

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 06555/10-11/ WC 1

In the matter between

CHARMAIN LENITA SCHOEMAN

First Complainant

THOMAS VINCENT MCCABE

Second Complainant

(In their capacities as executrix and executor, respectively,
of the estate of the late Lenita McCabe in terms of the letters
of executorship issued by the Master of the High Court
dated 7 August 2018)

and

IMPECTUS BROKERS & FINANCIAL SERVICES CC

First Respondent

FRANCOIS STEPHANUS VAN DER WALT

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 on 23 April 2018 in terms of section 27 (5) (c) of the Financial Advisory and Intermediary Services Act (FAIS Act). Section 27 (5) (c) empowers the Ombud to make a recommendation in order to resolve a complaint speedily, by conciliation. This determination therefore, shall be read in conjunction with the recommendation and shall form part of this determination.

[2] The respondent's response to the recommendation was received on 28 May 2018, and shall be dealt with below.

B. THE PARTIES

[3] The first and second complainants are the executors of the estate of the late Mrs Lenita McCabe (the deceased), who had concluded the investment that forms the subject of this complaint. The first and second complainant are therefore party to this complaint in their capacities as the executors of the estate, in accordance with the Letters of Executorship issued to them by the Master of the High Court dated 7 August 2018 2018.

[4] The first respondent is Impectus Brokers & Financial Services CC, a close corporation duly incorporated in terms of South African law, with registration number 1999/000128/23. The first respondent is an authorised financial services provider (FSP) (license number 11860) with its principal place of business noted in the Regulator's records as 31 Market Street, George, 6529. The license has been active since 20 October 2004.

[5] The second respondent is Francois Stephanus van der Walt, 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 the first respondent. At all times material hereto, second respondent rendered financial services to the deceased.

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

C. RESPONDENT'S REPLY TO THE RECOMMENDATION

[7] While the respondent confirmed that he bore the duties highlighted in the recommendation letter, that is, to act in accordance with the FAIS Act, he denied that he acted negligently when rendering the financial service to the complainant, and that he sought to escape liability for the loss suffered by the deceased as a result of the syndication having failed. The respondent claimed instead that he rendered the

financial service in accordance with the contractual relationship between him and the deceased, and maintained that the risks inherent in the product were discussed with the deceased. The respondent also claimed that the deceased was the one who insisted on the product because it offered a higher income than other products on the market at the time.

[8] Lastly, the respondent claimed that because the property syndication was registered with the Financial Services Board (FSB), now the Financial Sector Conduct Authority (FSCA), that *'it can be accepted that the FSB did a proper due diligence study on every financial investment before a license is issued and it is authorised to promote such product'* (sic).

D. ANALYSIS OF THE RESPONDENT'S RESPONSE

[9] The respondent did not offer any new information in response to the recommendation. Instead, he referred this Office to documentation that had already been presented to it. This Office had already informed the respondent that he failed to prove that he, as he alleged, discharged the duties imposed on him by the governing legislation, and which he bore, as a result of the contractual relationship that existed between him and the deceased.

[10] What is however striking from the most recent responses received from the respondent, is that he changed his version. Previously the respondent claimed that at the time he recommended the product to the deceased, there was 'absolutely no reason' for him 'to believe that the Spitskop product was not a reasonable and safe investment'. The respondent now claims that he presented all the risks inherent in the product to the deceased. It was the deceased, because of her need or desire to receive an income higher than what other presented products could offer, who elected to invest in Spitskop.

[11] These arguments are nonsensical and cannot exist side by side, when the first claim supposes that the respondent thought the product to be safe enough for the deceased to invest in given her risk profile and circumstances. On the other hand, the latter suggests that the respondent knew the investment carried risks that did not accord with the risk profile of the deceased and that he informed the deceased of this. The deceased then, understanding the relationship between the high returns offered by the Spitskop investment and the commensurate risk, nonetheless elected to proceed with the investment. I am therefore of the view that these claims are at odds with each other and lead me to doubt the version offered by the respondent in response to the complaint.

[12] In any event, the respondent has been unable to support his claims that he had ensured that the deceased was aware of the risks prior to her concluding the investment. The documents which the respondent attached in support of his claims show only that there was in fact some regard had to other products that were available on the market at the time, namely investments offered by Sanlam and Liberty. The other claims made by the respondent that during the discussion of these product offerings, he brought it to the deceased's attention that the risks inherent in these investments were lower than that in the Spitskop investment, are not recorded in any of these documents.

[13] The duty to record the discussions and advice rendered to the deceased lay with the respondent. Such a recording is absent from the documents kept by the respondent and can in my view only lead to the inference that this information was not presented to the deceased. In fact, I am persuaded by the absence of this recording, as well as the respondent's statements that he thought the product to be reasonable and safe, that when the advice was rendered to the deceased, she in all likelihood was led to believe that the risks in all three products were the same. Why then, if this is true, given the notable difference in the income that the Spitskop investment would offer, would the deceased have rejected the recommendation to invest in Spitskop?

[14] In my view, the respondent positioned the investment to the deceased as the better option because of the income it offered, in contrast with the other products that seem to have been considered. The deceased, as confirmed by both her and the respondent, relied entirely on this advice from the respondent. The respondent cannot now escape liability for the loss that was occasioned to the deceased estate when the product failed to deliver as advised it would.

E. CONCLUSION

[15] Further information collected from the deceased before her death was presented to the respondent to ensure that he had all the information necessary before him to adequately respond to the complaint. The respondent claimed that the deceased, in the presence of witnesses, indicated to him that she did not intend to proceed with the complaint. It is unclear what relevance or bearing the respondent intended this allegation to have. This Office never received any written instructions from the deceased prior to her death requesting that the complaint be withdrawn. The Office have however received confirmation from both the first and second complainant in writing that they wish to proceed with the complaint. These claims from the respondent therefore have no bearing on matter and the complaint stands.

[16] The issues raised in the recommendation have therefore not been disturbed. Based on the information provided in the recommendation, it follows that respondent is liable to pay the deceased's claim.

F. THE ORDER

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

1. The complaint is upheld.

2. The respondents are ordered to pay to the first and second complainant, in their capacities as executors of the investor's estate, the one paying the other to be absolved, the amount of R150 000.
3. Interest on this amount at a rate of 10% per annum from the date of determination to date of final payment.
4. The complainants are to cede their rights and title in respect of any further claims in respect of this investment to the respondents.

[18] Should any party be aggrieved with the decision, leave to appeal is granted in terms of section 28 (5) (b) (i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 29th DAY OF MARCH 2019.



NARESH S TULSIE
OMBUD FOR FINANCIAL SERVICES PROVIDERS