IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 03378/12-13/ KZN 1

In the matter between:

Talita Hough	**Complainant**
and	
Fanie Du Preez Makelaars CC t/a The Meadow Group	**First Respondent**
Stephanus (Fanie) Johannes Du Preez	**Second Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO 37 OF 2002 (the Act)

A. INTRODUCTION

[1] This determination follows a recommendation made in terms of section 27 (5) (c) of the Act on 7 September 2017. Section 27 (5) (c) empowers the Ombud to make a recommendation in order to resolve a complaint speedily by conciliation**.** The recommendation is attached hereto marked Annexure (A) and is to be read together with, and shall form part of, this determination.

[2] The respondent's reasons for not accepting the recommendation are dealt with in the paragraphs following below.

B. THE PARTIES

[3] The complainant is Mrs Talita Hough, an adult female teacher, 40 years of age at the time the financial service was rendered to her. The complainant's full details are on file in this Office.

[4] First respondent is Fanie Du Preez Makelaars CC t/a The Meadow Group, a close corporation duly incorporated in terms of South African law, with registration number (1995/039060/23). The first respondent is an authorised financial services provider, (license number 15422) with its principal place of business noted in the Regulator's records as 73 6th Avenue, Newton Park, Port Elizabeth, 6001. The license has been active since 26 November 2004.

[5] Second respondent is Stephanus (Fanie) Johannes Du Preez, an adult male, key individual and representative of the first respondent. The Regulator's records confirm his address to be the same as that of first respondent. At all times material hereto, second respondent rendered financial services to the complainant.

[6] I refer to the respondents collectively as "respondent". Where appropriate, I specify which respondent is being referred to.

C. RESPONDENT'S REPLY TO THE RECOMMENDATION

[7] The respondent's response begins by criticising the Office for failing to take into account his application in terms of section 27 (3) (c), the material disputes of fact and to establish the true facts pertinent to the complaint. Respondent also accuses the Ombud of either assuming information on behalf of complainant, or

alternatively being in possession of information which has not been made available for him to consider. Based on this, respondent contended that the Ombud was not treating him fairly.

[8] Whilst respondent provides no specifics on the allegations raised above, this Office has taken all of respondent's responses into account. With regard to the application in terms of section 27 (3) (c), the document appears to be cut from previous responses prepared by the same set of attorneys in other matters before this Office.

[9] Respondents do not make any case at all. Their claims are not backed by fact; only unreasonable suspicion and hollow attack. Besides, on a proper interpretation of section 27 (3) (c), as pronounced by the High Court in the *Deeb Risk v FAIS Ombud & Others*[1] matter, the Ombud exercises a discretion when deciding whether or not to find that a matter is better suited for adjudication by a Court of law. The provision on which respondent seeks to rely in demanding that this Office renounce its jurisdiction to dispose of the matter, is one that neither confers a right on respondent to demand that this Office decline its jurisdiction to deal with complaint nor does it confer a duty on this Office to do so[2]. Absent a decision referring the matter to court, the Office retains its jurisdiction. The application in terms of section 27 (3) (c) is accordingly refused.

[1] Gauteng High Court Division, case number 50027/2014

[2] Supra, at paragraph 38.

[10] With regard to the findings in the recommendation, the respondent made bold statements to the effect that, with regard to the Sharemax investment, complainant had not lost her capital due to the section 311 Scheme of Arrangement and suggested that complainant would have been issued debenture certificates and provided with a date by which Nova Property Holdings Limited (Nova) would pay her historical capital. The respondent provides no document to substantiate his claims other than a timetable from Nova as to proposed payment dates. In the absence of such proof, there can be no doubt that complainant's capital is lost and as a result, she has suffered financial prejudice.

[11] Respondent rejected the notion that complainant did not have the capacity to absorb losses and that she required her capital to be guaranteed. In this vein, respondent made reference to documentation signed by complainant in which she confirms the disclosures made and the acceptance thereof. Respondent concluded that such evidence contradicts the conclusions reached in the recommendation.

[12] The prospectus of the investment was provided and explained to complainant, the contents of which make clear reference to the risks involved and the fact that the capital was not guaranteed, stated respondent. Complainant was informed in writing that the investments were capital risk investments which were illiquid and that complainant could lose her entire capital. Complainant was, according to respondent, in a position to make an informed decision.

[13] Respondent reiterated his claims that there were material disputes of fact as the documents referred to clearly spell out the risks inherent in the investment, the lack of liquidity, commission's payable and the structure of the investment. Respondent, as a result, maintains the view that this Office has not treated him fairly.

[14] Respondent disagrees with the conclusion reached by the Ombud that, as a result of the 'Risk Profile Questionnaire' having characterized complainant as a moderate investor, he had automatically assumed the risk associated with Sharemax as moderate. Respondent claims that the Ombud overlooked the fact that the investment must address both the needs and requirements of the investor, and that complainant had wanted Sharemax as a result of the projected capital growth and returns, despite having been fully appraised of the risks.

[15] Respondent debates the meaning behind the phrase 'due diligence', and the manner in which it is applied by the Ombud. Respondent believes that the Ombud's interpretation of due diligence is that of a commercial concept commonly referred to as a 'due diligence exercise'. This interpretation, respondent claims, sees the Ombud placing an obligation on the FSP to conduct a forensic investigation into the affairs of the investment company, which he sees as totally unreasonable and would set the standards above those required of a reasonable FSP. Respondent, in this regard, relies on an affidavit deposed by one Anton Swanepoel (Swanepoel,) and disagrees that the Code imposes such an obligation on a reasonable FSP, and that a due diligence investigation is usually conducted by a specialist trained to conduct such processes.

[16] Respondent, in addition to Swanepoel, referred to the opinions of two experts, namely, Mike Schussler and Derek Cohen and claimed that the Ombud had ignored their opinions. Respondent pointed out that the Ombud had conducted no investigation into the various aspects surrounding the Sale of Business Agreement (SBA) and how interest was generated in respect of investors. I deal with the opinions later in this determination.

D. DETERMINATION

[17] It is concerning to note that, despite overwhelming evidence provided in the recommendation letter, which included a summary of the relevant prospectus pointing to the provisions that conveyed the directors' disregard for the law and their intentions to pay investor funds well before transfer (all of which made a compelling case against recommending this product), the respondent still believes that the standard documents he submitted (including the prospectus) assist his case in stating that he disclosed the risk to his client.

[18] What respondent deliberately avoids answering is what, of his consideration of the product, persuaded him that it was appropriate for complainant's risk profile and financial needs. The only inference that can be drawn from respondent's insistence that the product was appropriate even in the absence of proof to show that it was, is that the respondent had no appreciation of the risks inherent in the investments. Respondent, in my view, was therefore never in a position to adequately consider the appropriateness of the product owing to the above but this did not deter him from advising complainant to invest in the syndication. It stands to reason then that

respondent could not and did not for him to have properly advise complainant. Examples of the risks were adequately set out in the recommendation letter and will not be replicated in this determination. In short, the findings made in the recommendation were left undisturbed. It is worthy to note, once again, that nowhere in his papers has respondent dealt with the violations of the law and the implications for the security of complainant's investment.

The experts' opinions: Mike Schussler and Derek Cohen

[19] The opinions from Mr Schussler and Mr Cohen are dealt with extensively in the Vorster[3] determination. I note once again, that the opinions do not assist the respondent in so far as the question of appropriateness of his advice to complainant is concerned.

Swanepoel's Opinion

[20] The opinion of Swanepoel, which was attached to the response, is dealt with in detail in the Vorster[4] determination paragraph 31 (a) – (m). The opinion adds no value as Swanepoel claims that the Notice did not apply to schemes such as The Villa Ltd and that the promoters of the scheme had to adapt it. The law, however, does not call for the Notice to be adapted; it is to be complied with. Swanepoel also failed to substantiate why the Notice would not apply to The Villa Ltd. Overall, this Office is simply not persuaded by the opinion.

[3] BERNARDUS RUDOLF VORSTER AND MAGDALENA JOSINA VORSTER v FANIE DU PREEZ MAKELAARS CC T/A THE MEADOW GROUP AND STEPHANUS JOHANNES DU PREEZ PARAGRAPHS 19 – 27.

[4] Mr Bernardus Rudolf Vorster & Mrs Magdalena Josina Vorster vs Fanie Du Preez Makelaars CC t/a The Meadow Group & Mr Stephanus (Fanie) Johannes Du Preez.

The section 311 Scheme of Arrangements

[21] Respondents referred to the section 311 Scheme of Arrangements where they state that complainant had been furnished with debenture certificates by Nova coupled with a date for payment of her historical capital. Respondent, however, does not point to any legally enforceable instrument that guarantees complainant's capital. There can be no doubt that complainant has lost her 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.

[22] As evidenced in the recommendation, the respondent failed to appropriately advise complainant. In addition, and despite respondent's claims that this was a single need, no evidence is offered in support of his duty to provide advice that is suitable to the clients' circumstances and risk profile (section 8 (1) (a) to (c) of the Code).

[23] It is important to note that even in his response to the recommendation, respondent still failed to provide adequate records in compliance with section 3 (2) and section 9 of the Code. He argued that the standard documents (which contain no reference to the risks canvassed in the recommendation) had been discussed with the complainant along with the prospectus, and confirm complainant's acceptance that the material issues, including risk, had been disclosed.

[24] It must be appreciated that neither the respondent's record of advice, nor the standard documents deal with the violations of Notice 459, including the implications of such violations for investor security.

[25] Even in his response to the recommendation, respondent still denies that these products were high risk. There can be no doubt that respondent failed to appropriately advise his client.

E. CAUSATION

[26] 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 Sharemax product, risks which respondent still refuses to acknowledge. As a result of respondent's failure to disclose the true nature of the risk involved, complainant accepted respondent's advice and made the investment. Respondent knew that the complainant was reliant on him for advice.

[27] The loss in this case was foreseeable for the following reasons:

27.1 The violations of Notice 459 alone were a sufficient basis for respondent to raise serious questions about investor protection. There is no evidence that he did. Instead respondent makes reference to these very violations as evidence of the soundness of the Sharemax investment.

[28] Respondent's conduct contravened the Code and consequently breached the very contract he had with the complainant[5].

[29] Complainant's loss arose from this respondent's failure to appropriately advise complainant therefore caused the loss.

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

F. THE ORDER

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

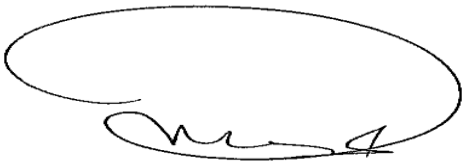
1. The complaint is upheld.

2. The respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the complainant the amount of R10 000;

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

4. Complainant, upon full payment, is to cede his rights, title and any further claims in respect of this investment to respondent.

DATED AT PRETORIA ON THIS THE 22nd DAY OF MARCH 2018.



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OMBUD FOR FINANCIAL SERVICES PROVIDERS