IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 01435/12-13/ KZN 1

In the matter between

HASSAN ALLY FAKHROODIN TYEBALLY	**First Complainant**
HASSAN ALLY RABIAH BIBI	**Second Complainant**

and

MAK INVESTMENTS AND ASSURANCE t/a	
NU ERA INSURANCE BROKERS CC	**First Respondent**
ANESH MAHARAJ	**Second respondent**

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

A. INTRODUCTION

[1] This determination follows a recommendation made in terms of section 27 (5) (c) of the Act on 2 August 2017. Section 27 (5) (c) empowers the Ombud to make a recommendation in order to resolve a complaint speedily by conciliation**.** Where a party does not accept the recommendation, they are to provide reasons. Where the parties accept the recommendation, such recommendation has the effect of a final determination as contemplated in section 28 (1).

[2] The recommendation is attached hereto marked Annexure (A) for ease of reference and is to be read together with this determination.

[3] The respondent's reasons for not accepting the recommendation are dealt with in the paragraphs following here below. Before I deal with the reasons, I note that respondents did not disturb the legal and factual conclusions reached in the recommendation.

B. THE PARTIES

[4] Complainants, Mr Hassan Ally Fakhroodin Tyebally and Mrs Hassan Ally Rabiah Bibi are married to one another and their full details are on record in this Office.

[5] First respondent is Mak Investments and Assurance trading as Nu Era Insurance Brokers CC, a close corporation duly incorporated in terms of South African laws, with its principal place of business at 103 Shannon Drive, Reservoir Hills, Durban, KwaZulu Natal. First respondent is authorised as a financial services provider, (FSP) with licence number 20036. The licence was issued on 15 June 2005 and is still valid. Nu-Era Brokers appears to be the trade name of first respondent and the respondents' stationery is also styled Nu-Era.

[6] Second respondent is Anesh Maharaj, an adult male representative whose address is the same as that of first respondent. Second respondent is noted in the regulator's records as one of the key individuals. Both respondents are collectively referred to in this determination as respondent.

C. RESPONDENT'S REPLY TO THE RECOMMENDATION

[7] The salient features of respondent's reply go as follows:

7.1 Respondent had made an offer to settle both complaints. In his view, the terms proposed were reasonable when one takes into account the current economic conditions. It is common cause that complainants rejected respondent's offer.

7.2 Respondent contends that an acting registrar of CIPRO had signed the prospectus thus, implying that it complied with all the requirements. Respondent states that the FSB[1] is acting *ultra vires* in making the unsubstantiated statements about violations of Notice 459. He further states that he could not have '*guessed*' that mismanagement would occur in Sharemax.

7.3 Respondent adds that in advising complainants, he acted under supervision as an agent of Unlisted Security South Africa (USSA) (Pty) Ltd, trading as FSP Network (Pty), USSA, and the Key Individual was Rinette Goosen. Respondent alleges that Goosen closed her business and then took a position at the FSB. In his view, questions should be directed at her.

7.4 Finally, respondent refers to the section 311 Scheme of Arrangements and suggests that complainants would have been issued debenture certificates and they were provided a date by which Nova Property Holdings Limited, (Nova) would pay their historical capital.

[1] Should be the FAIS Ombud

7.5 Respondent further states that any ruling will be premature as there is a High Court case that is due to be heard on 15 October 2017 in which the FSB and the FAIS Ombud are respondents with 13 others.

D. DETERMINATION

[8] As evidenced in the recommendation, the respondent failed to appropriately advise complainants. Respondent did not dispute that complainants had expressed the need for a product that will guarantee their capital. In spite of this expressed need and respondent's duty to provide advice that is suitable to his clients' circumstances and risk profile (section 8 (1) (a) to (c) of the Code), respondent recommended the Sharemax products which guaranteed neither the capital nor the income.

[9] Notwithstanding the evidence pointing to the high risk involved in the Sharemax products, respondent still argues that the products were not high risk. The remarks are unfortunate.

[10] Respondent fails to see that by the time he presented the prospectus to his clients, the directors were already contravening the law in that money was paid out illegally immediately after payment into the attorney's trust account, firstly to cover commissions and secondly, to advance to the sellers. Thus, complainants' funds were lost at the time of making the investment. Nowhere in his response to the recommendation does respondent deal with such risk. He ignored the red flags demonstrated by the poor governance and the clear message that investors would have no protection. I now deal with the defences raised by respondents:

Respondents acted as representatives of USSA

[11] Respondent states that in rendering financial services to complainant, respondents acted as agents of USSA. The Appeals Board rejected this defence in *Black v Moore*[2] and concluded that:

"In effect a "representative" executes the very same acts as are expected from the provider when operating alone with the exception of when a representative either:

1. acts on behalf of the provider;

2. Subject to the provider concerned taking responsibility for these acts.

Apart from these two (2) qualifications, a representative acts as if it were a provider.

…The provider is directly regulated by the FAIS Act and by the Registrar. But representatives are, apart from being regulated by the FAIS Act, in effect regulated by the overseeing provider rather than by the Registrar. Such provider clearly has a discretion on how precisely to exercise responsibility over a representative but should ensure in the agreements with the representative that the responsibility covers all aspects, including those duties and obligations imposed by the FAIS Act and the Regulations pertaining to them. The fact that the representative "acts on behalf of" the provider also means that in law, the provider may be held accountable for the acts and omissions of his representative and thus should be regarded as a co-respondent in the event of negligence on the part of the representative."

[2] In the Appeal Board of the Financial Services Board, John Alexander Moore and Johnsure Investments CC / Gerald Edward Black, 15 January 2013 at para 59 and 61

The section 311 Scheme of Arrangements

[12] Respondents referred to the section 311 Scheme of Arrangements and speculated that complainants were party to the arrangement. He questions why complainants are seeking payment from him. He further speculates that complainants would have been furnished debenture certificates by Nova coupled with a date for payment of their historical capital. Respondent however does not dispute that complainants have not seen a single cent of their capital. Neither does respondent point to any legally enforceable instrument that guarantees complainants' capital. There can be no doubt that complainants have lost their capital. In any event, the Board in the Siegriest and Bekker appeals (FAIS 00039/11-12/GP1 and FAIS 06661/10-11/ WC 1) ruled that the investors' claims had not been compromised.

E. CAUSATION

[13] It is not sufficient to merely point to the violations of the Code without dealing with the question of whether such violations caused the loss. The recommendation dealt extensively with the risk involved in the product which risks respondent refuses to acknowledge along with the consequences of his conduct.

[14] On the facts of this case, the loss was foreseeable. The following is of importance:

14.1 The violations of Notice 459 alone were sufficient basis for respondent to raise serious questions about investor protection. There is no evidence that he did.

14.2 There is no evidence that respondent had even read the prospectus and this is evident from several of his claims[3].

14.3 The conflicting provisions of the prospectus and the payment of money to entities like Brandberg, all of which do not appear to have aroused any suspicion or questions regarding the protection of investors on the part of respondent.

14.4 The poor governance that is demonstrated by several provisions of the prospectus also does not appear attracted respondent's eyes.

[15] Respondent's conduct breached the very contract he had with the complainants and the Code. In a recent decision of the Appeals Board[4], it was stressed:

'*43….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.*

44. In both instances the breach must be the cause of the loss. We stress this point because the Ombud's reasons give the impression that any breach of the Code makes a provider liable for damages without due regard to this aspect of causation, namely did the failure to comply with the Code cause acceptance of the advice.'

[16] Respondent's failure to appropriately advise complainants caused the loss.

[3] See in this regard the statement about the prospectus being in compliance with Notice 459; the shopping malls that provided security for the investors.

[4] J & G Financial Services Assurance Brokers (Pty) Ltd &O v Dr Robert Ludolf Prigge Case No FAB 8/2016 – para 43 to 44

F. ORDER

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

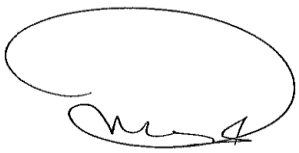
1. The complaint is upheld.

2. The respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the complainants an amount of R300 000 each;

3. Interest on this amount at a rate of 10.25% per annum from the date of determination to date of final payment.

4. Complainants to cede their rights and titles in respect of any further claims in respect of this investment to respondents.

DATED AT PRETORIA ON THIS THE 16th DAY OF OCTOBER 2017.



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