IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 07292/11-12/ KZN 1

In the matter between

RHISTA 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 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] Respondent's reasons for not accepting the recommendation are dealt with in the paragraphs here below. Before I deal with the reasons, I note that respondents did not disturb the legal and factual conclusions reached in the recommendation.

B. THE PARTIES

[4] Complainant is Ms Rhista Singh, an adult female full details are on record in this Office.

[5] First respondent Mak Investments and Assurance trading as Nu Era Insurance Brokers CC, a close corporation duly incorporated in terms of South African laws, with its principal place of business at 103 Shannon Drive, Reservoir Hills, Durban, KwaZulu Natal. First respondent is authorised as a 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.

[6] 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. RESPONSE TO THE RECOMMENDATION

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

7.1 Respondent avers that he had made an offer to settle the complaint. In his view, the terms proposed were reasonable, given the current

economic conditions. It is common cause that complainant rejected respondent's offer.

7.2 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. Apart from the letter from Ms Hease, respondent provides no cogent proof to support his challenge. In any event, respondent misses the point altogether in that the recommendation grants relief in respect of the capital. It does not matter therefore when complainant's income installments ceased. The fact remains that complainant's capital has not been repaid. There is no dispute in this regard and there is no legally enforceable document which guarantees complainant her capital by a particular date.

7.3 Respondent disputes that the investment was meant to endure for five years. He refers to pages of the prospectuses and points to that only the income projections were for five-years. He concludes that complainant was aware she was investing over a longer term but does not mention the term. The suggestion here is that complainant agreed to invest 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.

7.4 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.

7.5 Respondent questions the conclusion that the Sharemax investments were high risk. He questions why most insurers invest in building shopping malls at such high rate in the country if indeed shopping malls are high risk.

7.6 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) and the Key Individual was Rinette Goosen, (Goosen). Respondent alleges that Goosen closed her business and then took a position at the FSB. In his view, questions should be directed at her.

[2] Should be the FAIS Ombud

7.7 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 pay her historical capital.

7.8 Finally, respondent 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. Respondent however, does not state how the outcome of this High Court case would material influence the complaint being considered by this Office.

D. DETERMINATION

[8] Notwithstanding the evidence pointing to the high risk involved in the Sharemax products, respondent still argues that the products were not high risk.

[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 into the attorney's trust account, firstly to cover commissions and secondly, to advance to the sellers and entities like Brandberg. Thus, complainant's funds were lost at the time of making the investment. Respondent did not disclose these risks. He could not even see the risk inherent in the poor governance that was demonstrated in the prospectuses. I now deal with respondent's response.

Respondents acted as representatives of USSA

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

"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."

[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

"*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 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] Respondents 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 her historical capital. Respondent however does not dispute that complainants have not seen a single cent of their 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

[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.

compromised. Certainly, complainant's claim against respondent in respect of his inappropriate advice was not compromised.

[12] None of the points raised by the respondent disturb the conclusion that he failed in his duty to appropriately advise complainant, in breach of the contract he had with complainant and in breach of the Code.

E. CAUSATION

[13] 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. 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 their failure to disclose the true nature of the risk involved, complainant accepted respondents' advice and made the investments.

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

14.1 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.

14.2 There is no evidence that respondent had even read the prospectus and this is evident from several of his claims[5].

[5] See in this regard the statement about the prospectus that is in compliance with Notice 459; the shopping malls that provided security for the investors.

14.3 The conflicting provisions of the prospectus and the gratuitous payment of money to entities like Brandberg, all of which do not appear to have aroused any suspicion or questions regarding the protection of investors on the part of respondent.

[15] Respondent's conduct breached the very contract he had with the complainants, which amounts to a breach of the Code[6].

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

F. THE ORDER

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

1. The complaint is upheld.

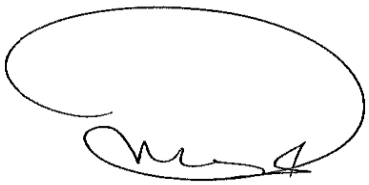
2. The respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the complainant the amount of R400 000;

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

4. Complainant to cede her rights and title in respect of any further claims in respect of these investments to respondents.

[6] 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 25th DAY OF JANUARY 2018.



_____

NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS