IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 09769/12-13/ WC 1

In the matter between:

Skye Ryalls	**Complainant**
and	
Van Strijp Financial Advisors CC	**First Respondent**
Anna Van Strijp	**Second Respondent**

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

A. INTRODUCTION

[1] This determination follows a recommendation made in terms of section 27 (5) (c) of the Act on 24 October 2017. Section 27 (5) (c) empowers the Ombud to make a recommendation in order to resolve a complaint speedily by conciliation**.** This determination shall be read in conjunction with the recommendation and the latter shall form part of this determination.

[2] Respondent, in paragraph 40 of the response, claims that summaries of the Waterfall Estate prospectus as well as Government Notice 459 had not been annexed to the recommendation as communicated by this Office. This Office after

consulting its records can confirm that this information was provided as an attachment to the e-mail which had also contained the recommendation, dated 24 October 2017.

[3] The respondent's reasons for not accepting the recommendation are dealt with in the paragraphs following below.

B. THE PARTIES

[4] Complainant is Miss Skye Ryalls, an adult female, a pilot by occupation of 28 years of age. At the time the transaction was concluded complainant was 18 years. Complainant's full details are on file in this Office.

[5] First respondent is Van Strijp Financial Advisors CC, a close corporation duly incorporated in terms of South African law, with registration number (1995/005017/23). The first respondent is an authorised financial services provider (FSP) (license number 11088), with its principal place of business noted in the Regulator's records as No. 4 Flaming Rock Crescent, Mooikloof, Pretoria, 0081. The license has been active since 15 December 2004.

[6] Second respondent is Anna Van Strijp, an adult female, key individual and representative of the first respondent. The Regulator's records confirm her address to be the same as that of first respondent. At all times material hereto, second respondent rendered financial services to complainant.

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

C. RESPONDENT'S REPLY TO THE RECOMMENDATION

[8] The respondent's response begins by criticising this Office for failing to take into account her application in terms of section 27 (3) (c) of the FAIS Act, for material issues of factual dispute. Respondent also accuses the Ombud of either assuming information on behalf of complainant, or alternatively, being in possession of information which has not been made available for her to consider. Based on the aforesaid, respondent contends that the Ombud is not treating her fairly and is biased against FSPs who in her own words "...assisted…" investors to invest in Sharemax syndications.

[9] Despite respondent's claims, this Office had taken all of respondent's responses into account; there is no additional information that this Office has which has not been made available to respondent.

[10] With regard to the application in terms of section 27 (3) (c), respondent does not make any case at all. These claims are not backed by fact; only unreasonable suspicion and hollow attack. Besides, on a proper interpretation of section 27 (3) (c), as pronounced by the High Court in the *Deeb Risk v FAIS Ombud & Others*[1] matter, the Ombud exercises discretion in each case. Absent a decision referring the matter to court, the Office retains its jurisdiction. The application made by

[1] Gauteng High Court Division, case number 50027/2014

respondents in terms of section 27 (3) (c) therefore is refused. The attack that the Ombud is biased against FSPs who assisted clients with property syndication investments is gratuitous and unwarranted.

[11] With regard to the findings in the recommendation, the respondent made bold statements to the effect that complainant had not lost her capital due to section 311 Scheme of Arrangement that has been sanctioned by the High Court.

[12] Respondent denies having recommended the investment into Waterfall Estate as an 'absolute risk free investment'. Respondent once again points to documentation previously provided which she claims clearly contradicted complainant's submissions in this regard and accuses the Ombud of being grossly unfair in ignoring these documents. Respondent follows up with the argument that the aforesaid documents were signed by complainant and that, in accordance with the principle of *pacta sunt servanda*[2], the complainant cannot now repudiate her own signatures.

[13] It is claimed that the prospectus of the investment, which respondent believes forms part of the compliance documentation as required by the FAIS Act and the Code, was provided and explained to complainant. The contents of which make clear reference to the risks involved and the fact that the capital was not guaranteed. Complainant was informed at all times that the investment was a capital risk investment which was illiquid, and that complainant could lose her entire capital.

[2] Pacta sunt servanda is a Latin term which means agreements must be kept.

[14] Respondent further claims that as the prospectus was registered by the Department of Trade and Industry and approved by various statutory bodies, which involved both auditors and attorneys, it was reasonable for her to have relied on the contents thereof.

[15] Respondent reiterated her claims that there were material disputes of fact between her version and that of complainant with regards to her having made the required disclosures as to the risks inherent in the investment, the lack of liquidity, commission's payable, and the structure of the investment. Respondent is of the view that documentation provided in her previous responses highlight these material disputes of fact, which the Ombud has chosen to ignore, and as a result maintains the view that this Office has not treated her fairly.

[16] Respondent claims that not only did she complete a risk profile for complainant, but that she had considered complainant's capacity for risk and her risk tolerance. Factors such as complainant having been a young woman who was investing only 10% of her total 'wealth', and with no immediate need for the funds, meant that she had the capacity to absorb losses. Losses which could be recouped over her entire career. Respondent was therefore satisfied that this, together with complainant having specifically requested this investment, means she had made an informed decision as to the suitability of this investment to her circumstances.

[17] Respondent also claims that complainant had been greatly influenced by her mother, who at that time had benefited from the successful track record of a

number of Sharemax syndications. Complainant's investment in Sharemax was also seen to have been a single need, which respondent claims required no financial needs analysis.

[18] Respondent therefore denies that complainant's loss is attributable to inappropriate or negligent advice, and claims that the advice provided and subsequent recommendation were appropriate. Respondent believes that her duty as an FSP is to advise and inform investors and allow them to make up their own mind, and not to be a policeman. Reference is made to a previous determination issued by this Office in the matter of *Palmerias Hospitality CC v Willie du Plessis Financial Services*[3], where the then Ombud, Mr Charles Pillai, relied on the Supreme Court of Appeal decision of *Lappeman Diamond Culling Works (PTY) Ltd vs MIB Group (PTY) Ltd 2003 SA 217 (SCA).*

[19] Respondent debates the meaning behind the phrase 'due diligence', and the manner in which it is applied by the Ombud. Respondent believes that the Ombud's interpretation of due diligence is that of a commercial concept commonly referred to as a 'due diligence exercise'. This interpretation, respondent claims, sees the Ombud placing an obligation on the FSP to conduct a <u>forensic investigation</u> into the affairs of the investment company, which she sees as totally unreasonable and would set the standards above those required of a reasonable FSP. Respondent, in this regard, relies on an affidavit deposed by one Anton Swanepoel (Swanepoel,) and disagrees that the Code imposes such an obligation

[3] FOC 2372/06-07/ EC 3

on a reasonable FSP, and that a due diligence investigation is usually conducted by a specialist trained to conduct such processes

[20] In addition, respondent relies on Mr Swanepoel's claims that Notice 459 does not apply to Sharemax. Respondent also referred to the opinion of two further experts, namely, Mike Schussler and Derek Cohen and claimed that the Ombud had ignored their opinions. I deal with the opinions later in this determination.

D. DETERMINATION

[21] It is concerning to note that, despite overwhelming evidence provided in the recommendation letter, which included a summary of the relevant prospectus pointing to the provisions that conveyed the directors' disregard for the law, and their intentions to pay investor funds well before transfer of the property (all of which made a compelling case against recommending this product), the respondent still believes that the standard documents she submitted (including the prospectus) assist her case in stating that she disclosed the risk to her client. I further point to the gratuitous payment of funds to entities such as Brandberg Consultante which further exposed the directors' disregard for the law. Even in this response, the respondent proffers no cogent reason for recommending this investment, in the face of the illegalities cited in the recommendation. It is further evident that the respondent had no appreciation of the risks inherent in this investment, for her to have properly advised her client. Examples of the risks were adequately set out in the recommendation letter and will not be replicated in this determination.

In short, the findings made in the recommendation are left undisturbed.

The experts' opinions: Mike Schussler and Derek Cohen

[22] The opinions from Mr Schussler and Mr Cohen, which are unhelpful and do not assist the respondent in so far as the question of appropriateness of the latter's advice to complainant is concerned, are dealt with extensively in the Vorster[4] determination paragraphs 19 - 27.

Swanepoel's Opinion

[23] The opinion of Swanepoel, which was attached to the response, is dealt with in detail in the Vorster[5] determination paragraph 31 (a) – (m). Quite simply, the opinion adds no value and this Office is simply not persuaded by it.

The section 311 Scheme of Arrangements

[24] Respondent referred to the section 311 Scheme of Arrangements but does not point to any legally enforceable instrument that guarantees complainant's capital. There can be no doubt that complainant has lost her capital. In any event, the Board in the *Siegriest* and *Bekker* appeals (FAIS 00039/11-12/GP1 and FAIS 06661/10-11/ WC 1) ruled that the investors' claims had not been compromised. In any event the Board did not disturb the broker's liability in that case.

[4] Bernardus Rudolf Vorster and Magdalena Josina Vorster v Fanie Du Preez Makelaars CC t/a The Meadow Group and Stephanus Johannes Du Preez

[5] Mr Bernardus Rudolf Vorster & Mrs Magdalena Josina Vorster vs Fanie Du Preez Makelaars CC t/a The Meadow Group & Mr Stephanus (Fanie) Johannes Du Preez.

[25] As evidenced in the recommendation, the respondent failed to appropriately advise complainant. In this respect, respondent offers no basis for recommending an investment where both the prospectus and the Sale of Business Agreement, (SBA), manifested violations of the law. In addition, and despite respondent's claims that this was a single need, no evidence is offered in support of her duty to provide advice that is suitable to the clients' circumstances and risk profile (section 8 (1) (a) to (c) of the Code).

[26] It is important to note that even in her response to the recommendation, respondent still failed to provide adequate records in compliance with section 3 (2) and section 9 of the Code. She argued that the prospectus, and the standard documents (the latter contained no reference to the risks canvassed in the recommendation), had been discussed with the complainant and confirm complainant's acceptance that the material issues, including risk, had been disclosed.

[27] It must be appreciated that neither the respondent's record of advice, nor the standard documents deal with the violations of Notice 459, including the implications of such violations for investor security. The prospectus manifested violations of notice 459 and it was for respondent to point that out to complainant and document it.

E. CAUSATION

[28] 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 product, risks which respondent still refuses to acknowledge. As a result of respondent's failure to disclose the true nature of the risk involved, complainant accepted respondent's advice and made the investment. Respondent knew that the complainant was reliant on her for advice.

[29] The loss in this case was foreseeable due to the violations of Notice 459, which alone were sufficient basis for respondent to raise serious questions about investor protection. There is no evidence that she did. Instead respondent makes reference to these very violations as evidence of the soundness of the Sharemax investment.

[30] Respondent's conduct breached the Code, which amounts to breach of the very contract she had with the complainant.[6]

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

F. THE ORDER

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

1. The complaint is upheld.

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

2. The respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the complainant the amount of R25 000;

3. Interest on this amount at a rate of 10% per annum from the date of determination to date of final payment.

4. Complainant, upon full payment, is to cede her rights, title and any further claims in respect of this investment to respondent.

DATED AT PRETORIA ON THIS THE 12th DAY OF JUNE 2018.

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NARESH S TULSIE
OMBUD FOR FINANCIAL SERVICES PROVIDERS