IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 07257/11-12/ KZN 1

In the matter between

TASHIM SINGH **Complainant**

and

MAK INVESTMENTS AND ASSURANCE t/a

NU ERA INSURANCE BROKERS CC **First Respondent**

ANESH MAHARAJ **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 26 July 2017. Section 27 (5) (c) of the Act empowers the Ombud to make a recommendation to the parties for the purposes of achieving an expeditious resolution[1]. The recommendation was sent to both the complainants and respondents and is attached hereto for ease of reference. To avoid prolixity, the recommendation must be read as part of this determination.

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[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…."

[2] On 15 August 2017, respondents forwarded their objection to the recommendation with reasons. Of importance, notwithstanding respondents' objection, respondents did not disturb the legal and factual conclusions reached in the recommendation.

B. THE PARTIES

[3] Complainant is Mr Tashim Singh, an adult male whose full details are on record in this Office.

[4] First respondent Mak Investments and Assurance, trading as Nu Era Insurance Brokers CC, a close corporation duly incorporated in terms of South African law, with its principal place of business at 103 Shannon Drive, Reservoir Hills, Durban, KwaZulu Natal. First respondent is an authorised financial services provider (FSP), with licence number 20036. The licence was issued on 15 June 2005 and is still valid. Nu-Era Brokers appears to be the trade name of first respondent and the respondents' stationery is also styled Nu-Era.

[5] Second respondent is Anesh Maharaj, an adult male representative whose address is the same as that of first respondent. Second respondent is noted in the regulator's records as one of the key individuals. Both respondents are collectively referred to in this determination as respondent.

C. RESPONDENT'S REPLY TO THE RECOMMENDATION

[6] The salient features of respondent's reply are set out in the following paragraphs:

6.1 Respondent avers that he had made an offer to settle the complaint. In his view, the terms proposed were reasonable when one takes into

account the current economic conditions. It is common cause that complainant rejected respondent’s offer.

6.2 Respondent disputes that the income in respect of the Rivonia Ltd investment stopped in 2010. He refers to a letter dated 3 November 2016, written by Ms Dominique Hease of Nova Property Holding (Nova), in which it is stated that income will cease as of 1 November 2016. Respondent misses the point altogether. The recommendation grants relief in respect of the capital. It therefore does not matter when income was stopped in either of the two investments. The fact remains that complainant’s capital has not been repaid. That fact is not disputed by respondent.

6.3 Respondent disputes that the investment was meant to endure for five years. He refers to pages of the prospectuses and points to only projections of interest rates for five-year periods. He concludes that complainant was aware she was investing over a longer term. The suggestion here is that complainant agreed to place funds in an investment with no definite term and thus complainant’s complaint is premature. The minimum term stipulated in the investment form complainant completed is five years. Moreover, it is not disputed that the entities into which complainant invested were part of the section 311 Scheme of Arrangement sanctioned by the High Court. Sharemax was finally liquidated more than five years ago. It therefore does not assist respondent that on the basis of his own failure to appropriately advise, he left out the most basic part of an agreement, the term. As at this point,

there is no legally enforceable document which guarantees complainant payment of his capital by a definite date.

6.4 Respondent contends that an acting registrar of CIPRO had signed the prospectus thus implying that it complied with all the requirements. Respondent states that the FSB[2] is acting *ultra vires* in making the unsubstantiated statements about violations of Notice 459. He further states that he could not have '*guessed*' that mismanagement would occur.

6.5 Respondent questions the conclusion that the Sharemax investments were high risk, He asks the question, if investing in shopping malls is high risk then what is the reason most insurers make such investments in such high rates in the country.

6.6 Respondent avers that in advising complainants, he acted under supervision as an agent of Unlisted Security South Africa (USSA) (Pty) Ltd, trading as FSP Network (Pty) with the key Individual being Rinette Goosen. Respondent alleges that Goosen closed her business and then took a position at the FSB. In his view, there are questions that ought to be directed at Ms Goosen.

6.7 Finally, respondent refers to the section 311 Scheme of Arrangements and suggests that complainant would have been issued debenture certificates and was provided a date by which Nova would have paid complainant's historical capital.

[2] Referring to the FAIS Ombud

6.8 Respondent further states that any ruling will be premature as there is a High Court case that is due to be heard on 15 October 2017, in which the FSB and the FAIS Ombud are respondents with 13 others.

D. FINDINGS

[7] As evidenced in the recommendation, which has not been disturbed by respondents, the respondent failed to appropriately advise complainant.

[8] Notwithstanding the mounting evidence pointing to the high risk involved in the Sharemax products, respondent still argues that the products were not high risk. Respondent's remarks are unfortunate.

[9] Respondent still fails to see that by the time he presented the prospectus to his client, the directors were already contravening the law in that money was paid out illegally immediately after payment, firstly to cover commissions and secondly, to advance to sellers. Complainant's funds were therefore lost at the time of making the investment. Respondent did not disclose these risks. He could not see the poor governance that was demonstrated in the prospectuses which also contributed to the high risk.

Respondents acted as representatives of USSA

[10] Respondent states that in rendering financial services to complainant, respondents acted as agents of USSA. The Appeals Board rejected this defense in *Black v Moore*[3] and concluded that:

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[3] [3] 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

"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:

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."

[11] 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[4]. Appellants, relying on Board Notice 95 of 2003 argued that the responsibility lay not with the appellant as a representative but rested

[4] 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.

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

[2] 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).

The section 311 Scheme of Arrangements

[11] Respondent referred to the section 311 Scheme of Arrangements and speculated that complainant was party to the arrangement. He questions why complainant is seeking payment from him. He further speculates that complainant would have been furnished debenture certificates by Nova coupled with a date for payment of his historical capital. Respondent, however, does not dispute that complainant has not seen a single cent of his capital. There can be no doubt that complainant has lost his 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. Certainly, complainant's claim against respondent for inappropriate advice was not compromised.

E. CAUSATION

[12] 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 risks involved in the product, risks respondent either refuses to acknowledge or was oblivious to. Whatever the reasons may be for respondent's failure to see the risk, respondent could not have appropriately advised his clients. As a result of the failure to disclose the true nature of the risk involved, complainant accepted respondent's advice and made the investments. It is highly probable that no investment would have been made in Sharemax had respondent disclosed the risk. In a recent decision of the Appeals Board[5] it was stressed:

'43….In the case of a provider under the Act more is required namely compliance with the provisions of the Code. Failure to comply with the code can be seen in two ways. The Code may be regarded as being impliedly part of the agreement between the provider and the client and its breach a breach of contract. The other approach is that failure of the statutory duty gives rise to delictual liability.

44. In both instances the breach must be the cause of the loss. We stress this point because the Ombud's reasons give the impression that any breach of the Code makes a provider liable for damages without due regard to this aspect of

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

causation, namely did the failure to comply with the Code cause acceptance of the advice.'

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

F. THE ORDER

[14] 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 R400 000.

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

4. Complainant to cede his rights in respect of any further claims in respect of these investments to respondents.

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

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NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS