IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 07293/11-12/ WC 1

In the matter between

FRANS JURIE NICOLAAS ROOS **Complainant**

and

DABIE SAAYMAN VERSEKERINGS MAKELAARS **First Respondent**

DABIE SAAYMAN **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 in terms of section 27 (5) (c) of the Act on 27 July 2017. Section 27 (5) (c)[1] empowers the Ombud to make a recommendation in order to resolve a complaint speedily by conciliation**.**

[2] The recommendation is attached hereto and is to be read together with this determination.

[1] "The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5)(c) has not been accepted by all parties concerned, make a final determination, which may include-
(a) the dismissal of the complaint; or
(b) the upholding of the complaint, wholly or partially…."

[3] Respondents' reasons for not accepting the recommendation are dealt with in the paragraphs here below.

B. THE PARTIES

[4] The complainant is Mr Frans Jurie Nicolaas Roos a retiree at the time of advice and whose details are on file in this Office.

[5] The first respondent is Dabie Saayman Versekerings Makelaars BK (registration number 2002/097235/23) with the principal place of business situated at 15 Somerset Street, Swellendam, 6740, Western Cape. The first respondent is an authorised financial services provider as provided for in the FAIS Act, with licence number 36575. The licence is in force.

[6] The second respondent is Mr Dabie Saayman, an adult male key individual and representative of first respondent. The regulator's records confirm second respondent's address to be the same as that of first respondent.

[7] At all material times hereto, second respondent rendered advice to complainant. I mention at this early stage that respondent claims he was representing an entity by the name of Unlisted Securities South Africa (Pty) Ltd (USSA), trading by the name FSP Network (Pty) Ltd when he rendered financial services to complainant. It is a fact that USSA no longer exists as it was voluntarily liquidated during 2011.

[8] Both respondents are collectively referred to in this determination as respondent. Where necessary I specify which respondent is being referred to.

C. RESPONSE TO THE RECOMMENDATION

[9] Respondent sent a number of documents to this Office. The documents include *inter alia*, a letter addressed to the Public Protector, the Master of the High Court and the South African Reserve Bank, (SARB); a High Court Application by a Mr Deon Pienaar, wherein Mr Pienaar asks the court for the restoration and preservation of Sharemax and its related entities to the rightful owners until a curator is appointed; and a declaration that the exercise of power by SARB was unlawful. The papers are quite lengthy and although respondent implored the Office to take them into account in finalising the case, they are simply not germane to the complaint before this Office.

[10] It might be worth repeating that the case made by complainant against respondent is that of inappropriately advising the complainant with the result that complainant suffered loss in the amount of R100 000. Having perused the documents, the respondent did not disturb the findings contained in the recommendation.

[11] I summarise respondent's response in the paragraphs immediately below and comment where necessary.

11.1 Respondent avers that he and some of his family members are investors in Sharemax. The point is made that respondent had full confidence in Sharemax.

11.2 Sharemax was totally legal and compliant until the SARB intervened and has never been liquidated as the Ombud implied. Sharemax was

finally liquidated in 2012. It is a proven fact that the full series of Zambezi prospectuses, issued by Sharemax, evidenced violations of Notice 459.

11.3 The funds invested by complainant were not part of his pension but discretionary funds. The point is further developed to demonstrate that complainant is a person of means. The undisputed facts demonstrate that the funds were initially invested by respondent with an insurer. On the advice of respondent that investment was terminated in order to invest in Zambezi Sharemax. Up to this point, despite several invitations, respondent has not explained what need was being addressed in terminating the Sanlam investment and why the Sharemax investment was considered more suitable. Respondent had to provide evidence of his compliance with section 8 (1) (d) of the Code and demonstrate that he took the time to ensure that complainant understood his advice in terms of section 8 (2) of the Code. He failed to do so.

11.4 Respondent submits that he conducted due diligence which included vising the Sharemax cites and meeting its board members whom the FSB had confirmed were fit and proper.

11.5 To prove the appropriateness of the advice, respondent avers that the money invested in Glacier had no guarantees,' *but at least with Sharemax, clients had an income from national tenants or the developer with the possibility of future growth*.'

11.6 Complainant ‘s wife signed the USSA disclosure document wherein she confirmed she is comfortable with the type of investment as it fits in with her investment objectives and needs; and her understanding that neither the capital nor the income is guaranteed. There is zero probability that complainant would have agreed to invest his wife’s retirement savings had the respondent pertinently informed them (as he was obliged to in terms of section 7 (1) of the Code) that they could lose their money, because, amongst others, the directors of Sharemax, who were also in charge of investor funds, had chosen to disregard the law (Notice 459) that is meant to protect investors. Respondent still does not deal with the implications of the Sale of Business Agreement (SBA) and its implications for complainant’s investment. He did not explain to the complainants that the directors were busy disbursing generous sums of investor funds gratuitously to entities like Brandberg Konsultive (Pty) Ltd as commission. It is clear from his response that he in fact did the opposite, extolling the investment because of its so-called track record and extraordinary returns.

11.7 Respondent denies that he recommended Sharemax because for self-enrichment. He states that with Glacier he would still be receiving trail commission and not the once off commission he received from Sharemax. I note that respondent still does not disclose that as much as 10% of complainant’s investment was withdrawn after the cooling off period to fund amongst others, his commission of R6000, calculated as 6% of the investment. The remainder of the funds were utilized by the

directors of Sharemax to fund other marketing costs, in direct contravention of Notice 459.

D. DETERMINATION

[12] Respondent's inappropriate advice has been sufficiently demonstrated in the recommendation. That respondent and members of his family were also investors in Sharemax does not take away that the recommendation of this product to the complainant and his wife was a violation of the Code.

[13] Respondent fails to see that by the time he presented the prospectus to his client, the directors were already contravening the law. Respondent did not disclose these risks. He could not even see the risk inherent in the poor governance that was demonstrated in the prospectuses.

Respondents acted as representatives of USSA

[14] Respondent notes in his response that when he rendered the service he acted as a representative of USSA. The submission further goes on to state that the complaint should be addressed by USSA and/or its member and key individual, Gert Goosen. The Appeals Board has already answered this question in *Black v Moore*[2] , where the board stressed that:

[15] "*In effect a "representative" executes the very same acts as are expected from the provider when operating alone with the exception of when a representative either:*

[2] Parties names are stated as in the original complaint. In the Appeal Board of the Financial Services Board, John Alexander Moore and Johnsure Investments CC / Gerald Edward Black, 15 January 2013 at para 59 and 61

1. *acts on behalf of the provider;*

2. *Subject to the provider concerned taking responsibility for these acts.*

Apart from these two (2) qualifications, a representative acts as if it were a provider. …The provider is directly regulated by the FAIS Act and by the Registrar. But representatives are, apart from being regulated by the FAIS Act, in effect regulated by the overseeing provider rather than by the Registrar. Such provider clearly has a discretion on how precisely to exercise responsibility over a representative but should ensure in the agreements with the representative that the responsibility covers all aspects, including those duties and obligations imposed by the FAIS Act and the Regulations pertaining to them. The fact that the representative "acts on behalf of" the provider also means that in law, the provider may be held accountable for the acts and omissions of his representative and thus should be regarded as a co-respondent in the event of negligence on the part of the representative."

[16] The question of whether a representative [and not the provider] should be held liable in this context was again dealt with by the Board of Appeal in the second *Black v Moore* Appeal[3]. Appellants, relying on Board Notice 95 of 2003 argued that the responsibility lay not with the appellant as a representative but rested solely with the financial services provider. In dismissing the argument, the Board concluded, '*the effect of the Exemption Notice thus allows a representative (due to his minimum experience) to market products subject to*

[3] In the Appeal Board of the Financial Services Board, John Alexander Moore and Johnsure Investments CC / Gerald Edward Black Decision handed down on 12 November 2014, paragraphs 18 to 23.

a supervisor's guidance. Apart from this exemption, he has to comply with the Code of Conduct.'

[17] Section 13(2)(b) of the Act states:

"*An authorised financial services provider must take such steps as may be reasonable in the circumstances to ensure that representatives comply with any applicable code of conduct as well as with other applicable laws on conduct of business*" (underline supplied).

[18] It is clear that there is a duty imposed not only on the provider but also the representative to comply with the provisions of the FAIS Act and Code of Conduct.

[19] The complaint is thus directed against the correct parties, the respondents. As already mentioned, respondent is fully aware that USSA was liquidated in 2011.

E. CAUSATION

[20] It is not sufficient to merely point to the violations of the Code without dealing with the question of whether such violations caused the loss. The recommendation dealt extensively with the risk involved in the Sharemax products which risks respondent still refuses to acknowledge. As a result of their failure to disclose the true nature of the risk involved, complainant accepted respondents' advice and made the investments.

[21] The loss in this case was foreseeable for the following reasons:

21.1 The violations of Notice 459 alone were sufficient basis for respondent to raise serious questions about investor protection. There is no evidence that he did.

21.2 There is no evidence that respondent had even read the prospectus and this is evident from his failure to deal with the SBA and its implications for his client's investment.

[22] Respondent's conduct breached the contract he had with the complainants, which amounts to a breach of the Code[4].

[23] Respondent's failure to appropriately advise complainant caused the loss.

F. THE ORDER

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

1. The complaint is upheld.

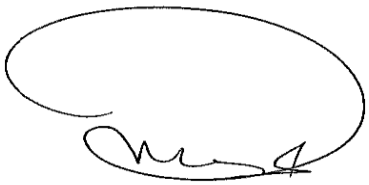
2. The respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the complainant the amount of R100 000.

3. Interest on this amount at a rate of 10.25% per annum from the date of determination to date of final payment.

4. Complainant to cede his rights and title in respect of any further claims in respect of this investment to respondents.

[4] J & G Financial Services Assurance Brokers (Pty) Ltd &O v Dr Robert Ludolf Prigge Case No FAB 8/2016 – para 43 to 44

DATED AT PRETORIA ON THIS THE 25th DAY OF JANUARY 2018.



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