chinzaé ..ô

[14] Refuting any claim that she was negligent, 1st Respondent wrote to Complainant in a letter dated 26 August 2006, stating *inter alia* that she is a broker and not a stockbroker or portfolio manager. In this letter 1st Respondent clearly states that she has ónever done any business as a broker under the auspices of ñWillemse Financial Services CCò with either Leaderguard or Stanlib.ô She claimed that since signing a contract in 2003 she became an agent of Leaderguard Spot Forex. Other pertinent aspects of the letter are:-

14.1 That she had been paid 0.5 % commission per month;

14.2 That brokers as well as investors were made aware that the Moderate Growth Option óproduced a 20% stop loss.ô

[15] It is not in dispute that at the time of the transactions LS has still not been licensed by the Financial Services Board. It operated in terms of exemption BN 94 which was advertised in Government Gazette 26820 on 23rd September 2004. There is no indication that LSF had ever been approved as a foreign forex service provider.

C. THE RESPONSE

[16] A letter of response was received on 18th October 2005 from Sim Attorneys acting for both Respondents. In that letter the Respondents refuted all claims of wrongdoing. The relevant aspects of the letter are that:-

(i) The 1st Respondent was at all times material hereto acting as agent of Leaderguard in terms of a mandatory agreement between her and the latter;

(ii) The complaints were premature and that it would not be possible to determine whether any loss had been suffered as the various issues regarding LSF were still being investigated. They denied that the Complainant had suffered any loss;

(iii) It was as a result of the Complainantsôinsistence that the funds were transferred into LSF and that it was not necessary to complete a new application form as a trading mandate and letter advising of the additional amount would do;

D. JURISDICTION

[17] The Complainant had been made aware during the investigations that this Office would not be able to entertain the claim in respect of all investments made prior to 30 September 2004. It is therefore only the amount of R60 000 that is dealt with in this determination. Similarly, this Office is not pronouncing on the allegation of fraud pertaining to the signature in the document used to obtain tax clearance.

Determination and Reasons Therefore

[18] The issues to be determined are:-

18.1 Whether this matter can be determined on the undisputed facts or whether any further steps need to be taken including a hearing before determining it;

18.2 Whether 2nd Respondent is liable at all for the alleged unlawful conduct of the 1st Respondent;

18.4 Whether the 1st Respondent acted in a manner which is not in compliance with the FAIS Act and / or negligently;

18.5 If it is found that the 1st Respondent acted in a manner which is not in compliance with the FAIS Act and / or negligently, whether her conduct caused the Complainants to suffer financial prejudice or damage;

18.6 Quantum of such financial prejudice or damage.

Whether there is a need to hold a hearing?

[19] It is submitted on behalf of the Respondents that there are disputed facts with regard to several aspects of liability in this matter and that it is necessary that those disputed facts be adjudicated upon after they have been examined and tested under cross examination.
A decision in my view can be made on the basis of the undisputed facts. There is therefore no need for a hearing.

Whether the 2nd Respondent is liable for the actions of the 1st Respondent

[20] Complainant has alleged that the 1st Respondent ought not to have advised her on a forex investment product as she was not licensed to do so. The Respondents however have submitted that there existed an agency agreement between 1st Respondent and Leaderguard Spot Forex. It is on the basis of this agreement that the 1st Respondent claims to have had authority to render financial services on forex.

[21] I point out that the 2nd Respondent has never denied knowing that the 1st Respondent was an "agent" of Leaderguard. If, for the purpose of this transaction 1st Respondent was on a frolic of her own and not representing the 2nd Respondent, she was duty bound to inform the Complainant of this fact, in writing. This is required of the provider in terms of Section 5 (b) of the General Code of Conduct for Authorised Financial Services Providers and Representatives as promulgated in Board Notice 80 of 2003 and advertised in Government Notice 25299 of 8 August 2003, ("the General Code"). The 1st Respondent further was duty bound to not only inform the Complainant that she was acting in the capacity of an agent for Leaderguard, but she was also obliged to draw the Complainant's attention to the actual or potential conflict of interest which was brought

about by her acting in this capacity. I refer in this regard to Part II section 3 (1) (b) of the General Code. Nowhere in the Respondentsô reply is it mentioned that the aforesaid steps had ever been taken.

[22] The only document submitted to this office in support of the claim that 1st Respondent acted as agent of LSF are a few pages of what purports to be an ó*Agency and Representation*ô agreement between ó*Wilma Willemse and LeaderGuard Limited*ô an entity incorporated in terms of the laws of Mauritius with its registered office ó*at number 4th Floor Orchid Tower, 20 Sir William Newton Street Port Louis*ô This document is not signed.

[23] There is no indication that LeaderGuard Limited had ever applied for approval, or any form of recognition in terms of the FAIS Act to the Financial Services Board, (ó*FSB*ô). Section 13 (1) of the FAIS Act which provides:-

> ó*A person may not* ï
>
> (a) carry on business by rendering financial services to clients for or on behalf of any person who ï
>
> (i) is not authorised as a financial services provider; and
>
> (ii) is not exempted from the application of this Act relating to the rendering of a financial service; or
>
> (b) act as a representative of an authorised financial services provider, unless such person ï
>
> (i) is able to provide confirmation, certified by the provider, to clients-
>
> (aa) that a service contract or other mandatory agreement, to represent the provider , exists; and
>
> (bb) that the provider accepts responsibility for those activities of the representative performed within the scope of, or in the course of implementing, any such contract or agreementé .ô

[24] Based on the foregoing, it cannot be seriously contended that the 1st Respondent had any lawful authority on which she could render financial services on forex. The conclusion I reach is that as an authorised representative of the 2nd Respondent the 1st Respondent was in all its dealings with the Complainant acting within the course and scope of her duties with the 2nd Respondent, which 2nd Respondent was aware of.

Whether the Respondents acted in a manner that is not in compliance with the FAIS Act and/ or negligently.

[25] Complainant alleges that Respondents had negligently made positive statements about Leaderguardôs success and cited a track record of over 98 months, notwithstanding that they had taken no steps to establish the true position about the entities concerned. In addition to this, they failed to mention that LSF had not been approved by the FSB. Instead they made a positive statement that LS was licensed. In truth, LS was operating in terms of an exemption. All of this, Complainant submits, was negligence on the part of Respondents.

[26] In addition to this, Complainant has submitted that Respondents had underplayed the risk inherent in the investment and further failed to disclose commission in violation of the provisions of the FAIS Act.

[27] It has been submitted on behalf of the Respondents that no broker would have known that Leaderguard would collapse. Reference in this regard is made to material provided by LSF and LS on performance indicating negative trading for only 20 months since 1997. The Respondents have further submitted that the Complainant knew of the risk involved in the product and that it is based on her insistence that the investment in March 2005 was made.

[28] It cannot be accepted that Complainant knew the risk inherent in the investment. Nowhere in 1st Respondentôs response, does she even allude to the fact that she ever properly disclosed risk. All that is contained in her letter of 26 August 2005 is that ôall brokers as well as investors were made aware of the fact that the Moderate Growth Option produced a 20 % stop loss.ôThis cannot be accepted as a proper disclosure of risk. I quote what is set out in the document titled Foreign Exchange Risk Disclosure Notice:

> ô8. Under certain trading conditions it may be difficult or impossible to liquidate a position. This may occur, for example, at times of rapid price movement. Placing a Stop-Loss Order will not necessarily limit your losses to the intended amounts, because market conditions may make it impossible to execute such an Order at the stipulated price.ô

A further condition stipulated in the document titled ôThe General Terms and Conditionsôprovides:

> ô3. Pre-determined risk mandates and trading styles may change from time to time according to market conditions. **No capital guarantee is offered by LSF and the investor warrants that he/she shall not hold LSF liable for any capital losses suffered by the investor.' (my emphasis)**

[29] With regard to the claim that the investment had been approved by the FSB, there is sufficient evidence to conclude that no such approval had either been sought or granted. The entity LSF had not been approved and Respondents had a responsibility to seek this approval in terms of the FAIS Act. The Financial Advisory and Intermediary Services Regulations as promulgated in Government Notice 879 of 2003 and advertised in Government Gazette 25092 of 13 June 2003, subsequently amended by Government Notice 297 of 2004 advertised in Government Gazette 26112 of 12 March 2004, (ôthe Regulationsô). Chapter VI section 14 provides:

ÓA forex service provider seeking in accordance with a 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 application:

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;
c) full particulars as regards the nature of the regulatory environment under which the firm or provider operates in the country concernedô

Chapter III section 3 provides:

ôNo person ï

(a) may in any manner or by any means, whether within or outside the Republic, canvass for, market or advertise any business related to the rendering of financial services by any person who is not an authorised financial services provideré é ô

[30] On Respondentsôversion, no such approval was ever sought.

Costs

[31] Complainant had claimed that 1st Respondent had not made any disclosure in respect of costs. She (Complainant) claims she had no idea of the costs payable. Based on the claim made by Complainant in her letter of 30 August 2005 about her knowledge of financial markets, I find this statement to be a bit far fetched. Having said so however, this does

not take away from the fact that 1st Respondent had a duty to disclose costs prior to the conclusion of the contract. Instead, and in response to the complaint, 1st Respondent makes the statement that she was paid 0.5 % commission per month. She ought to have disclosed all costs prior to the conclusion of the contract. Nowhere in Respondentôs reply is it stated that this disclosure had been made. In fact 1st Respondent is on record as claiming that she was never paid commission in respect of the investments she had placed with Leaderguard. 1st Respondent maintains that all she had been paid was a fee from ómerchandising transactionsô, whatever that is supposed to mean. This is in her letter of the 26 August 2005 in response to a claim made by Mr and Mrs Du Plessis who happen to be parents to the Complainant in this case. I refer in this regard to Du Plessis v Willemse and Another, FOC 1176/05/GP (5) paragraph 50.

> ó Regarding payment for commission, I would like to point out that no commission was paid out by Leaderguard for any business deals. The 0, 5 % paid monthly by Leaderguard was based on compensation from merchandising transactions and had nothing to do with your investmentsé ..ô

Did the 1st Respondent's non compliance and / or negligence cause financial loss to the Complainants

[32] It has been argued on behalf of the Respondents that, firstly, the complaints are premature; that it is difficult to determine whether the complainants have suffered any loss at all and if they in future were to suffer loss, what the extent of such loss would be. The conclusion is that the Respondents deny that Complainant have suffered loss. The Respondents have also argued that there is no causal link between the loss allegedly suffered and the alleged non compliance or negligence.

[33] This argument is untenable. It is now almost two years since both LS and LSF were liquidated. There has certainly been no word of distribution from the liquidators of either entity. In fact, in respect of all the complaints submitted by the various complainants to this office, the point has repeatedly been paid that there is still an investigation pending in respect of LSF and that there is no certainty as to whether complainants have suffered any loss. The argument simply begs the question. If any credence were to be paid to this argument, then complainant might as well wait eternally.

[34] There is also no basis for the submission that there is no causal link between the non compliance or negligence and the loss suffered by Complainant. I hold the view that had Respondents taken the basic step of establishing the authorisation status of LS and the approval of LSF, they would not have recommended the investment to Complainant. But for the conduct of the Respondents therefore, Complainant would not have been exposed to the investment and thereby suffered the attendant loss.

Quantum of Damages

[35] The Complainant has claimed the sum of R60 000 together with the interest. This amount is not disputed by Respondents. For all the reasons set out in this determination the 1st Respondentõs conduct violated the Code and it is that conduct which occasioned the Complainantõs loss. The complaint succeeds.

ORDER

The following order is made that:-

[1] The 1st and 2nd Respondents are jointly and severally, the one paying the other to be absolved, ordered to compensate the Complainant in the amount of R60 000;

[2] Interest on the aforesaid amount at the rate of 15.5 % to be calculated SEVEN (7) days from the date of this determination to date of final payment;

[3] Respondents pay case fee of R1000 to this Office.

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

CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS