IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 05679-09/10 KZN 1

In the matter between:

VINESH MOHANLAL	**COMPLAINANT**
and	
RAJ CHUTTERPAUL	**1ST RESPONDENT**
RAJ CHUTTERPAUL BROKERS CC	**2NDRESPONDENT**

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

A. INTRODUCTION

[1] The complainant made an investment through the respondents in a certain Venture Capital Company. This company was stopped from conducting business and placed under liquidation shortly after the investments were made. Complainant lost his investment and lodged a complaint with this Office. The respondents presented this Office with a comprehensive response denying liability for any loss suffered by the complainant.

B. THE PARTIES

[2] The complainant is Vinesh Mohanlal, an adult male motor mechanic of 178 Brixham Road, Orient Heights, Pietermaritzburg 3201.

[3] The first respondent is Raj Chutterpaul an adult male financial services provider of 16 Rudling Road Pelham 3201. First respondent is a member of and key individual in second respondent.

[4] The second respondent is Raj Chutterpaul Brokers CC, a duly incorporated close corporation having its principle place of business at 16 Rudling Road Pelham 3201. The second respondent is a licensed financial services provider whose FSB licence number is 14541.

In this determination, reference to "the respondent" is a reference to the first respondent.

C. THE COMPLAINT

[5] During 2008 complainant was introduced to an "Edwafin Investment" by the 1st Respondent.

[6] Complainant was an existing client of the Respondent and his investments with Old Mutual with an amount of R500 000 had matured. This Old Mutual Policy was purchased by the Complaint for the purpose of securing his

child's education. The Respondent approached the Complainant in order to assist the Complainant in Re- investing the funds.

[7] At this stage there already existed a provider/client relationship between Complainant and Respondent. The Respondent advised Complainant to invest the R500 000 as follows:

(a) An amount of R200 000 in Edwafin Investment Holdings Limited ("Edwafin"),

(b) R200 000 in Sharemax, and

(c) R100 000 to be kept as a reserve fund.

[8] 1st Respondent gave Complainant an impressive picture of Edwafin and persuaded Complainant to invest in 200 debentures in Edwafin to the value of R200 000.

[9] Respondent described this as a safe investment with very good returns. Respondent pointed out that Edwafin easily outperforms the established insurance companies by offering a return of at least 20% per annum. In this regard Respondent presented the Complainant with quotations that showed outstanding returns from an investment in Edwafin.

[10] After the Investment was made Complainant received written confirmation of his investment from the Respondent. The letter recorded the product as "Debenture" with a term of 63 months. The letter states further that the Investment fund selected is "Edwabond". The inception date of the investment is recorded as 1st of October 2008. In this letter, Respondent stated as follows:

> "Edwabond come highly recommended and the returns provided by them are excellent at 20% and this guaranteed for investment period".

[11] However in the same letter the Respondent points out that neither the Capital nor the Income is guaranteed.

[12] Pursuant to the investment, the Complainant received a debenture certificate for 200 debentures from Edwafin. The term of the debenture is set out as 17 October 2008 to 17 January 2014. This certificate is number L046.

[13] Complainant states that he invested in Edwafin upon the Respondent`s advice. At all material times the respondent was an authorised financial services provider. His complaint is that his money was lost as a result of the respondent's conduct and accordingly wishes to be repaid his investment.

[14] It is not in dispute that the complainant's funds were eventually invested in Edwafin. The Respondent does not dispute that he sold the Edwafin Investment product to the complainant.

[15] It is equally undisputed that Edwafin was placed into liquidation and the complainant did not receive any part of his investments.

[16] According to the Complainant the nature of the Investment in Edwafin and the actual risks associated with the investment were not fully explained by the Respondent.

[17] The complainant submits that he was misled by the respondent into putting his monies into a highly risky investment. The Complainant stated that the Respondent "had failed to do his homework" in respect of Edwafin

[18] The Complainant points out that he made it clear to the Respondent that he could not afford to loose his investments.

[19] In his complaint, the Complainant suggests that the Respondent failed to properly advise him. As a result of the Respondent's failure to exercise due skill and care of a professional he held himself out to be, the Respondent lost his investment which was worth R 200 000.00.

[20] Complainant requests a return of the money that he invested plus interest on it from the end of October 2008.

D. THE RESPONDENTS' RESPONSE

[21] There was no prospect that the parties could settle the matter and accordingly, a notice in terms of section 27 (4) of the Act was sent to Respondent. On the 22nd of June 2010, the Respondent issued a statement in which he sought to answer the Complainant's allegations. I deal with the Respondent's response to the Complainant's allegations:

[23] The Respondent submits that in early 2009 he became extremely concerned about the security of his clients' investments in Edwafin. After many discussions with the Company`s directors he then reported Edwafin to the then Scorpions for investigation - (Case Number DSO KZN 851-159/02/2009).

[24] The Respondent set out the material history of his involvement with Edwafin. He also suggested that he had carried out due diligence in respect of Edwafin, he stated as follows:

[25] The Respondent was approached by a representative from Edwafin to market their debenture products on the 24th of June 2008. At that time the Representative of Edwafin was one Tracy Barends. The Respondent stated that she was fairly new to Edwafin. He requested that she bring along someone who was more knowledgeable in respect of the Company and its products. The Respondent was then introduced to a certain Mr CJ Kreuler (Kreuler) of Edwafin.

[26] From Kreuler the Respondent learnt that Edwafin was the Holding Company of a group of five wholly owned subsidiary companies viz. Dynamic Motor Company, Rainbow Adhesives and Paints, Edwabond Capital Options, The Edwafin Foundation and Protea Holdings in Australia. In addition Edwafin successfully developed the Heritage Supper Theatre in Hillcrest on a venture capital basis and recovered all their investment capital within a shorter period of time than anticipated.

[27] In addition, Kreuler advised the Respondent that the clients' security existed in the fact that the investment was a debenture, which is a legally binding debt instrument. This enables the client to claim or sue for monies loaned to Edwafin.

[28] Kreuler further informed the Respondent that a Fidelity Fund was also in place that is similar to that of attorneys, which was an added security benefit for the client. The cover amount in place was R 20,000,000.00 (Twenty million Rands) and the assurer was Etana in association with Hollard. The Responded was further assured that this policy was in fact in force at the time at which he contracted into marketing the Edwafin brand.

[29] At that time the Respondent requested a list of existing clients and their contact numbers from Edwafin to establish if they were in fact satisfied with Edwafin as an investment company and their promises of the quoted returns. He was provided with a list of existing investors with names and

telephone numbers which he was at liberty to call for a reference on the Company and its performance to date. The Respondent wanted to call other investors to see if they were happy with the investment and that the promised returns were paid.

[30] The Respondent contacted other investors who confirmed that the investment performed as promised. Some of the clients that the Respondent contacted actually stated that they would reinvest with Edwafin when their current investments matured. These success stories served as proof that the Edwafin and their products were excellent. Respondent was also given a statement of an investment of a client, Mr M Adam, whose return was approximately 24%.

[31] The Respondent stated that he requested a letter from Edwafin confirming that the Company was acting legitimately and in compliance with the law. Respondent states that he received such a letter which confirmed that Edwabond Capita Options was licensed, FSP NO: 31990 and was a member of the Edwafin Group. The Respondent received confirmation that Edwabond was granted a category 1.10 license on the 13th of February 2008. A copy of this letter was forwarded to this Office. Significantly, this letter states that the Compliance Officer maintains a register of Representatives of Edwabond, the significance will emerge later in this determination. I also note that the request for the information and the response in the form of this letter was made by the Respondent on the 5th

of November 2008, long after the investment was made and at a time when the investment was already showing signs of going wrong.

[32] The Respondent further submits that he visited the Damara vehicle manufacturing factory, and Edwafin Company and found it to be "up and running and legitimate".

[33] He further contends that apart from the above mentioned visits, he had meetings and attended functions at Edwafin. He was satisfied that this was a legitimate Company.

[34] After these investigations, the Respondent submits that he "contracted into marketing the Edwafin products on the 12th of August 2008". Edwafin was represented by Tracy Barends and his contract was "issued with Edwabond Capital Options (FSB Licence No. 31990) which is a financial Services Board registered Company".

[35] According to the Respondents the fact that Edwafin was a registered financial services provider afforded him the certainty that the regulator would have scrutinised the company and its structure prior to issuing it with a licence to trade.

[36] Further, the Edwafin Product that he was marketing was endorsed by the Retail Motor Industry.

[37] The Respondent had meetings with Tracy on the 26th of August and 3rd of September 2008 for information sessions, where Tracy brought pamphlets and Brochures on the Company, she further brought along a DVD of a

vehicle, The Damara, which was the latest investment product offering by Edwafin. The DVD was well produced and of high standard, the content was authentic, she also brought a copy of the Company`s balance sheet, which she took back with her. The Company appeared to be healthy and she assured him that Edwafin and its subsidiaries were doing extremely well.

[38] Tracy Barends was replaced by Mr Sunil Singh, who had a banking background and had a better understanding of investments and how they worked. Respondent conducted correspondence with Edwafin through Mr Sunil Singh.

[39] On the 19th of September 2008 the Respondent states that he made a visit to Edwafin offices in Hillcrest were he attended a pre- launch of the Damara vehicle. At this function Respondent met with the various Heads of Departments and Directors and there was nothing that neither him nor his business partner noticed or became aware of that made them suspicious in any way. This site visit and viewing of their product served as proof that their offices and the product did exist.

[40] The Respondent also attended the official launch of the Damara vehicle at Mkaranga Lodge where guests and potential investors were given an in-depth look at the Company`s operation. Various Heads of Departments delivered talks on each aspect of the business with projections of future production and profit indications. He further met with Retail Motor Industry representative, Mr Jeffrey Brian Stewart Osborne and meeting him served

as proof that the cash flow projections for this project looked very promising.

[41] Respondent states that he was informed that at that time Edwafin were in final negotiations with the mining industry to manufacture and supply an adaptation of the Damara vehicle for underground use. This would make them the sole suppliers to the mines of this type of vehicle and would count as a major factor in their favour to be able to deliver the returns on the investments that they offered.

[42] Edwafin was also at the end stage of finalizing a bulk order of the vehicles mentioned to be supplied to Saudi Arabia in the Region of approximately R50m. Another target market was for younger generations who would use it for transportation of surfboards, jet skis and other targeted markets were farmers who required a utility vehicle to traverse uneven rough terrain. Back orders were already in place from farmers. This was the information that the Respondent received at Edwafin.

[43] Respondent suggested that he had taken the necessary steps to satisfy himself that Edwafin was a viable investment, it is his response that he should not be held liable for the Complainant`s loss.

E. RESPONDENT'S VERSION OF THE SEQUENCE OF EVENTS REGARDING THE COMPLAINANT'S INVESTMENT:

[44] What appears in this paragraph is the sequence as relayed to this Office by the Respondents. For convenience I will make comment and findings regarding these events

[45] On the 15th of October 2008 the Respondent's business partner contacted the Complainant as his old Mutual policy had matured. She asked if the Complainant required any assistance with investing any of the proceeds and enquired if he had a preference for any assurance company. The Complainant was very clear that he would like to make an investment into alternative investment products and definitely not any assurance company. The Complainant is a motor mechanic who does not have any knowledge of investments options and relies entirely on the advice of his broker. The Complainant denies that he expressed any "definite choices". On the probabilities I find that it is highly improbable that the Complainant, bearing in mind his recent investment history will instruct his broker to steer clear of any assurance company. I find that this version was fabricated by the Respondent.

[46] Thus in his presentation to the Complainant on the 16th of October 2008, Respondent showed Complainant Sharemax Investments and Edwafin as alternative investment vehicles. The Complainant indicated that he would like to invest R 500 000, 00 i.e. R 400 000.00 from the matured old mutual policy and R 100 000.00 of his personal funds. At that time the Complainant wanted to invest the entire R 500 000.00 lump sum into one vehicle, the

Edwafin Product. According to Complainant he was persuaded to invest in Edwafin by the Respondent. On the probabilities, the Complainant would not have made an independent choice of the Edwafin Product. By its nature the Edwafin product was an investment in a venture capital company through the purchase of debentures. This kind of investment requires a certain degree of sophistication and understanding. The Complainant was not possessed of any of these attributes. On the facts before me I find that the Complainant invested in Edwafin only because of the advice given by the Respondent.

According to the Respondent, he advised the Complainant as follows:

[47] Respondent suggested that an emergency fund needed to be arranged and a percentage of the available funds should be set aside for this purpose. Respondent recommended that R 100 000 00 be set aside for this purpose.

[48] Respondent recommended against investing all the funds that the Complainant had into one investment vehicle; instead the Complainant should diversify and spilt the funds available in order to reduce risk. He therefore presented two different companies' quotations in keeping with the Complainant`s instruction to use alternative investment products. Indeed the Respondent presented the Complainant with two quotations, one from Edwafin and the other from Sharemax. Both these options promised a return of 20% per annum.

[49] In respect of these quotations the following is worth noting:

i) With regard to Edwafin, Respondent presented two quotations, one for an amount of R 500 000 and another in an amount of R 250 000. The 1st quotation promised capital growth after 63 months in an amount of R 1416 513 88. The 2nd option promised capital growth over 63 months in amount of R 708 256 94.

ii) It is quite clear that these quotations promised a performance in respect of the investment that can only be described as spectacular. It comes as no surprise then that the lay Complainant was tempted into investing all his money into Edwafin. These returns were substantially and breathtakingly better that any normal investment company product.

iii) The Respondent is an experienced financial services provider; one would expect him to question how such spectacular returns could be achieved. The Respondent would have been aware that a commission of 6% was to be paid to him and that Edwafin will also incur administrative costs and fees, yet the growth rate of the investment was as much as 20% per annum. One would expect a prudent and diligent broker to ask the question, how is this possible.

[50] The Respondent states that the Complainant was further advised that both the investments were unlisted and high risk investments. Exactly what this advice entailed was not stated by the Respondent. There is no evidence before me that the Respondent explained to Complainant what an "unlisted investment" means. I noted that the Respondent himself conducted business under a category 1 licence. He was not licensed to sell this

product. One must then question his own capacity to give advice in this regard.

[51] The Respondent relies on the results of a risk analysis that he carried out on the Complainant, this involved the completion of a questionnaire the results of which gave an indication of the investor`s tolerance for risk.

[52] The Complainant`s risk profile categorised him as "an assertive investor". According to the Respondent`s questionnaire "Assertive investor" is defined as *"you are an assertive investor, probably earning sufficient income to invest most funds for capital growth. Prepared to accept higher volatility and moderate risks, your primary concern is to accumulate assets over the medium to long term. You require a balanced portfolio, but more aggressive investments may be included".* There is no evidence before me that the Respondent explained what this meant to the Complainant, the Respondent was obliged, by the general code of conduct, to present his client with information in simple language and in a manner that client can easily understand. It is not even clear to me, by the definition, as to what or who is an" assertive investor". The one aspect that somehow managed to escape the Respondent's attention is the fact that his client was a motor mechanic with a very conservative investment history. I will say a little more about the risk profile later in this determination.

[53] The Respondent alleges that the Complainant was aware of the nature of the investment and his responses were that "he was a risk taker by his own admission". The Complainant was decisive in his actions and was certain about the selection of the companies he chose to invest in. There is no

recorded information on which the respondent objectively assessed the complainant's financial standing and circumstances to satisfy himself that complainant was a risk taker. The Complainant denies that he ever described himself as a "risk taker". The Complaint`s objective profile is entirely inconsistent with this. On the probabilities the Complainant was unlikely to have described himself to his own broker as a 'risk taker". I accept the Complainant's version.

[54] According to the Respondent the Complainant asked to be shown alternative products and he decided to take up both of the offers at his own free will. At that time Edwafin investments were perfectly fine with no indication of uncertainty as an investment company. Upon considering the client advice record from the Respondent it was clear to me that the Respondent only offered two alternatives namely Edwafin and Sharemax, no other alternatives are set out. The only mention of alternatives appears in Section F of the Client Advice Record, where it is noted that client elected not accept "Assurance Company Products". This is extremely vague. It is equally interesting to note that in Section A of this form the complainant's objectives are stated as follows "to re-invest proceeds from matured investment policy (Old Mutual) into unlisted securities namely Edwafin & Sharemax investments (50% into each)".

[55] Complainant denies that this was his stated objective. It is unlikely, bearing in mind Complaint`s profile, that he would use words such as "unlisted securities". I accept the Complainants version that the client advice form was filled in by the Respondent and merely signed by the Complainant

upon the instruction of the Respondent. It is not in dispute that the hand writing in the Client Advice form is that of J Chatterpaul.

[56] I also note that in Section C the Financial Advisor lists the products on which quotes were obtained. Only two products namely Edwafin and Sharemax are listed. On the Respondent`s own version no other quotes were obtained.

[57] In Section D of the Client Advice Record, the motivation for the investment is recorded. It comes as no surprise that the motivation is the 20% return per annum and 0% charges to the client. As I have already stated, this spectacular return should have been questioned by the Respondent. The Complainant himself had no means of testing the viability of such growth and merely relied on what the Respondent told him.

[58] In Section E of the Clients Advice Record, important information "highlighted to client" is set out. This is what is recorded "Both companies recommended are unlisted companies, there is a Risk attached to capital invested". There is no evidence before me that Respondent explained to Complainant exactly what the risk was. The form conveniently does not state this and remains vague. I have no hesitation to conclude that the respondent wrote the notes for himself and not to record any understanding he had with the complainant.

[59] According to the Respondent, soon after placing the Complainant`s investments with Edwafin, the world was gripped by a recession and Edwafin was not spared. Respondent gives the example of General motors and Toyota, two of the largest motor manufactures in the world that were

affected. He even states that had it not been for the USA Government, General Motors would have been bankrupt. The relevance of this comment escapes me, exactly what the world recession had to do with the Edwafin liquidation is not explained by the Respondent.

[60] In early 2009 after the Respondent reported Edwafin to the then Scorpions for investigation, he contacted the Complainant to inform him that Edwafin had been placed under liquidation.

[61] On the 26th of May 2009, the Respondent assisted the Complainant by advising him that he should send a letter of demand to the Brokers who were handling the Fidelity Fund of Edwafin, namely Coleman Insurance Brokers. The letter was sent to them, to date there has been no response from them. He further advised the Complainant to engage attorneys. Needless to say none of this advice was of any assistance to the Complainant.

[62] The response from the Complainant was that the Respondent should engage an attorney on his behalf and that the Respondent should cover the legal cost. The Respondent's response was that such could lead to conflicts of interest. He further advised the Complainant to attend the liquidators meeting which was to take place on the 23rd of June 2010.

[63] The Respondent feels strongly that he was not negligent in any way in his actions regarding the Complainant's investment choices. He did inform the Complainant about the diversification and the risks thereof. He is then certain that his advice was sound and in keeping with his instructions.

F. THE ISSUES

[64] The following are the issues for determination:

64.1 Did the respondent give advice as contemplated in the Act?

64.2 Whether the respondents rendered the financial service herein negligently and/or in a manner which is not compliant with the FAIS Act;

[65] If it is found that the respondents did render the financial service negligently and/or failed to comply with the FAIS Act, whether such failure caused the complainant's loss.

[66] For convenience, the issues are dealt with under the following headings:

(a) Due Diligence

(b) Profile Risk Analysis

(c) Investments Options

(d) Licensing

G. DUE DILIGENCE

[67] The Complainant contends that he was not properly advised by the First Respondent, an allegation which is rejected by the Respondent. There is

no indication that the Respondent conducted a proper due diligence to satisfy himself of the suitability and the viability of the Edwafin Investment scheme.

[68] The Respondent merely satisfied himself by visiting different offices or by merely attending an official launch of the Damara vehicle at Mkaranga Lodge where guests and potential investors were given an in- depth look at the Company`s operation. One can safely conclude that this was not a proper due diligence.

[69] There was a duty on the Respondent to conduct a check on the Edwafin Investment scheme and its related entities, this he could have done by going through the relevant documents which would have shed light on the liquidity of the Companies. There is no indication that the Respondent sought to establish whether any of the Edwafin entities had issued any financial statements. In passing in his response he made mention of one financial statement that was showed to him and it was immediately taken back.

[70] The Respondent failed to make an independent and objective assessment of the Edwafin product. All of his efforts appear to be superficial inquiries, basic due diligence was not conducted. The Respondent failed to carry out basic analysis of Edwafin`s financial statement and in particular the Respondent failed to inquire into how such an extravagant return was possible and viable.

[71] The Respondent failed to apply his mind to the nature of the investment that he sold to the Complainant; in effect the investment amounted to a loan to an unlisted venture capital company. There is no record of Respondent explaining this in clear terms to the complainant. In particular the risks associated with this type of investment were not explained to the Complainant.

H. COMPLAINT`S RISK PROFILE

[72] It is common cause that the Respondent conducted the Complainant's risk profile. Accordingly, it is appropriate to examine the manner in which the Complainant's risk profile analysis was conducted so as to determine whether such 'analysis' was appropriate.

[73] On the evidence before me the Complainant was assisted in filling out the "investor profile" questionnaire by a representative of the Respondent one J. Chutterpaul. My experience is that many of these questionnaires do not necessarily produce an accurate assessment of the investor's risks tolerance. The questionnaires are generally standard and carry questions that may not really relate to the business of investing. Sometimes the question being asked relate to chance taking of which many clients are unable to relate to the serious consequences of losing their capital. A prudent and diligent FSP will not slavishly rely on the results of the

questionnaire. The Client`s personal profile and circumstances which the provider must ascertain by asking relevant and appropriate questions, must be taken into account. The results of the questionnaire is merely one factor which can be taken into account. These questionnaires were never meant to be conclusive proof or evidence of the investor's actual risks tolerance.

[74] The form used by the Respondent is worth considering. Ironically this form commences with the following words, highlighted in italics: *"Understanding your risk and return profile is the most important step in the investment planning process".*

[75] Significantly the document also states the following: "When you have completed and scored the questionnaire, the total number of points can be used to help determine your individual investment profile and form the basis of further discussion". Clearly, on the Respondents own version, the questionnaire was merely a guide and a factor to be used in making a proper assessment of the investors risks tolerance. It was not intended to be the answer.

[76] Question four (4) of the form is as follows: "How familiar are you with the investment market?" Significantly the Complainants response was *"Not very familiar*". There are no probabilities that the motor mechanic Complainant will have any knowledge of investments in debentures involving venture capital in unlisted public companies. This answer alone should have alerted the Respondent. I am satisfied that the Complainant is being truthful when he states that he made the investment on the advice of his broker. On the facts before me the Complainant was incapable of

making an assessment of investments and exercising choices independently. Certainly not when it comes to risky investments.

[77] According to the Respondent's version he presented various other investment options to the Complainant. In the Respondent's Client Records, quotations were presented to Complainant in respect of only two investments namely Edwafin and Sharemax. The record of advice then states in vague terms that Client rejected "assurance company products". The advice form also records that the Complainant is "prepared to take risks attached"; this is entirely inconsistent with the Complainants answer to question 4 and recent investment history. Significantly the Client Advice Record was filled in by the said J Chutterpaul and not by the Complainant. The Complainant merely signed the document.

[72] The Respondent was expected to recommend investments that were consistent with the client's risk profile. The Respondent merely went through the motions when he purported to be conducting the risk analysis. On the undisputed facts before me, it appeared that the Respondent's intention from the onset was to sell the complainant Edwafin`s investments, regardless of the outcome of the risk analysis. This leaves me without a doubt that the Respondents actions were influenced by the commission that was promised to him, which was said to be 6%. In actual fact he received 7.5% commission with no claim back. By industry standards a rather generous and possibly even an extravagant commission. There was an obligation on the broker to act within the scope of his client's mandate.

In that regard, it is clients risk tolerance evidenced by the client's personal circumstances that assists in shaping the limits of the client`s mandate.

[73] In his response, the Respondent states that the Complainant acted "at his own free will" and did not come any under pressure from the Respondent. This assertion is not supported by the facts before me. The Complainant was simply incapable of making an independent assessment of the Edwafin and Sharemax investments. In fact the Complainant was simply persuaded to make the investments by the Respondent through the promise of a return of 20% per annum.

I. LICENSING

[74] According to the records of the FSB the Respondent had a category 1 licence. The only legal method to market this debenture product was for Respondent to be appointed as a Representative, in terms of Section 13 of the Act.

[75] For the Respondent to have legally sold the Edwafin Product to Complainant, both he and the provider, Edwafin, had to comply with the provisions of Sections 13 of the FIAS Act.

[76] For a full discussion of the provisions of Section 13 of the FIAS Act I refer to the following determinations:

(a) Black VS Moore case no. Case Number: FAIS01110/10-11/WC1

(b) S.P. Naidoo vs. C.J Swanepoel case number : FAIS 01110/10-11/ WC1

[77] This Office's inquiries with the Regulator brought out the following facts:

(1) The Respondent had a category 1 licence.

(2) Edwafin had no licence at all.

(3) A company called Edwabond Capital Options (PTY) Limited has a category 1.10 licence which was granted on the 13th of February 2008. This Company is described as "a member of the Edwafin Group". The regulator withdrew this licence on the 5th March 2010.

[78] The Respondent could only have sold this option as a Section 13 Representative of a provider who had a category 1.10 licence from the FSB.

[79] From the records of the Respondent the following emerges:

79.1 There is no written mandate or contract between Respondent and any licensed entity as contemplated in Section 13 (1) (b) of the FAIS Act.

79.2 There is no certificate by any provider that the latter accepts responsibility for the activities of the Respondent in terms of Section 13(1) (b) of the FAIS Act.

79.3 The Respondent provides no proof that he had received training and comprehensive information regarding the investment product as contemplated in Section 13 of the Act.

79.4 There is no proof that Respondent was appointed in terms of Section 13 of the Act.

79.5 Significantly, it appears from the correspondence in the Respondent`s file, the Respondent only became concerned about licensing after he sold the product to the Complainant. In a letter dated 5th November 2008, the Compliance Officer of Edwabond responded to a query about licensing from the Respondent. In that letter the Compliance Officer mentions that Edwabond was granted a category 1.10 licences on the 13th of February 2008. There is no evidence that the Respondent was concerned about licensing before he marketed the Edwafin product.

79.6 Plainly the Respondent acted illegally when he sold this product to the Complainant.

79.7 There was an onus on the Respondent as an intermediary to ensure that he gets the correct and necessary training and that he is satisfied that he has the competence and ability to serve members of the public. There was equally an onus on the Respondent to ensure that he complied with Section 13 of the Act.

79.8 In order to protect investors, legislation and applicable codes of conduct must be strictly applied in respect of both providers/promoters and the individual FSPs.

J. SUMMARY OF VIOLATIONS OF THE FAIS ACT

[80] The Respondent committed numerous infractions of the Act. I list below briefly some of the more significant ones.

[81] Section 7 of the Act requires every FSP to be licensed under Section 8 of the Act. An exception is when the FSP acts as a Representative in terms of Section 13. The Respondent was not licensed in his own right, to sell this product, nor was he appointed as a Representative in terms of Section 13 by a licensed provider. The Respondent acted illegally in selling this product to the complainant. On this basis alone the Respondent can be held liable for Complainant's loss.

[82] The Respondent also violated the provision of Section 3 of the General Code of Conduct in that,

i) He failed to provide the Complainant with information that was factually correct and in plain language, and

ii) The Respondent sold a product that was not appropriate taking into account the level of knowledge the circumstances of his client.

[83] The Respondent held himself out as an expert who was able to advise clients on various products including investments of different kinds. However, it is clear from his response that he was not qualified to advise on this product, namely debentures. As already mentioned, the Respondent

failed to tell the Complainant that his experience in the marketing of such products was extremely limited. As indeed it was.

[84] Given the fact that the Respondent knew that he was to receive 6% of the investment as his commission and that there were other administrative costs involved, he had an obligation to ask as to where the commission and the high investment returns come from. He made no attempt to satisfy himself.

[85] The respondent failed to comply with the provisions of section 8 of the Code, in that:

85.1 Respondent failed to conduct a proper needs analysis and risk profile of the Complainant and consequently recommended a product that was inappropriate, bearing in mind Complainants financial situation.

85.2 The Respondent was not merely marketing the product, he was in fact providing financial services as a Financial Services Provider as contemplated in the FAIS Act.

85.3 In *Durr v ABSA Bank LTD and Another 1997 (3) SA 448 (SCA)* the Supreme Court of Appeal had occasion to consider the duties of a broker. At 463 the following is instructive:

"The important issue is that even if the advisor himself does not have the personal competence to make the enquiries, I believe it is incumbent upon him to harness whatever resources are available to him or if necessary to ask for professional, legal or accounting opinion before committing his client's funds to such an investment".

K. FINDINGS

For reasons set out in this determination, I make the following findings:

1. The respondents rendered financial advice, as contemplated in the act and code.

2. The first respondent rendered financial services, acted as a licensed financial services provider and as a member of the second respondent. The First Respondent did not render any financial services as a direct marketer.

3. The respondents in rendering the service to the complainant were negligent and acted in a manner not compliant with the act.

4. The aforesaid failure caused the complainant`s loss.

L. THE QUANTUM

1. It is not in dispute that the company in which the investments were made have been liquidated. There is no prospect that the complainant will recover his investment.

2. The respondents are liable to repay this to the complainant.

3. Since the 30th of October 2008 the Complainant received no returns from the investments and lost the capital amount. Accordingly interest will be awarded from this date. The complainant lost an amount of R200 000 00.

THE ORDER

I make the following order:

1. The complaint is upheld.
2. Respondents are ordered to pay to complainant R200 000.00, jointly and severally the one paying the other to be absolved.
3. Interest on this amount at the rate of 15% per annum from the 1st of November 2008 to date of payment.
4. The respondents are ordered to pay the case fee of R1000- 00 to this office within 30 days of date hereof.

DATED AT PRETORIA ON THIS 7th DAY OF MARCH 2011

NOLUNTU N. BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS