IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

HELD IN PRETORIA

CASE NO: FOC 914/05/GP/(1)

In the matter between:

MICHAEL DENMAN MACKRORY **Complainant**

and

MARIUS NAUDE **Respondent**

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

INTRODUCTION

[1] This case revolves around investments made by Complainant in an entity known generally as Leaderguard. There have been many other investors who invested in Leaderguard and who lost millions of rand in the process. This Office is seized with a number of complaints relating to the financial service rendered in the course of the Leaderguard investments. There will be determinations that will be made in the course of time on these various cases. This is the first of such determinations.

In order to properly understand the background to this and the various other cases that this Office will pronounce upon it is important, as a first step that the story behind Leaderguard is made known. Of course, as will become evident just about everything that was told about Leaderguard was wrong and many investors were misled by what can be described as nothing more that a series of deceits. These deceits, emanating from those in control of the Leaderguard group of companies travelled through the distribution channels and eventually to the investors.

THE LEADERGUARD GROUP OF COMPANIES

[2] Information circulated to the public and intermediaries involved in marketing Leaderguard merely referred to three entities, namely, Leaderguard Securities, ('LS'); Hamilton Solutions, ('HS'); and Leaderguard Spot Forex, ('LSF'). Not much was said of other Leaderguard companies which formed part of the Leaderguard group. Companies like Leaderguard Limited ('LL'); Leaderguard Worldwide (Pty) Ltd; Leaderguard Asset Management; Leaderguard Properties Investments (Pty) Ltd; and Leaderguard Game Farm (Pty) Ltd were never mentioned yet they formed part of the group.

LEADERGUARD SECURITIES ('LS')

[3] Leaderguard Securities (Pty) Ltd, ('LS') was a company registered and incorporated in terms of the laws of the Republic of South Africa. The Company's registered address at the time was 1531 Waltham Avenue, Hertford Village, Dainfern, Johannesburg, although it ran its operations in Pinmill Farm, Sandton.

[4] LS was placed under liquidation following an urgent application to the Transvaal Provincial Division of the High Court on 24th March 2005 at the instance of its financial director, one Maria Jacoba Fryer, ('Fryer'). In Fryer's affidavit she states that LS had three directors. The directors were Maria Jacoba Fryer, the financial director, one Hermanus Stephanus Pretorius and a Jacobus Venter, also known as Basie Venter.

[5] Juan Venter and Renso du Plessis, once directors of the now defunct forex investment company, Prozet, which robbed investors of millions of rand, were at one stage also directors of LS. They resigned as directors of LS during 2001. It is believed they resigned due to reputational damage

following the collapse of Prozet. The South African Police Services are still busy with the investigations into Prozet.

[6] According to Fryer's affidavit, the shareholders of LS at the time were one Gavin Bagley and Heine Venter both of whom owned 10% of the shares in LS. The other two shareholders were the Steven du Plessis Trust represented by Steven du Plessis and Jacobus Venter. The latter two shareholders owned between them 90% of the shares.

[7] The main purpose of LS was to exclusively market the investment products of Leaderguard Spot Forex ('LSF') a company registered and incorporated in Mauritius in 2003.

[8] The affidavit further states that LS focused on recruiting investors in various ways for foreign investment institutions in overseas markets since 2001. Since the start of LSF in 2003, LS had focused exclusively on recruiting investors for LSF. LSF's major business objective was to enter into merchandising agreements with currency brokers in England and Denmark using local investor funds. Recruited investors would give LSF a mandate towards this end. LSF would, in terms of the mandate with the investor, be entitled to a fee based on each position taken by the company in the currency market on behalf of the investor. LS would in turn earn a fixed commission paid to it by LSF.

[9] LS recruited investors by making use of consultants who were employed on a full time basis by it as well as brokers to whom it referred to as agents. Consultants were responsible for the recruitment of agents. The agents together with the consultants marketed LSF's products. Consultants earned a standard commission of 6% per annum of the total fund invested by any particular client. The same commission rate of 6% per annum was applicable to agents. It is said that the rate of commission paid by LS was higher than that paid by other financial institutions.

[10] A large number of these agents were brokers, some of whom had been licensed by the Financial Services Board ('FSB') in their own right in terms of the FAIS Act, although a much smaller number had been licensed for Forex Investment Business.

[11] LS derived income solely from commission paid by LSF at the rate of 1.85 % per month of the total funds under the control of LSF. From the commission received by LS, consultants' and agents' commission would be paid and the balance would be LS's gross monthly income.

LEADERGUARD SPOT FOREX ('LSF')

[12] LSF was a private company incorporated on 28 January 2003 in Mauritius. It was initially registered as a protected cell company. A protected cell company or PCC can be thought of as being a standard limited company that has been separated into legally distinct portions or cells. The revenue streams, assets and liabilities of each cell are kept separate from all other cells. Each cell has its own separate portion of the PCC's overall share capital, allowing shareholders to maintain sole ownership of an entire cell while owning only a small proportion of the PCC as a whole. In October 2003, LSF ceased to be a protected cell company when Catergory One Global Business License status was granted to it by the Financial Services Commission, ('FSC'), Mauritius.

[13] The directors of LSF were Jacobus Venter (also a director of LS); Hermanus Stefanus Pretorius, (also a director of LS), one Warren Luyt, ('Luyt') and one Amanda Ramburuth. Luyt was appointed as director of LSF due to his position as managing director of Federal Trust, (Mauritius) Ltd, an administrator to LSF.

[14] LSF relied on LS, its marketing arm for the recruitment of investors. The relationship between LS, LSF and HS was never made clear to brokers, let alone to investors. LS had a 20 % shareholding in HS. HS owned 10%

of Leaderguard Limited, LSF and LS. HS marketed Leaderguard products under a 'white label' agreement. White label investments are products / funds registered under the license of a product supplier, which are named and branded under the name of some third party. Thus, HS played a key role in the growth of the Leaderguard group.

Jacobus Venter, Hermanus Stefanus Pretorius, Juan Venter, and Renso du Plessis were the principal members of the Leaderguard group of companies.

[15] Between LS and LSF there existed an agency agreement in terms of which LS had to recruit investors for LSF. Flowing from the agreement, LSF would pay commission to LS at the rate of 1,85 % per month based on the total investment placed with LSF. This commission would be payable over the life of the investment based on the initial amount placed regardless of whether the amount had reduced or not. This commission model placed enormous financial pressure on LSF hence churning became inescapable in the pursuit of profit. Churning means excessive trading in a client's account by a forex investment intermediary to maximise the commission or revenue of the intermediary, regardless of the client's interests. As losses were incurred during trading, more and more of investors' funds were required to be traded to meet the commission obligations. The evidence of Renso du Plessis, the risk

manager of LSF revealed that at times he had to trade up to twenty times a day. The industry norm is trading about four times a day. If profits were made, less trading was necessary to fulfil the 1.85 % monthly obligation to LS. This is not because LS was a different person to LSF. It must be borne in mind that whilst the corporate persona were different, essentially the commission payable was payable to the principal members.

THE NATURE OF THE INVESTMENTS OFFERED BY 'LSF'

[16] The nature of the investment is described in the affidavit of Fryer as very risky and unpredictable due to the instability in foreign currencies. Indeed, the Disclosure Notice which formed part of the Leaderguard Application Form sets out in detail the risk inherent in the product. The Form is titled "Leaderguard Spot Forex, Foreign Exchange Risk Disclosure Notice'. The opening paragraph in this form is in the form of a warning which reads:

'*You should not deal in foreign exchange derivatives unless you understand the nature of the contract you are entering into and the extent of your exposure to risk. You should also be satisfied that the contract is suitable for you in the light of your circumstances and financial position.*'

Under the general terms and conditions the following statement is made:

'*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.'*

[17] In an interview held in May 2005 with Moneyweb, one Hilton McCann, ('McCann') Deputy CEO of the Financial Services Commission in Mauritius described the product as one involving very high risk. McCann went on to state that the product would need someone with a fairly high appetite for risk. In his view, trading in foreign currency is very tricky business. Losses could be incurred very easily and very simply.

HOW THE LEADERGUARD GROUP OPERATED

[18] It is necessary to deal with the *modus operandi* of the Leaderguard group. I am mindful that many of the events would have taken place outside the jurisdiction of this Office as they occurred prior to the 30th September 2004. It is nevertheless relevant to refer to the information. The Leaderguard group used four methodologies.

Methodology 1:

During the year 2001 investments were marketed by L S. Investors' funds were placed with forex services providers offshore and traded under the supervision of Renso du Plessis who was then located in South Africa.

Methodology 2:

From late 2001 until July 2003, investments products were still marketed by LS. However investors' funds were transferred from their individual bank accounts to accounts in the name of either Jacobus Venter, (Basie Venter) or Hendrik Lourens van der Westhuizen, (van der Westhuizen). These two individuals had accounts held at Investec Bank in Mauritius. From these accounts, investors' funds would be transferred to an entity known as GNI in the name of Leaderguard Limited, ('LL') or Hamilton Worldwide Solutions,('HWWS'); both companies falling within the Leaderguard group of companies.

Methodology 3

L S continued to market the investment products; however Basie Venter's and Van der Westhuizen's accounts were replaced by bank accounts in the name of LL and, ('HWWS'). LL was a consultancy services company which was not licensed to accept funds from members of the public. The shareholder of LL was Fidei International Limited which held the shares on

behalf of Basie Venter. Investors' funds were transferred from their individual bank accounts into either LL's or HWWS's bank accounts. Thereafter funds would be transferred to GNI in the name of either of the two entities. This methodology was still being used during or about March 2004. It is apposite to mention that whilst this methodology endured, the Leaderguard group was in trouble with the FSC for its methods of operation. On the 2nd of July 2003, the FSC wrote to Mr Stefan Pretorius one of the directors of LL. An extract from this letter reads:

'*1. We note your agreement "not to conduct any transactions through LL's bank accounts"… To be precise, our requirement was that LL should not take on any new business if that business was not covered by LL's licence. By definition, this means that LL's bank accounts should not be used to process money that belongs to clients. Please confirm that FSC's precise requirement has been satisfied.*

2. We note the need to repay $277609.55 to clients. We will not prevent these repayments. Similarly, we will not prevent repayment of the balance of money belonging to clients. Please indicate when (if appropriate) any money belonging to clients that has to be processed through LL's account is due to be repaid. If there is no fixed repayment date, please indicate when it is likely that all client (sic) money will be repaid. Unless there is some exceptional reason for not doing so (in which case please revert),

FSC would like LL to unwind the licensable business undertaken by LL without a licence as soon as possible – but within three months at latest. Unless the repayments can be made very quickly – that is to say within 4 weeks, we will require monthly progress reports indicating the amounts repaid within the month, the balance of repayments remaining and the number of clients involved. These reports should be submitted by the 7th of the following month in which transactions are done…… Lastly, please let us have a summary of the current status of Hamilton Worldwide Solution (Mauritius) Ltd which we understand is under your control and in similar situation as LL.'

A letter written by Stefan Pretorius, a director of LL on 26th February 2004, indicates that an amount of $8 606 810.00 was paid to all clients from the account of LL. A further $ 4 444 929.56 represented the amount paid to all clients from HWWS. The letter further undertook to apply for all the LL and HWWS's accounts to be closed as soon as it was possible and a further requirement to wind up both companies. It would later be confirmed in proceedings brought by the FSC against three of the principal members that in fact funds were paid back to a small number of investors and certainly not as stated by Stefan Pretorius. The aim of the letter, was to mislead the FSC to believe that its requirements had been complied with.

Methodology 4

During late 2003, when the FSC granted LSF a Catergory One Global Business License, it utilised Saxo Bank as the clearing house. LS remained the marketing arm within the group. This set up would endure until the collapse of the scheme in early 2005.

THE AGREEMENT BETWEEEN THE PRINCIPAL MEMBERS

[19] Although falsified statements to investors were sent from as early as February 2004 following losses suffered by the group, it was confirmed that during August 2004, a meeting was held between the principal members of the Leaderguard group, namely, Juan Venter, ('Juan'); Renso du Plessis, ('du Plessis'); Jacobus Venter, ('Basie') and Stefanus Pretorius, ('Stefanus') in Mauritius. In this meeting it was agreed between the members that investors in South Africa would be furnished with statements with incorrect and misleading information. It would later emerge that du Plessis was responsible for calculating the performance figures on a monthly basis. The figures would be sent to all the principal members who would agree upon them and only then would the figures be disclosed to the investors. Performance figures were overstated and falsified in order to cover up the losses. In that meeting it was also agreed

that when an investor withdrew his or her funds, the funds held in the commission account of the group would be used to top up whatever shortfall occurred.

THE FALL OF 'LSF' AND 'LS'

[20] It is not clear when exactly LSF's problems arose. From the documents available to this Office, indications are that as early as February 2004, LSF had financial problems allegedly arising from losses in trading. When one analyses the sustainability of the scheme in totality, it would have been clear to whoever had designed it that it would not have been sustainable. At least the principal members were aware that continued trading not withstanding the significant losses was sufficient evidence that the scheme would eventually collapse or be wound up.

[21] For the investors, information about LSF's financial problems came to light during or about March 2005, when LS filed for liquidation. According to Fryer's affidavit commission for the months of December 2004, January 2005 and February 2005 was delayed. This resulted in a deficit of $200 000 dollars for LS. The truth however is that LS knew that LSF had solvency problems as early as February 2004. It nonetheless continued collecting funds from investors aided by consultants and brokers for an

entity which was not financially sound. Clearly this would not only have been in contravention of the FAIS Act in particular the Code of Conduct for Authorised Financial Services Providers and their representatives involved in Forex, but in contravention of the Companies Act 61 of 1973, as amended, by virtue of the entity trading recklessly whilst under insolvent circumstances.

[22] On the surface, intermediaries in South Africa continued to market LSF products unaware of the dilemma facing the institution. While LSF was still contemplating whether it should reveal its insolvent status around October 2004, intermediaries continued to market its investment product in earnest. It would appear that the delay in commission for the months of December 2004 and January and February 2005 did not send any signal to them. As a result of the collapse of LSF, an estimated R300 million from about 1600 investors from South Africa, Botswana and Swaziland had been lost.

[23] On the 28th April 2005, a rule *nisi* was issued which, amongst other things placed LS in provisional liquidation. On the 19th July 2005 the rule was confirmed.

THE POSITION OF 'LS' WITH THE FINANCIAL SERVICES BOARD, ('the FSB')

[24] With the advent of the FAIS Act, business entities or individuals who are involved in the rendering of financial services had to be licensed to do so. Such entities were given until 30th September 2004 to obtain such licences or face prosecution. However, those entities or individuals that had submitted their applications on or before 30th September 2004 but had not received their licences had the benefit of carrying on operations in terms of an exemption contained in Board Notice No. 94 of 23rd September 2004. LS was one such entity that qualified for this exemption.

[25] Before the liquidation of LS and whilst the rule nisi was still operative, the FSB announced during May 2005 that the application made by LS for a license in terms of the FAIS Act had been declined. Regrettably, by this time, millions of rand of investor's monies had already been lost.

THE FATE OF LSF

[26] On 9th September 2005 the FSC in Mauritius revoked LSF's license. A notice to this effect was posted on FSC's website. On 5th September 2005, the Intermediate Court of Mauritius convicted LSF, represented by

Hermanus Stefanus Pretorius and Jacobus Venter for, amongst other offences, failing to comply with the directives of the FSC. The Court also sentenced Renso Du Plessis for, amongst other offences, the offence of falsification of documents.

THE CALCULATED INFORMATION FURNISHED TO THE PUBLIC

[27] The public was fed with claims of performance which when followed up had no basis. The performance data, when examined on its own gave away the secret behind LS and LSF. Performance dated back from 1997 when LS had only been in operation since 2001 and LSF since 2003. This misrepresentation was made with the purpose of creating a performance history for LSF. On this basis alone, one immediately realises that a false picture was being painted to the public. It is unfortunate that this was not picked up by the intermediaries involved in marketing the investment products.

[28] Investors were told that their funds would be kept in segregated accounts. Evidence found upon inspection of records indicated that the funds were pooled and that the segregated accounts were essentially dormant at all times. It is unclear whether any investor would have been aware of how LS had been remunerated. One thing is clear however and that is that if

brokers did not know, it would have been impossible for the investors to know.

[29] The risk in the product was to a large extent underplayed whereas the fine print in the forms painted a totally different picture. Investors were informed of a so called 20 % exposure to risk and 80 % guarantee of their capital. This is how many brokers explained the risk to their clients. In fact the product carried no guarantee whatsoever regardless of what investment option one chose.

[30] Investors were told that should the 20% trade negatively, trading would stop and that they would be informed by LSF. This however, did not happen.

[31] Brokers and investors alike were not aware that the moving spirits behind many of the Leaderguard group of companies were essentially the same as those who masterminded Prozet. The picture that emerges is that of fraud on a massive scale perpetrated on investors through brokers who naively believed that all was well.

What is set out above is the general background to the various complaints that this Office is seized with. It is against this background that I turn to the particular facts of this case.

THE PARTIES

[32] The Complainant is Michael Denman Mackrory, a pensioner who resides at 28 Wonderboom Mews, 175 Elizabet Street, Wonderboom.

[33] The Respondent is Marius Naude, an authorised financial services provider in terms of the FAIS Act whose business address is Plot 4 Phiana, Kameeldrift West, 0068.

THE COMPLAINT

[34] The Complainant is seeking to recover from the Respondent, his broker of some 8 years the sum of R231 000 plus interest which he invested in August 2004 plus a further R60 000 with interest which he invested in February 2005. These amounts had been invested with LSF which had been brought to the attention of the Complainant and came highly recommended by the Respondent. The allegation is that the Respondent, by recommending a financial product without accurately explaining the risk attached to it with an institution with no financial soundness acted in violation of the duty placed on providers to act with due care, skill, and diligence as required in terms of the FAIS Act when rendering a financial service

THE UNCONTESTED FACTS OF THIS CASE

[35] The Complainant had an investment in a Sage Life Offshore fund. He advised the Respondent that he wished to invest in another investment, due to the poor performance of the Sage Life investment. The Respondent recommended an investment offered by an entity which he referred to as Leaderguard. This is how the investment would be referred to between the two parties throughout their dealings in this regard. He spoke to Complainant about an income option. The option according to the Respondent would expose only 20 % of the Complainant's capital to risk whilst the 80% would be protected. The Complainant was told income would be payable immediately and that there was no requisite period for which the investment should remain with Leaderguard.

[36] As part of their discussion, the Respondent advised the Complainant that he was attached to a company called HS. He did not dwell on the nature of his relationship with that entity.

[37] Based on the Respondent's advice, the Complainant settled for the option where 80 % of the capital invested was guaranteed whilst 20% was exposed to some risk. An amount of $38 330.34 which translates to about

R231 000 was thus invested in August 2004 with Leaderguard. In February 2005, yet another investment in the amount of R60 000 was made by the Complainant in Leaderguard.

[38] In initiating the first investment, a meeting was scheduled in August 2004 with one Heine Venter, ('Venter'), who was introduced to the Complainant by the Respondent as a Leaderguard consultant. Arrangements to meet with Venter at a coffee shop in Jacaranda, Pretoria were made by the Respondent. The Complainant signed some documents in the presence of Venter and the Respondent. Thus the first investment was made. In February 2005, the Complainant met with Venter alone in the same coffee shop in Jacaranda. Arrangements to meet had already been made by the Respondent. Indeed, the Respondent was to attend this meeting as well, but for some reason he called Complainant and cancelled at the last minute. The Complainant's understanding of the meeting with Venter was that Venter was to assist in completing the paper work. During the meeting with Venter and after completing and signing the necessary documents, Complainant had occasion to talk casually to Venter about the investment. During the conversation, he noted some differences regarding the 20 % and 80% guarantee.

[39] Complainant sought to clarify the apparent discrepancy. He enquired of the Respondent during one of their meetings about the discrepancy

between the two sets of information regarding the limits to risk. Complainant avers that Respondent, somewhat dismissively, advised that if he needed clarity, he should have discussed the matter with Venter. At that stage however, Complainant had already signed the papers. Upon further probing by the Complainant about other matters relating to Leaderguard, it became apparent to the Complainant that the Respondent knew very little about Leaderguard, notwithstanding his earlier praise of the investment.

[40] During August 2004, Complainant received letters and statements from LS and LSF regarding his investments. The letters are variously in LSF's, LS's and HWWS's letterheads. The letters were all signed by Basie Venter. Notable from the performance figures is performance dating to 1997, despite the fact that both Leaderguard Securities and Leaderguard Spot Forex had not come into existence at that stage.

[41] The Complainant alleges that no income was received in respect of the investment made in February 2005. However in respect of the August 2004 investment, he received income as promised until February 2005 when all income ceased.

NO CONTRACT RECEIVED FOR BOTH INVESTMENTS

[42] Complainant did not receive any contract for the investments. All he received were letters of update from either LS, or LSF and sometimes HWWS regarding performance. When Complainant enquired of the Respondent regarding the contracts for the investments, he was advised that they would eventually be sent to him. This did not happen.

THE NEWSPAPER REPORT

[43] On the 4th April 2005, barely two months after the last investment, whilst reading the Beeld, an Afrikaans daily newspaper circulating locally, the Complainant learnt about financial problems facing LS and LSF. The newspaper article stated that the problems with LSF began sometime in December 2004. Upon making enquiry from the Respondent about the matter, Complainant was advised that LS knew nothing about LSF. This infuriarated the Complainant as modern technology could make it possible for the two companies to communicate with each other.

RELIEF

[44] It is the Complainant's case that owing to the Respondent's failure to exercise the degree of care, skill and diligence which he is entitled to expect of someone in the position of the Respondent, he has lost his total investment of R291 000.

[45] He accordingly seeks payment from the Respondent of the full amount of his investment together with interest.

THE RESPONSE

[46] On 1st September 2005 this Office referred the complaint to the Respondent to enable him to address the matter directly with the Complainant as required by Rule 6 (b) of the Rules on Proceedings of this Office. The Complainant confirmed that the Respondent had not contacted him since May 2005. On 17th October 2005, a notice in terms of section 27 (4) of the FAIS Act was sent to the Respondent, advising him that the matter was proceeding to investigation. In the same letter the Respondent was asked for his version of events together with all documents in his possession which would support his case.

[47] On 26th October 2005, a two paragraph letter was received from the Respondent. It states:

'*As already mentioned to you; I'm not in possession of any documentation regarding the investment made by MD Mackrory with Leaderguard.*

Mr Hein Venter of Leaderguard advised the client that he also completed all the documentation. These documents are in the possession of Mr Venter.' The Respondent had sent an earlier letter which was only found later in response to this matter. The response is the same.

JURISDICTION

[48] This Office became empowered to accept complaints as defined in the FAIS Act as of 30th September 2004. This means that complaints relating to a financial service rendered prior to this date cannot be entertained by this Office. This determination therefore is only in respect of the investment made on 25th February 2005 in the amount of R60 000.

THE ISSUES:

[49] The issues in this case are:-

[49.1] Whether the Respondent rendered the financial service herein negligently and/ or in a manner which is not compliant with the FAIS Act;

[49.2] If it is found that the Respondent did render the financial service negligently/ and or failed to comply with the FAIS Act, whether such failure caused the Complainant's loss;

[49.3] Whether the involvement of Hein Venter in the completion of documents for the investment would influence the Respondent's liability; and

[49.4] The quantum of damages

DETERMINATION AND REASONS THEREFORE

CERTAIN DISPUTES OF FACT

[50] The Respondent has denied having advising Complainant. His defence is simply that he was not the one who advised Complainant but that it was Hein Venter. This defence is, however fraught with improbabilities and is not borne out by the facts:-

[50.1] Respondent has not challenged the fact that he is the one who has been providing financial advice and servicing the Complainant for a period of approximately eight years prior to these transactions;

[50.2] Respondent placed the investment with Sage Life from which the Complainant withdrew the first amount which was later placed with Leaderguard.

[50.3] Respondent failed to challenge specifically the allegation that the Complainant spoke to him about his intentions to terminate his investment with Sage due to poor performance and that he directed the Complainant to invest with Leaderguard

[50.4] It is not in dispute that Respondent brought the product to the attention of the Complainant. He not only did that, he recommended the product by pointing the Complainant to the positive aspects of the product without explaining the risks involved. No where does the Respondent deny his explanations of 20 % and 80% regarding risk.

[50.5] Respondent does not deny that he mentioned that Leaderguard had been generating good returns and that Complainant's capital would be secure.

[50.6] Respondent explained and recommended the income option to the Complainant. In the result, the Complainant chose the plan.

[50.7] Respondent has not challenged the fact that he introduced the Complainant to Venter. However, this was after the Complainant had made up his mind based on Respondent's recommendation of the product.

[50.8] When Respondent received a call to attend a meeting into the plight of Leaderguard, he called the Complainant to inform him of this. If he did not regard himself as having any relationship with the Complainant, he would not have bothered to call. It was because of the client broker relationship that he called the Complainant.

[50.9] Respondent's name is set out in all the statements Complainant received as the agent.

[50.10] From all of this the conclusion is clear that it was Respondent's conduct in providing advice to invest in LSF which made the Complainant to invest with LSF. Thus Respondent's argument that he did not provide advice cannot be sustained.

Whether the Respondent failed in his duty to render the financial service with due skill, care and diligence.

[51] The General Code for Authorised Financial Services Provider and Representatives ('General Code') provides as the general duty that providers must, when rendering a financial service do so with due skill, care and diligence, in the interests of clients and integrity of the financial services industry. A similar provision exists in the Forex Code for Forex investment advisors.

[52] The Respondent in this matter was advising his client, the Complainant about an investment. There is no doubt that the Respondent in providing such advice had to comply with the FAIS Act. He did not do so. He could not have done so as he is not licensed to provide advice on the product which he eventually recommended. He ought not to have advised on this product at all. In essence, the Respondent had no skill to advise on a forex investment product. The basic rule is stated in Joubert (ed) The Law of South Africa First Reissue vol 8.1 para 94 which was quoted with approval in Durr v Absa Bank Limited and Another 1997 3 SA 448 as follows:

'*The reasonable person has no special skills and lack of skill or knowledge is not per se negligence. It is however negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity*.'

[53] Given this rule of law and given the limitations of his license, the Respondent should have not have advised the Complainant on this financial product at all.

[54] The dictum in Randeree and Others v W H Dixon & Associates and Another 1983 (2) SA 1 (A) at 4E is relevant:

'*If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in like circumstances*.'

[55] The fact that the Respondent was not licensed to give advice on forex investment products should have militated against him advising on the product. That would have been caution enough on his part. Given the limitations on his licence, the Respondent would not have been aware of what the law expects of a person rendering financial services in this area. I do not even deem it necessary to measure the Respondent's conduct to

what would have been expected of him in term of the Forex Code. I conclude that the Respondent's conduct was culpable simply by virtue of the fact that he rendered a financial service in an area where he was not legally authorised to do so.

Did the Respondent's failure to comply with the FAIS Act cause the Complainant's loss.

[56] The operations of the companies within the Leaderguard Group were tainted with fraudulent acts and other acts which although not strictly fraudulent, are not permissible in law. There is evidence that at some stage funds were transferred from the Investec bank to individual accounts in the names of some of the principal members. The latter acted as clearing houses. Further evidence points to the principal members acting in a concerted fashion in falsifying performance figures to investors. Both entities LS and LSF's members have a questionable track record, based on their masterminding of Prozet. The higher than normal commission paid to the intermediaries was also an indicator that should have aroused some suspicion on the part of the Respondent. It is clear that losses suffered by the Complainant are as a direct result of the Respondent's poor judgment of the entities involved in the investment, coupled with the

fact that he was not authorised to render a financial service in connection with this type of financial product.

Whether the involvement of Hein Venter in the completion of the investment in any way influences the liability of the Respondent

[57] It is not in dispute that the Respondent persuaded the Complainant to invest with Leaderguard. Effectively he saw an opportunity to talk him into investing with Leaderguard the moment he complained about the returns on the Sage investment. He thereafter arranged a meeting with Hein Venter. The act of advising the Complainant had been covered by the Respondent already. Without even referring to Venter, the Respondent on his own would have to demonstrate to this office as to what need of the Complainant did he see fit to be addressed by means of a forex investment product; what other products were considered; why the forex investment product was considered in his opinion to be appropriate to address the need. A record would have had to be provided to the Complainant, which in this case had not been. It is clear that the Respondent would not have been able to justify his conduct in the light of the requirements of Forex Code or even the General Code.

[58] Nowhere in his statement does the Respondent deny persuading the Complainant to invest in Leaderguard. He does not deny that he explained to the Complainant about the options involved in Leaderguard and the fact that was associated with HS. It was also important that the Respondent be present in the first meeting to establish the link. The fact that he was not present at the second meeting makes no difference as he had already established the link.

It is clear that the Respondent knew that he owed some responsibility to the Complainant regarding the investments and this is supported by the fact that when he was summoned to that urgent meeting relating to the collapse of Leaderguard, he telephoned the Complainant to inform him that something was wrong. Although he failed to give the full feedback, that sense of responsibility which he knew he owed to the Complainant clearly manifested itself when he made that call. Thus, the involvement of Hein Venter cannot affect the Respondent's liability. It was Respondent who rendered the financial service and it is he who must take responsibility for rendering that service without due skill and diligence and most importantly without being licensed to do so.

The quantum of damages

[59] It is the Complainant's case that he invested an amount of R 291 000. As stated in the paragraph dealing with jurisdiction, it is only the investment of R60 000 made during February 2005 that this Office can pronounce upon. Before any benefit could be paid out from the investment, LSF was facing liquidation. Proof of the amount invested and acknowledgement by LS and LSF has been furnished. The Complainant has asked for payment of R60 000 plus interest. I am prepared to grant him this relief.

[60] In all the circumstances and based on an assessment of the totality of the evidence, before me, it is clear that it was the Respondent who rendered the financial service. In rendering the financial service, it is clear that the Respondent did not comply with the FAIS and acted without the necessary skill, care and diligence and without being authorised to do so. For all these reasons, the complaint is upheld.

[61] I am fully aware that the FSB is pursuing its own enquiry into Leaderguard. Admittedly the jurisdiction of the FSB is much wider than that given to this Office. It expected that they will be able to probe into matters that this Office may be precluded from investigating. It is hoped that in the process of its own investigation, the FSB will also investigate

the desirability of providers in the position of the Respondent to continue to hold authorisation to render financial services.

ORDER:

The following order is made:-

(a) The Respondent is to pay the Complainant the sum of R60 000;

(b) Respondent is to pay interest on this amount at the rate of 15.5 % from the 24 February 2005 to date of final payment.

(c) The Respondent is to pay the case fee of R1000 plus Vat to this office.

DATED AT PRETORIA ON THIS THE 31st DAY OF MAY2006

CHARLES PILLAI

OMBUD FOR FINANCIAL SERVICES PROVIDER