

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

**PRETORIA**

**CASE NO: FAIS 06416/12-13 GP 1**

In the matter between:

**SENAMANE BENEDICT MACHAHA**

**Complainant**

and

**LINDIWE MTASA MAGAJANA**

**1<sup>st</sup> Respondent**

**MAGAJANE TRADING AND PROJECTS CC**

**2<sup>nd</sup> Respondent**

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**DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY  
AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')**

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**A. THE PARTIES**

- [1] The Complainant is Mr Senamane Benedict Machaha an adult male whose full contact details are on file with the Office.
- [2] The 1<sup>st</sup> respondent is Ms Lindiwe Magajana, a member and representative of 2<sup>nd</sup> respondent, residing at 26 Princeps Crescent, Garsfontein, Pretoria.
- [3] The 2<sup>nd</sup> respondent is Magajana Trading and Projects CC, a close corporation with registration number 2008/237769/23; its registered address being 26

Princeps Crescent, Garsfontein, Pretoria. The 1<sup>st</sup> respondent at all material times rendered financial advice to complainant on behalf of 2<sup>nd</sup> respondent.

- [4] First respondent was the sole member and principal guiding the activities of the 2<sup>nd</sup> respondent. I henceforth refer to them jointly as respondent.

## **B. BACKGROUND AND UNDISPUTED FACTS**

- [5] In terms of a written 'money market investment policy' agreement between the complainant and Magajana Financial Services CC dated 2<sup>nd</sup> December 2009, complainant invested R100 000.00. The investment policy was to pay R1 420.00 per month up until and subject to a 60 day notice period upon withdrawal.

- [6] At this point I need to point out that Magajana Financial Services CC and the 2<sup>nd</sup> respondent are one and the same entity, as revealed by the registration number on the policy agreement, namely 'Reg 237769/23' which matches the number issued to the 2<sup>nd</sup> respondent by the Registrar of Close Corporations.

- [7] Magajana Financial Services CC was an authorised financial services provider with license number 38060, which license was withdrawn by the Financial Services Board on the 12<sup>th</sup> January 2012 for non-submission of financial statements and compliance reports.

- [8] The December 2009 agreement referred to in para 5 above amalgamated an initial investment of R50 000.00 which was concluded on the 27<sup>th</sup> May 2009 and a further R50 000.00 on 2<sup>nd</sup> December 2009, totalling R100 000.00.

- [9] Whilst some payments were met; to date calls for the remaining balance of R80 000.00 remain outstanding, in consequence whereof the complainant

submitted a complaint to the Office requesting a refund of the R80 000.00 plus interest thereon.

[10] Attached to the complaint, alongside the May and December 2009 agreements, was a copy of an affidavit attested to by the 1<sup>st</sup> respondent before a member of the South African Police Services on the 12<sup>th</sup> July 2012. In the affidavit the 1<sup>st</sup> respondent stated that she would pay the complainant the sum of R35 000.00 on the 27<sup>th</sup> July 2012 with the remaining balance of R45 000.00 to be paid by the end of the same year. No payments were made.

[11] The complaint along with the aforementioned attachments were submitted to the respondents; the 1<sup>st</sup> respondent in turn acknowledged receipt thereof and in an e-mail to this Office on the 29<sup>th</sup> November 2012, apologised for the delay in settling the complainant and promised to settle it in full plus outstanding annuities by 20<sup>th</sup> December 2012.

[12] Nothing came of this further assurance and upon further prompting 1<sup>st</sup> respondent again apologised for the delay and requested that she be given until the 11<sup>th</sup> March 2013, which date was likewise not met.

[13] The Respondent later contended that she had made payments into complainant's bank account, as well as those of his wife and daughter. First Respondent was however unable to produce proof to support her assertions, which complainant denies.

### **C. DETERMINATION**

[14] That monies are outstanding is not in dispute; the sole issue in contention being

that 1<sup>st</sup> Respondent contends that she had made some payments towards settling the debt; yet and despite several opportunities afforded by the Office she is yet to substantiate her averments.

[15] I therefore have no option but to accept that the amount of R80 000.00 as laid out in the complaint remains outstanding.

[16] That in contracting with complainant, respondent did so in the capacity as an authorised financial services provider is not in dispute. As already mentioned, the 'policy' agreement containing the relevant FSP license number 8060 is headed Magajana Financial Services CC.

[17] As described in the agreement I am satisfied that complainant understood that he was placing his monies in what he understood to be a 'money market investment policy'.

[18] Complainant had retired and the monies were part of his savings, meant to see him through this phase of his life; therefore they could not be recklessly invested.

[19] Accordingly I would have expected respondent as an authorised financial services provider to have taken cognisance of this fact and to have applied the necessary due skill care and diligence appropriate to the circumstances.

[20] On the contrary one finds no evidence as to exactly where or how complainant's funds were actually invested if at all. One thing is clear, they were not securely invested. In fact all indications at this stage are that the funds may have landed directly with 1<sup>st</sup> respondent.

[21] This investment in no way meets even the most basic requirements in terms of the rendering of financial advice and it is not at all surprising that respondent's license was withdrawn by the Financial Service Board.

[22] Practically every single section of the General Code of Conduct for Authorised Financial Service Providers ('the Code') appears to have been violated, to name but a few:

22.1. Section 2 thereof requires that 'a provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry. In making this investment respondent could not have had complainant's interests at heart or she would have placed the funds with a reputable authorised FSP with proper delineation and protection of investors' funds.

22.2. Section 3(1) (a) (iii) requires that representations to the client must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed knowledge of the client. It is self-evident that complainant could never have been informed about the risk he was taking in investing with respondent for had he been so aware he would have probably taken his business elsewhere.

22.3. Section 3.(1) (vii) requires disclosure of any fees, remuneration or monetary obligations, yet no mention at all is made in the agreement as to what fees would be charged by the respondent.

22.4. Section 8 of the Code, which pertains to suitability of the advice requires,

*inter alia*, that the provider identify the product or products that will be appropriate to the client's risk profile and financial needs. These were retirement funds and required particular care, yet it is clear that no attempt was made to identify a suitable product.

22.5. Likewise and despite the requirements of section 9 of the Code, no record of advice was furnished to complainant.

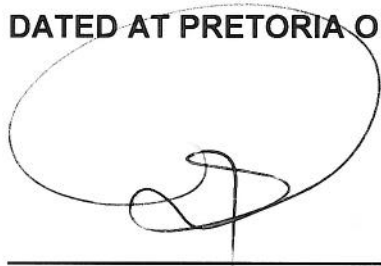
[23] There is clear and direct link between the failure to heed the requirements of the FAIS Act and the loss of complainant's funds.

#### **D. ORDER**

[24] Accordingly the following order is made:

1. For all the reasons set out in this determination it is necessary that I hold both Respondents liable jointly and severally, the one paying the other to be absolved.
2. The Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to complainant the amount of R80 000.00.
3. Interest on the aforesaid amount at the rate of 15.5%, per annum seven (7) days from the date of this order to date of final payment.

**DATED AT PRETORIA ON THIS THE 14<sup>th</sup> DAY OF APRIL 2014**



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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**