IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS PRETORIA

Case Number: FOC 1318/08-09/NW/(1)

In the matter between:-

SIMON MADLAZI MASHILOANE **COMPLAINANT**

and

TSHUKUDU INVESTMENT GROUP (PTY) LTD **FIRST RESPONDENT**

SELLO EDWARD MATSEPE **SECOND RESPONDENT**

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

The Parties

[1] The Complainant is Mr S.M. Mashiloane, an adult male presently residing at Stand 2508, Siyabuswa, KwaNdebele.

[2] The First Respondent is Tshukudu Investment Group (Pty) Ltd, a company registered in accordance with the laws of South Africa with registration number 2005 / 037919 / 07 with its registered address as 31 Monument Street, LYTTELTON, 0140. The first respondent is represented herein by its sole director, Mr Sello Edward Matsepe. The first respondent is not licensed as an Authorised Financial Services Provider in terms of the FAIS Act.

[3] The second respondent is Mr Sello Edward Matsepe an adult male businessman of 31 Monument Street, LYTTELTON, 0140. Second respondent is also not authorised in terms of the FAIS Act to render financial services.

The Background

[4] Mr Mashiloane (the complainant) invested an amount of R300 000.00 with the first respondent during February 2006. He was to receive interest at the rate of R9 000.00 per month. The banking account details of the first respondent were provided to the complainant on a letterhead from Tshukudu Investment Group. The amount was paid into that account by the complainant. All interactions with first respondent took place through the second respondent, who has been its active and only director since 24 October 2005 according to the Companies and Intellectual Property Registration Office (CIPRO).

[5] At the end of April 2007 (confirmed later in a letter dated 21 May 2007 addressed to first respondent and marked for the attention of the second respondent) complainant requested that he be refunded the capital and the balance of the interest due.

[6] Complainant says he received the R9 000.00 monthly interest for nine months only. When he enquired why no further interest payments were being made he received a further R1 900.00 in April, 2007 and R2 000.00 in May 2007. He was told by second respondent that this should not be considered as interest payment but a *solatium* for the inconvenience caused to the complainant for the delay in refunding his capital and outstanding interest.

[7] The second respondent apparently made numerous promises to repay the complainant but failed to do so over a protracted period of more than fourteen months.

[8] In what appears to have been the last meeting between the complainant and the second respondent on the 5th of March 2008 the latter informed complainant that he would repay the investment with interest within two weeks. This meeting was confirmed with a signed letter from the second respondent, who once again did not honour his commitment.

[9] Complainant then complained in June 2008 to the Long Term Insurance Ombudsman, who in turn referred the matter to this Office – it being within this Office's jurisdiction.

The relief sought by Complainant

[10] The complainant wishes to recover his money which he invested with the first respondent, together with interest.

Investigation by this Office

[11] At the outset it should be mentioned that as the respondents are both not licensed in terms of the FAIS Act and therefore not authorised to render financial services, this Office has assumed jurisdiction in terms of Rule 4(d) of the Rules framed under the FAIS Act.

[12] The complaint was referred to the first respondent (marked for the attention of the second respondent) with a letter in terms of Rule 6(b) of the Rules on Proceedings of

this Office. In the letter this Office gave the first respondent a period of six weeks to resolve the matter with the complainant. It was also told that if it failed to resolve the complaint it was to furnish this Office with its version of events and complete file of papers relating to the investment in accordance with section 27(4)(a) of the FAIS Act. The matter was not resolved by respondents and neither was this Office furnished with respondents' version of events nor any documentation.

[13] After a telephonic conversation by a case manager of this Office with second respondent on the 19th of November 2008 an e-mail was received from the latter wherein he requested an extension for two weeks in which to resolve the matter by repaying the complainant's money. The extension was granted but to no avail.

[14] From the documentation handed to this Office by complainant it is clear that there were only two documents handed to him by the respondent. The first is a Tshukudu Investment Group letterhead on which the banking account details appear for the money to be transferred to. The second is a signed letter dated 5 March 2008 from the respondent stating that the complainant invested R300 000.00 with him and that he would repay this amount within two weeks to the complainant. On 22 July 2009 complainant received an SMS from the second respondent which said, *"Mr Mashloane (sic) I amworking very hard to refund your money with interest."*

[15] Complainant says he was told by second respondent that the capital would be invested on the Johannesburg Stock Exchange ("JSE"). However, in the e-mail dated 19 November 2008, second respondent says (reproduced as is) *". . . Mr Mashiloane was one the clients I have introduced to the following companies, Sharegate, Tradergate & CFD Management as to minimized the risk."* He then adds, *"I am*

currently working on the finalization of a project, whereby i will be giving a proposal to refund him his money."

[16] Information from CIPRO reveals that Sharegate is registered as a private company and Tradergate as a public company, while CFD Management's correct name is CFD Management Services and is registered as a close corporation.

[17] This Office enquired from the FSB whether any of these entities, including the respondents, were registered as authorised Financial Services Providers. It was informed in an e-mail dated 29 July 2009 from a Ms Jabhile Mbele that:

17.1 FSP No. 25768 Tshukudu Investment Group t/a Trans-Africa Funeral Brokers: *"obtained the FSP number but never lodged a formal application form for approval [of a licence]. The contact person was Mr Sello Matsepe . . . ."*

17.2 FSP No. 27988 Tshkudu Investment Group: *"same information as above."*

17.3 FSP No. 22793 Rabohlala Solutions (Pty) Ltd t/a Sharegate: *"This application is (sic) rejected. The Shareholder and Director is Mr Bouwer . . . ."*

17.4 FSP No. 24898 Sharegate (Pty) Ltd: *"Never lodged a formal application for approval[.] Contact person & details are Mr Pieterson . . . ."*

17.5 FSP No. 26196 Sharegate (Pty) Ltd: *"same as above".*

17.6 Tradergate (No FSP number): *"This licence was withdrawn. The contact person and details are: Mr Halasz . . . ."*

17.7 CFD Management (No FSP number): *"[N]ever lodged a formal application for approval[.] Contact person and details are: Mr Groenewald . . . ."*

[18] The allocated FSP numbers may create the impression that the entities had obtained licences as financial services providers. However, that is not the case. Apparently the FSB would allocate the number to an applicant when the application is initially made. When the licence is approved, it is allocated another number. This has had the (no

doubt unintended) consequences that in at least one instance an applicant falsely announced to a number of brokers that it had obtained a licence as it had been allocated a number, when in fact it was merely an application number.[1]

[19] If, as alleged by complainant, second respondent had informed him that the monies were to be invested on the JSE then clearly, neither of the respondents were authorised to do so.

[20] Second respondent says he "introduced" complainant to Sharegate, Tradergate and CFD Management. However, complainant's dealings were with second respondent only and not the aforementioned entities. If, in fact, second respondent is saying (and it is not clear that he is) that complainant's capital was either invested in these companies or passed on to them for investment, he was not authorised to do that either as neither respondents nor these other entities were authorised FSP's.

[21] It is also evident from the second respondent's response to this Office that the documentation required in terms of the FAIS Act, i.e. financial needs analysis, client advice record and risk analysis was not duly prepared as required by the Code of Conduct for Financial Services Providers ("the Code") framed under the FAIS Act and that there is no record thereof. There is therefore virtually no information available from the respondents about the financial service rendered.

[22] This determination is therefore based on the information received from the complainant and the other sources referred to above. It is clear that there was no adherence to the requirements of the FAIS Act as explained in detail below.

[1] Selwyn Comrie and Another v Ewing Trust Co. Ltd. FOC 1807/05/KZN (5)

[23] The respondents did not comply with the requirements of the FAIS Act when they advised the complainant to invest the amount of R 300 000 through Tshukudu Investment Group. The following contraventions of the Act are material to this matter:

- Section 2 of the Code:

  "*A provider must at all times render a financial service honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry."*

  The second respondent did not adhere to these requirements.

- He held himself and the first respondent to be authorised FSP's when in fact they were not. This is also apparent from the first respondent's letterhead (dated 1 February 2006) on which a confusing mass of information appears. Next to the second respondent's name at the bottom of the letterhead on the left hand side appears *"Authorised Service Provider (Limpopo)."* In the same line, but on the right hand side, appears "Quinton van der Westhuizen – Marketing Director". The word "Financial" does not appear between "Authorised" and "Service". I can only infer that this was deliberately done as both respondents were not authorised FSP's. It seems the use of the words *"Authorised Service Provider"* was to create the misleading impression on the public that second respondent was an authorised FSP.

- The name *"Tshukudu Investment Group Company Reg: 2005/037919/07"* appears at the top of the letterhead. About three-quarters of the way lower down the word "SHAREGATE" appears in bold and large letters. Then follows further down and

underneath the names of both second respondent and Van der Westhuizen the website address: www.sharegate.co.za. A visit to this website by this Office on 28 August 2009 elicited the response "Under Construction" which appears to mean that it has been under construction since at least February 2006! The name sharegate is that of a different company yet its name and that of its website address appears on this letterhead. At the very bottom appears *"You trading your share".* If it is meant to be a reference to what the complainant said – that second respondent had told him the money would be invested on the JSC – then again it is misleading as complainant was not trading in any shares.

- Section 7 (1) (a) of the Code:

> *"A provider must provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client . . . to enable the client to make an informed decision."*

There is no record that indicates that the complainant was in a position to make an informed decision with regards to this investment.

- Section 7 (1) (b) of the Code:

> *"whenever reasonable and appropriate, provide to the client any material contractual information and any material illustrations, projections forecasts in the possession of the provider."*

The respondent did not provide the complainant with any material illustrations, projections or forecasts about this investment.

- Section 7 (c) (iii) of the Code:

"where the financial product is marketed or positioned as an investment or as having an investment component –

(aa) concise details of the manner in which the value of the investment is determine, including concise details of any underlying assets or other financial instruments;

(bb) separate disclosure of any charges and fees to be levied against the product, including the amount and frequency thereof..... in such a manner as to enable the client to determine the net investment amount ultimately invested for the benefit of the client."

- Section 8 (1) of the Code of Conduct:

"A provider other than a direct marketer, must, prior to providing a client with advice –

(a) Take reasonable steps to seek from the client appropriate and available information . . . to provide the client with appropriate advice;

(b) Conduct an analysis, for the purposes of the advice, based on the information obtained;

(c) Identify the financial product or products that will be appropriate to the clients risk profile and financial needs . . . ."

There was no financial needs analysis done for the complainant to establish his investment needs nor was there a risk assessment done to establish whether the risk the complainant was exposed to would be in line with risk the complainant was willing to take.

- Section 9 (1) of the Code:

"a provider must, subject to and in addition to the duties imposed by section 18 of the Act and section 3 (2) of this Code, maintain a record of advice furnished to a client as contemplated in section 8, which record must reflect the basis on which the advice was given . . . ."

- Section 9 (2) of the Code:

  "a provider, other that a direct marketer, must provide a client with a copy of the record of advice contemplated in 9(1) in writing." There was no client advice record completed for the complainant nor was he given a copy thereof.

[24] It is clear that the conduct of the respondents, particularly the second respondent has caused the complainant's loss.

[25] There remains the question of whether both respondents should be held liable. The money was paid over into the account of the first respondent. However, it was the second respondent who acted, ostensibly, on behalf of the first respondent. But the facts indicate that it was the second respondent who took all the decisions and acted recklessly and negligently on behalf of the first respondent. He did not ensure that the first respondent and himself were properly licensed in terms of the FAIS Act. He creates the misleading impression on first respondent's letterhead that he is an Authorised FSP. I have also set out the various other sections of the Code that he has transgressed. Finally, as stated above, second respondent has personally acknowledged that he is liable to the complainant.

Conclusion

[26] Both the respondents are liable jointly and severally to the complainant for the amount of his loss. Complainant had requested refund of his capital investment at the end of April, 2007. It would therefore be appropriate that interest and the statutory rate imposed by a court of law be ordered to be paid from 1 May 2007.

ORDER

I make the following order:

1. The complaint is upheld.

2. First and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay complainant the sum of R300 000.00 together with interest on the said sum at the rate of 15.5 per cent per annum from 1 May 2007.

3. The respondents are ordered, jointly and severally, the one paying the other to be absolved, the case fees of this Office in the amount of R1 000.00.

Dated at Pretoria on this the 2nd day of September 2009.

CHARLES PILLAI

OMBUD FOR FINANCIAL SERVICES PROVIDERS