

**IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS**

**PRETORIA**

**Case Number: FAIS-07397-12/13 GP 1**

**FAIS-07399-12/13 GP 1**

**FAIS-07400-12/13 GP 1**

**In the matter between:**

**HELENA PETRONELLA ESPAG**

**First Complainant**

**MICHELLE PIETERSEN**

**Second Complainant**

**(In her capacity as executrix of the estate late**

**RUDOLPH HENRI ESPAG in terms of the letter of  
executorship issued by the Master of the High Court  
dated 18 February 2015)**

**and**

**HENDRIK VAN SCHALKWYK MAKELAARS CC**

**First Respondent**

**HENDRIK VAN SCHALKWYK**

**Second Respondent**

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**DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL ADVISORY AND  
INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS ACT')**

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**A. INTRODUCTION**

[1] This determination follows from a recommendation made in respect of section 27 (5) (c) of the Act on 28 March 2018. The respondent did not reply to the recommendation. This determination shall therefore be read in conjunction with the recommendation, and shall form part of it.

## **B. THE PARTIES**

- [2] The first complainant is Helena Petronella Espag, an adult female pensioner whose particulars are on file with the Office. The second complainant is Michelle Pietersen, in her capacity as executrix of the estate late Rudolph Henri Espag, in terms of the letter of executorship issued by the Master of the High Court dated 18 February 2015.
- [3] The first respondent is Hendrik van Schalkwyk Makelaars CC, a close corporation duly incorporated and registered in terms of South African law, with registration number 1993/006496/23. The first respondent's last known address is 880 18<sup>th</sup> Avenue, Wonderboom South. The first respondent was an authorised financial services provider with licence number 14082. The licence has lapsed on 23 August 2017.
- [4] The second respondent is Hendrik Cornelius Hugo van Schalkwyk, an adult male, key individual and representative of the first respondent at the time. The second respondent's address is the same as that of the first respondent. The regulator has confirmed that Mr van Schalkwyk is currently licensed as an FSP of Discovery Life Ltd.
- [5] At all materials times the second respondent rendered financial services to the complainant.

## **C. FINDINGS**

- [6] Having regard to the information provided in the recommendation, I reiterate the findings that the respondent could not have acted in the best interest of his clients when he recommended an array of property syndication investments, all of which failed, and continued to do so even after he became aware of the funds the complainants lost as a result of his advice.
- [7] In this respect, the respondent's advice was negligent and in violation of his duty as set out in section 2 of the General Code (the Code). The respondent could therefore not

advise his client appropriately, in contravention of sections 3 (1) (a) (i) – (iii) and 8 (1) (a) to (c) of the Code.

- [8] The respondent disregarded the complainants' personal circumstances when he considered the suitability of the investments. The respondent knew that the complainant had no means to recoup any losses, owing to Dr Espag's ill health and the fact that the first complainant was not employed. Despite the aforesaid, the respondent still considered the property syndication investments to be appropriate. In the absence of a record in terms of section 9 of the Code, there is no justification or explanation as to why the said investments prevailed.

#### **D. CAUSATION**

- [9] The question that has to be answered, is whether the non-compliance of a provision of the Code can give rise to legal liability, whether in contract or delict.
- [10] I refer in this regard to the decision of the Appeals Board<sup>1</sup> in the matter of *J&G Financial Service Assurance Brokers (Pty) Ltd and another v RL Prigge*<sup>2</sup>. The Board noted the following:

*"The liability of a provider to a client is usually based on a breach of contract. The contract requires of a provider to give advice with the appropriate degree of skill and care, i.e., not negligently. Failure to do so, i.e., giving negligent investment advice, gives rise to liability if the advice was accepted and acted upon, that it was bad advice, and that it caused loss. And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.*

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<sup>1</sup> Effective 1 April 2018, the Board is now called the Financial Sector Tribunal

<sup>2</sup> FAB 8/2016, paragraphs 41 - 44

*In the case of a provider under the Act more is required namely compliance with the provisions of the Code. Failure to comply with the code can be seen in two ways. The Code may be regarded as being impliedly part of the agreement between the provider and the client and its breach a breach of contract. The other approach is that failure of the statutory duty gives rise to delictual liability.*

*In both instances the breach must be the cause of the loss.....”*

[11] Had the respondent truly appreciated what he was advising the complainants to invest in, he would have considered other more appropriate alternatives. Not only was the loss to investors reasonably foreseeable, it was inevitable.

[12] The complainants sought investments that would keep their capital intact, especially in light of the money they have already lost. For all the reasons mentioned in the recommendation, the investments were high risk and inappropriate for the complainants.

[13] The findings made in the recommendation letter are hereby confirmed.

#### **E. THE ORDER**

[14] In the result, I make the following order:

1. The complaint is upheld.
2. The respondent is ordered to pay the complainants the following amounts, as set out in the recommendation:

2.1 First complainant – R925 000<sup>3</sup>

2.2 Second complainant – R700 000<sup>4</sup>


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<sup>3</sup> This amount comprises of the following investments: R350 000, R375 000 and R200 000

<sup>4</sup> This amount comprises of the following investments: R375 000, R125 000 and R200 000

3. Interest on this amount at a rate of 10% per annum from the date of determination to date of final payment.

**DATED AT PRETORIA ON THIS THE 15<sup>TH</sup> DAY OF JUNE 2018.**



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**NARESH S TULSIE**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**