IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Numbers: FOC 5378/07-08 FS (1)

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In the matter between:-

PETRUS JOHANNES GROPP	**1st Complainant**
GERT HENDRIK OTTO	**2nd Complainant**

and

JACOBUS GORDON	**Respondent**

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

A. PARTIES

[1] The 1st complainant is Petrus Johannes Gropp, a 59 year old pensioner of 42 Generaal Cronje Street, Dan Pienaar, BLOEMFONTEIN, 9301.

[2] The 2nd complainant is Gert Hendrik Otto, a 62 year old pensioner of 10 Jukskei Avenue, VIRGINIA, 9430

[3] The respondent is Jacobus Gordon a registered Financial Services Provider (license number 13002) conducting business as JSL Investments. His business address is Second Floor, MBA Building, 43 Bok Street, Welkom, 9459.

[4] In this determination I deal with two separate complaints as it would be convenient and economical to do so. The facts in respect of both complaints are substantially the same and it would make no sense to deal with this in two separate determinations.

[5] The complainants have cited Chris Viljoen (Viljoen) of 67 President Reitz Street, Westdene, Bloemfontein as the 2nd respondent. However, for reasons that are set out hereunder, I came to the conclusion that no case is made out against Viljoen.

B. THE COMPLAINT

[6] During August 2004, the respondent and a representative of Hamilton Solutions called Viljoen visited the complainants at 2nd complainant's home in order to sell a Leadeguard product to them.

[7] Although the complainants state that they were scared to buy the product, they were persuaded to do so, on continuous promises by the respondent that the investment would be tax free and would have an eighty per cent guarantee.

[8] On or about the 28th and 29th of October 2004, the complainants invested R150 000 and R200 000 respectively in Leaderguard Spot Forex ('LSF'). By

March 2005, LSF was declared bankrupt; resulting in the complainants losing their capital invested and interest payments.

[9] According to complainants, the respondent and Viljoen did not do their homework on LSF before they sold the product. According to investigations, it was found that already in 2003 there were problems with LSF. The complainants invested in a company that was already in financial difficulties.

[10] The complainants state that the respondent and Viljoen were only looking at the commission they were going to earn on the investments. The complainants are pensioners and there is no way in which they can make up the funds in their lifetime.

[11] Upon enquiries made by the complainants they found that the brokers and Leaderguard were not registered at the Financial Services Board ('FSB') when the LSF product was sold to them.

[12] The complainants hold the respondent and Viljoen responsible for their losses.

C. RELIEF SOUGHT

[13] The complainants require the return of their capital in the amounts of R150 000 and R200 000 respectively together with interest thereon from 01 March 2005 to date of payment.

D. RESPONDENT'S RESPONSE

[14] The Respondent's response could be summarised as follows;

14.1 The respondent takes a first point *in limine* that the determination may well be premature as investigations into Leaderguard have not been finalised. The respondent's reasoning is that there is a prospect of recovering complainants' funds and therefore this office may not, at this stage, determine the loss suffered by the complainants.

14.2 The respondent's 2nd point *in limine* is that the transactions relate to issues prior to the 1st of October 2004 and therefore the provisions of the FAIS Act do not apply. The respondent asks that the points *in limine* are upheld and that the complainants' complaints be dismissed.

In the event that the points *in limine* do not succeed, the respondent states as follows:

14.3 Respondent denies that he initiated the investment in LSF. According to the respondent it was the 2nd complainant who inquired about LSF and requested a presentation.

14.4 Respondent denies that he presented the product to complainants and states that Viljoen is the person that made such a presentation. It was Viljoen who gave the relevant figures to complainants and gave guarantees about income and capital protection.

14.5 According to respondent it was Viljoen who acted as the 'agent' of LSF and not the respondent.

14.6 Respondent denies that he was the cause of the complainants purchasing the LSF product. The respondent avers that the product

was requested by the complainants, it was presented by an agent of LSF and he distances himself from the transaction.

14.7 The respondent denies that he was not authorised to deal in this product. He claims to have acted under an exemption and he was also a representative of Hamilton Solutions which was also authorised to deal in the Forex product through the exemption.

E. FINDINGS

[15] At the outset I point out the following undisputed facts:

15.1 The complainants were employed by Harmony Gold Mine ('Harmony') prior to their retirement.

15.2 During July 2004, the respondent assisted the 2nd complainant with his retirement planning. It was during this time that the respondent arranged a presentation by Viljoen of the LSF products at 2nd complainant's home. The 1st complainant was invited to attend the presentation. The presentation was held on the 17th of August 2004 and was attended by the two complainants, the respondent and Viljoen.

15.3 On the 28th and 29th of October 2004 respectively, the respondent completed applications forms to effect the investments in question. The respondent signed the application documents as "the **advisor**" of the complainants.

15.4 The respondent was given training on the products of Leadeguard Securities, at the end of 2002, i.e. approximately two years prior to completing the application documents to effect the investments in question in LSF. He acted as a representative of Hamilton Solutions Ltd, which applied for its license prior to 29 September 2003 and at all material times operated under the exemption in terms of BN 94 in GG 26820 of 23 September 2003.

15.5 According to the respondent he was acting as a representative of Hamilton Solutions Ltd. He also claims to have acted in terms of a mandate with Hamilton Solutions Ltd. I also point out that the applications forms all bear the logo and details of Hamilton Solutions Ltd. although the application forms make it clear that the investment was in LSF.

15.6 The respondent in his personal capacity, applied to be licensed for foreign currency denominated investments and at all times material hereto, operated under the exemption in terms of Board Notice (BN 94 in GG 26280 of 23rd September 2004. The application was submitted prior to 30 September 2004 and signed on or about 14 July 2004. In his license application, the respondent identifies **LSF** as the Authorised Foreign Forex Services Provider as required by Section 2 of the Financial Advisory and Intermediary Services Regulations.

15.7 During July 2005, Leaderguard Limited as well as its Directors, i.e. H.S. Pretorius and J. Venter were charged in the Republic of Mauritius for

the following offences that were allegedly committed between October 2003 and 15 March 2005:

Failing to comply with the directives of the Financial Services Commission, which includes *inter alia* failure to refund the sum of US$3 069 551 resulting from investments made by its clients from South Africa as directed by the Financial Services Commission (1 Count);

Falsification of documents (6 Counts).

The said directors pleaded guilty to the charges and were ordered to pay fines as punishment.

15.8 Both the Leadeguard companies as well as Hamilton Solutions Ltd were liquidated and to date, no funds were recovered for the benefit of investors.

15.9 The respondent made a submission that there is a dispute of fact between the parties and therefore this office should call on the parties to give oral evidence.

[16] I now first deal with the two points *in limine*. According to the respondent if any of these points are successful this will result in the complaints being dismissed.

16.1 The respondent's first point *in limine* is that the complainants' complaints are premature as LSF is still under investigation. The respondent submits that it is impossible for this Office to determine any fair compensation. It is not in dispute that LSF stopped trading during

March of 2005. The respondent, I must accept, has kept a close eye on developments in the so called investigations into LSF. If indeed, there was any prospect of recovering investors' funds from LSF then the respondent should say so and state the facts upon which such prospect is based. The respondent failed to do so. Bearing in mind that a period of more than 5 years has lapsed, I can safely assume that there can be no prospect of investors recovering any money from LSF. In the premise, the complaint is not premature. The first point *in limine* is therefore dismissed.

16.2 The respondent's second point *in limine* is that the complaint is based on issues that took place prior to the 1st of October 2004 and that therefore the provisions of the FAIS Act do not apply. For this reason the complaint must be dismissed. I accept that the product was introduced to the complainants prior to the 29th of September 2004. The actual sale of the products to the complainants took place on or about the 28th and 29th of October 2004 respectively. This brings the transactions squarely within the jurisdiction of this Office. I point out that in dealing with this point *in limine*, the respondent was extremely vague. In particular, the respondent does not deny that a sale transaction took place after the 29th of September 2004, but fails to address this Office as to why the sale transaction itself falls outside of the jurisdiction of this Office. There is no merit in the second point *in limine* and it too must be dismissed.

16.3 It was intended by the FAIS Act that disputes referred to this Office be dealt with swiftly and economically. This Office is required to resolve

the disputes on the facts provided by the parties. It is only where a substantial dispute of facts arises which must be resolved in order to make a determination that this Office may call for a hearing of oral evidence. In this particular complaint there are no substantial disputes of fact that cannot be resolved other than by the hearing of oral evidence. This will become clear in the paragraphs that follow and accordingly, respondent's request for a hearing of oral evidence is refused.

[17] The first issue to be dealt with is whether or not the respondent was the cause of the complainants' investing in LSF. The respondent's version is that the complainants requested a presentation of LSF. The complainants deny this and state that the product was introduced to them by the respondent. On the respondent's own version, he was already associated with LSF since 2002. He received training on the LSF products and he was a representative of Hamilton Solutions which were aggressively marketing LSF products. Respondent also believed that he was duly authorised to market LSF. It therefore amounts to too much of a coincidence that the complainants, who are lay people would approach the respondent and ask about LSF. I find that on the probabilities only the respondent could have introduced LSF to the complainants.

[18] It is the respondent's version that the product was introduced and promoted not by himself, but by Viljoen. It is not in dispute that, neither of the complainants knew Viljoen. It is equally not in dispute that Viljoen, as a representative of LSF, enjoyed a close working relationship with Hamiltons. The respondent admits that **he** arranged for Viljoen to present the product to

the complainants. On the respondent's own version, Viljoen was going to present a product in which he received training and which he was also authorised to market. It cannot be disputed that the complainants gave Viljoen an audience only because he was recommended by the respondent. Respondent does not dispute that he was present throughout Viljoen's presentation to the complainants. Respondent was present when Viljoen presented the performance of LSF as an investment and explained how income may be received whilst guaranteeing the security of 80 percent of the capital. On the respondent's own version he said nothing to challenge Viljoen's presentation and his silence merely convinced the complainants that he, the respondent, approved of or endorsed what Viljoen was presenting. By his own conduct, the respondent cannot say that he had nothing to do with the presentation of the product. And, there are no facts, presented by the respondent, that justify, the respondent distancing himself from LSF. I note that even in his license application to the FSB he presented LSF as his service provider. By all accounts, respondent was no stranger to LSF.

19.1 It is further the respondent's version that he did not advise the complainants to invest in LSF, but that the complainants were persuaded by Viljoen and made a decision to invest independent of any conduct on the side of the respondent. Upon considering the facts before me I find that there is no substance to this submission.

19.2 The very nature of this investment, namely forex, is an investment that is meant for financially sophisticated individuals whose profile enables

them to invest in high risk investments. The respondent had a sound understanding of the profile of the complainants in this case. In fact in respect of the 2nd complainant, the respondent had a long standing relationship and had even conducted a needs analysis. The complainants were both retirees looking to invest a modest pension. It must have been clear to the respondent that these individuals could simply not afford to put their money into high risk investments.

19.3 On the respondent's own version he received training on this product. I therefore take it that at all material times, respondent appreciated that this was a high risk product. The respondent even stated that he waited two years before he actually marketed the product. Throughout Viloen's presentation and even after Viljoen's presentation up to the point when the transaction was entered into, the respondent did not advise the complainants that this was a high risk investment and was not appropriate for them. This is a contravention of Section 3 of the General Code of Conduct. In this regard, respondent referred this Office to a risk disclosure notice which was signed by the complainants.

19.4 According to the complainants they were not given an opportunity to read this document and they were merely asked to sign it by the respondent. The respondent also signed the documents as 'advisor'. I would like to refer to this document. The first thing to notice is that it is in the finest print. However, if one reads this document, it will become abundantly clear that only a most sophisticated investor will be capable of understanding it. The document is written using financial jargon and only people qualified in dealing with derivative type investments will be

capable of understanding what is contained in the document. There is no possibility that two retired miners will come even close to understanding what is in this document. One can safely assume that they would have relied entirely on their advisor. The respondent acknowledges on the documents that he is the advisor.

19.5 Nowhere in his response does the respondent say that he actually explained this document to the complainants and that the complainants understood it and appreciated the risks that were involved. If one considers the respondent's own training in this product, then the contents of this document are inconsistent with the promised guarantee that 80 per cent of the capital would be safe.

19.6 On the probabilities there can be no prospect that the complainants independently made an assessment of this product and independently made a decision to invest in it. They clearly decided to invest upon the advice of respondent.

[20] Respondent denies that he failed to apply his mind to the investment before recommending it to the complainants. He states that Hamilton had conducted a due diligence on LSF and he received training in respect of the product. On his own version the respondent satisfied himself that the service provider, namely LSF was sound and that the product was viable. It is clear to me that the respondent merely acted upon assurances received from Hamilton and the training that was provided by LSF themselves. It is obvious that LSF provided training with the object of marketing the product. As a prudent, careful and diligent financial services provider the respondent ought to have

asked the obvious question, namely how is it possible to pay the promised returns as well as commissions and administration costs from trading only 20 percent of the capital. The respondent can present no facts that he applied his mind to this question. If the respondent indeed did his homework as he claims then he did not have the capacity to make an assessment of this product. He nevertheless set about selling it. If he did have the capacity to evaluate this product, then he would have realised that this was a high risk product, in which event he was under a duty to advise the complainants accordingly.

[21] The respondent denies that he was not authorised to sell this product. He relies on the exemption which applied to both Hamilton and to himself. The respondent, as an FSP knew that in order to market spot forex a specific license must be obtained and which license can only be obtained after certain onerous requirements are met at the instance of the regulator. The respondent was therefore under a duty to disclose to the complainants that Hamilton, LSF and himself were operating under an exemption, whilst the regulator was considering their license applications. This was not done. This is a fact which might have influenced the complainants into accepting respondent's recommendations. As it turned out the respondent's application for a license to sell spot forex was rejected by the FSB as he was not qualified to market such product.

[22] The respondent suggested that it was Viljoen who sold the product to the complainants and he was merely a facilitator. As I have already pointed out, the respondent on his own version acted as advisor. According to the facts before me, Viljoen merely made a presentation on the 17th of August 2004 and he thereafter played no further part in the investment. I further find that

respondent arranged the presentation and was present throughout it. By his conduct respondent endorsed what Viljoen was saying and thereafter he prepared all the paperwork and entered into the transaction with the complainants, acknowledging in the same documents that he acted as advisor. I am therefore unable to hold Viljoen responsible for this investment.

[23] Accordingly I find that the respondent advised the complainants to invest in LSF. Such advice was given contrary to the provisions of the General Code. In particular, I find that, the respondent failed to act with due skill, care and diligence when advising the complainants to invest in LSF. The consequence of such conduct was the loss of their funds by the complainants.

[24] Accordingly, the complaints are upheld.

F. QUANTUM

[25] The complainants invested R200 000 and R150 000 respectively. With regard to the quantum, the respondent submitted that in the event that the complainant is upheld then the award should be 80 percent of the capital only as the complainants had agreed to risk 20 percent. There is no merit in this submission. The respondent cannot benefit from the terms and conditions of a contract which was inappropriate to the complainants' circumstances in the first place. I will award 100 percent of the capital that was lost by the complainants.

THE ORDER

I make the following order:

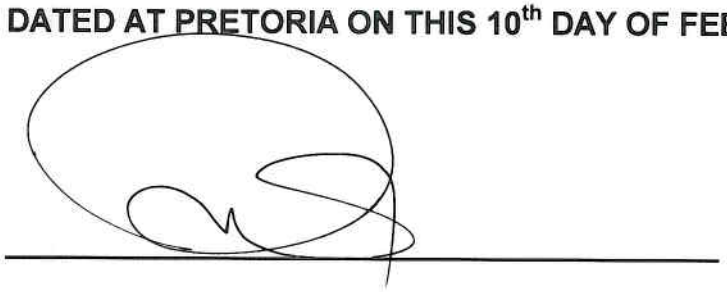
1. Both complaints succeed;

2. The respondent is ordered to pay 1st complainant R150 000 and 2nd complainant R200 000;

3. Interest on the aforesaid amounts at 15.5 per cent per annum calculated from seven days after date of this order to date of payment;

4. The respondent is to pay the case fee of R2 000.00 in respect of the two complaints to this Office.

DATED AT PRETORIA ON THIS 10th DAY OF FEBRUARY 2011.



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