IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS
HELD AT PRETORIA

CASE NO: FOC/540/05/KZN/ (1)

In the matter between:

ALAN ROBERT STEPHENSON Complainant

and

NEDBANK LIMITED Respondent

DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS Act')

The Parties

[1] The Complainant is Alan Robert Stephenson, male, a farmer and a valuer who lives in the Midlands of Kwa-Zulu Natal.

[2] The Respondent is Nedbank Limited, a bank established and registered in terms of the laws of the Republic of South Africa and an authorised financial services provider with its principal place of business at 135 Rivonia Road, Sandton, Johannesburg.

The issues

[3] The issues in this determination concern:

[3.1] The misrepresentation of the financial product sold to the Complainant;

[3.2] The non-disclosure by the Respondent of fees and charges levied in respect of an investment made by the Complainant in the Old Mutual Money Market Fund ('OMMMF');

[3.3] The appropriateness of the advice furnished by the Respondent in rendering certain financial services to the Complainant;

[3.4] Non - compliance with the FAIS Act.

The context

[4] The issues referred to above, arise in the context of a transaction involving the switching of funds held by the Complainant in his Nedbank Money Market Account ('NMMA') to the OMMMF. The transaction was brokered by one Nivern Maharaj ('Maharaj') an employee of the Respondent, acting in the course and scope of his employment with the Respondent as its duly authorised representative.

The facts

[5] The Complainant is a long standing client - some 25 years according to him - of the Respondent. He held a substantial amount to his credit in the NMMA with the Respondent.

[6] The allegations emerge from an affidavit attested to by the Complainant and dated the 4th March 2005. They are:

[7] During or about October 2004, a certain Ms Nadia Rasool ('Rasool') an employee of the Respondent's Cascades branch (where the Complainant's NMMA was held) telephoned the Complainant and informed him that Respondent had access to the OMMMF which was achieving an interest rate of 2% more than that which his NMMA was achieving. Rasool is alleged to have recommended that the Complainant move his funds to the OMMMF.

[8] Complainant requested some details about the OMMMF. He was advised, *inter alia*:

[8.1] That the OMMMF was much larger than the NMMA and was thus able to offer a better interest rate;

[8.2] That Old Mutual owned the Respondent and as such, there was no additional risk to him;

[8.3] That the only difference between his existing NMMA and the OMMMF was that whereas with the NMMA he could transfer between accounts via the internet, he would in the case of the OMMMF have to request withdrawals by way of a faxed withdrawal form and would need to give 72 hours notice.

[9] During the same conversation, the Complainant informed Rasool that although his cash reserves looked healthy at the time, he was going to make large payments for lay pullets for his farming business towards the end of November 2004. Furthermore, he would have to pay staff bonuses in December 2004 and also intended to purchase a new vehicle in February 2005. Notwithstanding that his cash reserves would be considerably depleted by February 2005, Rasool still felt that it would be advantageous for the Complainant to switch the funds.

[10] Though initially reticent about the idea, the consideration of a better interest rate and the fact that there was no difference between the two investments, prompted the Complainant to go along with Rasool's recommendation.

[11] Towards the end of October 2004, the Complainant duly telephoned Rasool to inform her of his decision to accept her recommendations and requested that the necessary arrangements be made for the funds to be transferred. Rasool informed Complainant that the investment would need to be done at the Westville branch of the Respondent. She undertook to make the necessary arrangements for that branch to contact the Complainant.

[12] Shortly thereafter, Maharaj from the Respondent's personal banking division telephoned the Complainant in connection with the investment. An appointment was set up to meet at Complainant's offices on the 1st November 2004. During the telephone conversation Maharaj is alleged to have confirmed Rasool's statements and again mentioned that the only difference was the 72 hour delay on withdrawals and that it had to be done by fax and not via the internet.

[13] The meeting with Maharaj on 1 November 2004, it is alleged, lasted no more than ten minutes. An investment of R1, 2 million was made pursuant to the advice furnished by Maharaj. During the meeting, the following documents were signed by Complainant, namely:-

a) a broker's note;
b) a summary of proposal investment; and

c) a buying form.

The forms, it is alleged, were not completed in the presence of the Complainant. Maharaj is said to have advised Complainant that it was not necessary to fill in all the other details as he would obtain same from the Respondent's records.

[14] No financial needs analysis was conducted as required by the FAIS Act, as the Complainant had agreed to waive the right to have one done. Thus, whatever advice was given was done without the benefit of a financial needs analysis.

[15] During this meeting, Maharaj is said to have promised the Complainant that he would e-mail him a withdrawal form which would enable the Complainant to withdraw the funds he needed at the end of November 2004.

[16] Maharaj did e-mail the aforesaid document on the 2nd November 2004. Together with the selling form a fund fact sheet was also e-mailed to the Complainant.

[17] Complainant's next meeting with Respondent in connection with this matter was on the 23rd November 2004. The complainant met Rasool in order to arrange a letter of confirmation of his investment, which, according to him was with the Respondent. This he required to provide proof of his available funds as he intended to attend a property auction around that time. Rasool advised Complainant that it was not possible to provide such letter unless the funds are transferred back from the OMMMF to the NMMA. It was on this occasion that Complainant discovered, for the first time, that charges of approximately R13 465.68 had been levied

information relating to the complaint and to the reasons for repudiation thereof, of which more will be said later.

[22] In response to the complaint, the Respondent duly transferred an amount of R 1 186 534.32 from the OMMMF to NMMA on the 24th November 2004. Thus the amount of R13 465.68 can be accepted as the amount that was deducted in respect of costs. It is this amount that the Complainant claims as part of the relief he is seeking.

The Complaint

[23] The essence of the complaint, as is evident from the affidavit and the complaint form, is that Respondent misrepresented the nature of the investment to the Complainant. In this regard, Complainant alleges that:

[23.1] At all times, Maharaj falsely maintained that the OMMMF was the same as the NMMA when he knew that in fact, these two investments differed materially;

[23.2] Maharaj had also falsely advised Complainant that there was no risk in the investment with OMMMF as Old Mutual owned the Respondent;

[23.3] Maharaj also falsely advised Complainant that the only difference between the two investments was the manner of effecting withdrawals. Whilst withdrawals from the NMMA could be done through the internet, withdrawals from the OMMMF had to be done by way of a faxed withdrawal form and that it would take 72 hour before the funds could be transferred;

against his investment. Complainant was shocked to discover this as no mention was made of costs at the time that the investment was made.

[18] The Complainant insisted that Rasool immediately get hold of Maharaj telephonically and sort the problem out. Rasool is said to have confirmed that she too had been unaware of the charges and indicated that she would arrange for these to be reversed. To this end, she contacted Maharaj telephonically to discuss the matter with him. When it became clear that Maharaj was not prepared to reverse the charges, Complainant spoke to him. Maharaj is said to have maintained that he had e-mailed the charges and was therefore not prepared to reverse any charges.

[19] The complaint then escalated, within the Respondent structures, to a Mr. David Hoyle ('Hoyle') who also was not able to assist the Complainant. Complainant met with Hoyle on the 30th November 2004 and again on the 16th December 2004 in an attempt to resolve the matter. During one or the other of these meetings, it became clear to the Complainant on the advice of Hoyle that there were marked differences between the NMMA and the OMMMF.

[20] Further communication between the Complainant and various Nedbank employees was exchanged all of which culminated in the Complainant lodging the complaint with this Office. Prior to lodging his complaint with this office, various options were investigated on the understanding that Complainant wanted a 'win-win situation'. However, none of the options were successful in resolving the dispute.

[21] Official confirmation of the repudiation of the complaint is contained in a letter dated 17 February 2005 signed by a Mrs Janet Esterhuizen, Regional Manager, Nedbank Financial Planning. The letter contains further

[23.4] Maharaj induced Complainant to sign the documents relating to investment by falsely claiming that they are the same.

[24] Maharaj failed to disclose commission and other relevant charges, as required by the FAIS Act, prior to the Complainant concluding the investment with OMMMF.

[25] It also appears from a general reading of the complaint that the Complainant alleges that the advice given to him was inappropriate. This is by virtue of the fact that Maharaj, at the time he rendered the financial service, allegedly knew that Complainant would need money in November 2004, December 2004 and February 2005 for his business needs. This was for the purchase of lay pullets, payment of staff bonuses and the purchase of a motor vehicle. Notwithstanding these financial needs, the investment was proceeded with.

[26] It also appears from a reading of the complaint that there are various allegations of non-compliance with the provisions of the FAIS Act.

[27] Complainant seeks the following relief:

[27.1] Payment of the sum of R16 215,26 being the financial prejudice he has suffered as a result of commissions and charges that were not disclosed at the time the investment was made;

[27.2] An award for distress and inconvenience;

[27.3] Payment of the sum of R3 900,00 being the estimated costs of filing the complaint with this Office.

[28] The following documents were annexed to the complaint:

[28.1] Annexure 'A' is a letter dated 11 August 2003 written by the Complainant to Respondent requesting it to open a money market account for him;

[28.2] Annexure 'B' is an e-mail from Maharaj to the complainant dated 2 November 2004;

[28.3] Annexure 'C' is a selling form which is an attachment in 'B'

[28.4] Annexure 'D' is a fund fact sheet, also an attachment in 'B';

[28.5] Annexure 'E' is an e-mail from Taryn van Wyk, Legal and Compliance Officer at Nedbank Financial Planning Division dated 19 January 2005;

[28.6] Annexure 'F' is a letter dated 13 January 2005 from Susan le Roux, General Manager of Nedbank Financial Planning addressed to the Complainant. This letter is an attachment to 'E';

[28.7] Annexure 'G' is a document titled 'Summary of Proposal Investment Solution';

[28.8] Annexure 'H' is a letter to the Complainant dated 1 March 2005, from Hoyle;

[28.9] Annexure 'I' is an undated document titled 'Client Broker Note and Letter of Authority';

[28.10] Annexure 'J' is a document titled 'Buying Form';

[28.11] Annexure 'K' is a letter dated 17 February 2005 from a Mrs. Janet Esterhuizen, Regional Manager of Nedbank Financial Planning to the Complainant;

[28.12] Annexure 'L' is a letter from Hoyle to the Complainant, dated 4 March 2005.

Additional documents forming part of the bundle are:

[28.13] Annexure 'M' is a letter from this Office to the Respondent, dated 23 March 2005, affording the Respondent a further opportunity to resolve the complaint with their client;

[28.14] Annexure 'N' is a Notice in terms of section 27 (4) of the FAIS Act from this Office to the Respondent;

[28.15] Annexure 'O' is the Respondent's letter to this Office dated 29 June 2005;

[28.16] Annexure 'P' is a statement by Maharaj.

The response to the complaint

[29] The Rules of Proceedings of this Office provide that any party lodging a complaint must satisfy the Ombud that they have attempted to resolve

the matter with the Respondent concerned. The Complainant lodged his complaint with the Respondent and the latter rejected his complaint by way of a letter, annexure 'K', to the Complainant's papers. The Respondent also furnished its reasons for rejecting the complaint in the said letter.

[30] The Respondent was given a further opportunity to resolve the complaint, after it had been lodged in this Office. This was done by way of a letter to the Respondent dated 23 March 2005, marked annexure 'M'.

[31] A further letter, dated 7 June 2005 was sent to the Respondent, notifying it that the matter was under investigation and calling upon the Respondent to furnish this Office with its version of events, together with any supporting documentation. This letter is marked annexure 'N'.

[32] On 29 June 2005, this Office received from the Respondent:-

[32.1] a letter dated 29 June 2005 to which a letter dated 8 April 2005 authored by Taryn van Wyk is annexed. This letter is marked Annexure 'O';

[32.2] a statement titled 'Affidavit', made by Maharaj. This statement is marked Annexure 'P'. This document is not an affidavit as it is not attested by a Commissioner of Oaths, as required by law. The document is therefore a statement.

[33] The Respondent denies various allegations made by the Complainant. In particular, it denies:-

[33.1] that it misrepresented the product to the Complainant and avers that the formal documentation signed by the Complainant clearly indicate that the investment is a unitized investment;

[33.2] that it failed to disclose costs prior to the Complainant concluding the investment. In this regard it relies on the Fund Fact Sheet which was sent to the Complainant electronically on the 2nd November 2004;

[33.3] having misled the Complainant.

[34] The letter mentioned in paragraph 32.1 contains a series of bare denials, supported by a statement by Maharaj.

Is this a complaint in terms of the FAIS Act?

[35] In order to answer this question in the affirmative, one must look at the definition of complaint as set out in the FAIS Act

[36] A complaint in terms of Section 1 of the FAIS Act is defined as a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of the FAIS Act and in which it is alleged that the provider or representative:-

'(a) has contravened or failed to comply with the provisions of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;

(b) has willfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the

complainant or which is likely to result in such prejudice or damage; or

(c) has treated the complainant unfairly.'

[37] The complaint must relate to a financial service that was rendered on or after the 30th September 2004.

[38] This complaint relates to a financial service that was rendered on or about the 1 November 2004, which is a date after the date of commencement of the FAIS Act.

[39] The complaint relates to the rendering of a financial service, which in this case is the furnishing of advice by the Respondent, which led the Complainant to invest the sum of R1 200 000, 00 with OMMMF.

[40] The allegations of the Complainant fall broadly within both paragraphs (a) and (b) of the definition of complaint and read with the definition of financial service in Section 1 of the FAIS Act.

[41] That the financial service was rendered by Maharaj, acting as representative of the Respondent is not in dispute and needs no further comment.

[42] The Complainant's alleged loss or damage is the sum of R20 115, 26 and thus falls within the monetary jurisdictional limits of the office.

[43] I am accordingly satisfied that the complaint is one that is justiciable before the Ombud in terms of the Act.

DETERMINATION AND REASONS THEREFORE

MISREPRESENTATION

[44] The Complainant has alleged that Maharaj misrepresented the nature of the investment to him. In order to answer this question one needs to look at all the evidence and documents presented by the parties.

[45] The Complainant contends that the investment was presented:-

[45.1] firstly, as a money market account and not an investment in a money market fund.

[45.2] secondly, as being the same in all respects with no added risk to the Complainant as, according to Maharaj, Old Mutual owns the Respondent. The only difference was the 72 hour delay for withdrawals and the method used to effect such withdrawals.

[46] Upon escalating his complaint within the Respondent structures, the Complainant was told that the investments are actually not the same. The Respondent has denied that the product was misrepresented. Firstly, in its letter of repudiation to the Complainant dated 17 February 2005, signed by Mrs. Janet Esterhuizen, being annexure 'K' and secondly, in its letter dated 29 June 2005, being annexure 'N'. I now examine briefly the contents of these letters. In annexure 'K,' the Respondent's defence is that the Complainant signed the buying form. In this regard the Respondent relies on an inscription, in fine print, on the buying form, which reads as follows:

" I agree to accept the number of units sold to me by virtue of this application and warrant that I have full power and authority to enter into and conclude this transaction, with the

necessary assistance where such assistance is a legal requirement. I am aware that this product offers no cooling off rights. I know that the cost of buying units includes an initial charge, plus VAT and that there are no guarantees on my capital. I acknowledge that there are further allowable deductions from the fund (e.g. an annual service fee) that impact on the value of my investment. I am satisfied that the facts provided are accurate and complete. I am aware of the fund's/funds' objectives, risk factors, the charges and income distributions, as set out in the fund fact sheet/s. I acknowledge that the Management Company may borrow up to 10% of the portfolio to bridge insufficient liquidity. I have read and fully understood all three pages of this application form. I hereby authorize Old Mutual Unit Trust Managers Ltd to debit the account mentioned"

[47] The Respondent further relies on the fact that the Complainant confirmed receipt of the Fund Fact Sheet per e-mail and alleges that although he stated it was illegible, once printed it was legible. In the last paragraph of Annexure 'K', the Respondent concludes by stating that the Complainant was provided with documents stating the composition, nature and costs relating to the Old Mutual Unit Trust Money Market.

[48] In annexure 'O', the Respondent relies once again on the fact that the buying form clearly indicates that the Old Mutual Money Market is a Unit Trust.

[49] The Respondent seems clearly unperturbed by the manner in which the investment was presented to the Complainant. In my view, the Respondent fails to address the crux of the complaint in both letters.

[50] Firstly, the investment was misrepresented to the Complainant to be a money market account which was the same as the account that the Complainant had with the Respondent at the time. Later on, a document for an Old Mutual Unit Trust investment is presented to the Complainant to sign without correcting the false impression created.

[51] Secondly, apart from the statements made in the two letters, no documents have been forwarded to this office to assist the Respondent in its version, save for the formal documents required for effecting the investments. I will come back to this in more detail.

[52] I proceed to examine the documents before me which lead me to the conclusion, almost inescapable, that the product was indeed misrepresented to the Complainant.

[53] An examination of annexure 'G', being the form which Maharaj filled in during the meeting with the Complainant states, under the heading: 'Summary of Advice & Recommendations' in handwriting the following:
'the client wants to move funds from bank money market to old mutual money market'.

[54] Page two of Annexure 'G', reads :
'Client's needs and objectives' and the words: 'money market' have been inserted.

[55] Under the heading 'Financial products considered'. The response:
'Old Mutual Money Market' has been inserted.

[56] Under the heading, 'Financial products recommended (why the product is likely to satisfy the client's identified needs or objectives)': the response 'Old Mutual Money Market' has been inserted.

[57] Annexure 'G' is one of the documents signed by the Complainant at his meeting with Maharaj on the 1st of November 2004. In this document, conspicuous by its absence, is any reference to a unit trust. In fact the

Respondent, it would appear, has taken the trouble to ensure that he steers clear from referring to the investment as a unit trust.

[58] Whilst it may be easy for someone schooled in financial products to comprehend what the investment is, for the ordinary member of the public, the matter is not that simple.

[59] Further evidence in support of the Complainant's contentions in this regard is an e-mail following the consultation of 1 November 2004. This e-mail, written by Maharaj to the Complainant dated 2nd November 2004 is annexure 'B' to the papers. It reads as follows:

'Hello Alan, Thank you for placing your investment with Nedbank. Please find attached the document you required. The selling form is used every time you wish to withdraw money. Also attached is a fund fact sheet for the money market account.'

[60] An examination of Maharaj's own statement, marked annexure 'O' reads as follows:

'I telephoned client and discussed the money market option with him. ..... I discussed the difference between Bank money market and Investment money market.'

Precisely what is meant by the above statement is unclear to me. However one thing is clear, the investment is still not being presented to the Complainant as a unit trust.

[61] With regard to the allegation that Maharaj falsely maintained that the investments are the same, no record of the communication between the

two has been forwarded to this office despite the requirement by the Code of Conduct for Financial Services Providers and their Representatives, ('Code'). The Code was promulgated by means of Government Gazette 25299 of the 8th August 2003 and came into operation on the 30th September 2004.

[62] Section 3 (2) of the Code provides:-

'a) that a provider must have appropriate procedures and systems in place to –

i) record such verbal and written communications relating to a financial service rendered to a client as are contemplated in the Act, this Code or any other Code drafted in terms of section 15 of the Act;

ii) store and retrieve such records and any other material documentation relating to the client or financial service rendered to the client; and

iii) keep such client records and documentation safe from destruction.'

The Respondent, as I have stated earlier on, has furnished no record of communication to support its case.

[63] I now examine the law on misrepresentation.

[64] The law provides that in order to allow the party who has been misled any recourse, the misrepresentation must be material. Materiality is used to

express the requirement that there must be a causal *nexus* between the misrepresentation and the alleged consequence. The following extract from the judgment of Hoexter JA (as he then was) in the matter of *Hullet and others v Hullet* 1992 4 SA 291 AD at 310, 311 I- B, in my view, dictates the correct approach. The learned judge said the following:-

'Where a plaintiff shows that the defendant has made false statements to him intending thereby to induce him to enter into a contract and those statements are of such a nature as would likely to provide such inducement and the plaintiff did in fact enter into that contract and thereby suffered damage and nothing more appears, common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract. However, it is open to the defendant to obstruct the drawing of that natural inference of the fact by showing that there were other relevant circumstances. Examples commonly given of such circumstances are that the plaintiff not only actually knew the true facts but knew them to be the truth or that the plaintiff either by his words or conduct disavowed any reliance on the fraudulent representations.'

[65] The statements made by the Respondent to the Complainant constituted a false representation of the financial product being recommended. To loosely refer to an investment in a Collective Investment Scheme as a money market can be confusing. Further, the insistence that they are the same and that there is no added risk as Old Mutual owns the Respondent is also false. The Fund Fact Sheet e-mailed to the Complainant the day after the investment was concluded states that the fund is exposed to limited risk due to the short term nature of the assets held in the portfolio and that the fund does not offer any guarantees. This is not the same with a bank account which carries no such risk.

[66] Maharaj would have known, or at least ought to have known that the investments are not the same. He also would have known that there are material differences between the two products and either willfully or negligently withheld them from the Complainant in order that he concludes the contract without relevant material information. The Complainant was persuaded by the fact that the investments are the same.

[67] The Respondent's conduct in this regard flouts Section 3 (1) of the Code. This section provides:-

'(1) When a provider renders a financial service-

(a) representations made and information provided to a client by a provider-

(i) must be factually correct;

(ii) must be provided in plain language, avoid uncertainty or confusion and not be misleading;'

[68] In addition to the requirements of the FAIS Act as set out in para 67, the nature of the relationship between a financial advisor and client is said to be based on trust, similar to that of attorney and client. The duty to disclose in such a relationship is encapsulated in the following extract from *Orban v Stead & Another* 1978 2 SA 713 WLD at 718 B – C:

'It is apparent that a person cannot be said to conceal what he is not bound to reveal. There must, therefore, be a duty to disclose the matter which it is believed would affect the final conclusion of the agreement.
Secondly, there is designed concealment where, as a result of the surrounding circumstances of a particular case, a duty to disclose arises. It must be shown in the case that information was purposely withheld in order to induce the contract or to conceal the facts which, if known, would probably result in the innocent party not contracting.
The duty to disclose normally arises out of the relationship of the parties. Thus, it is clear that such a duty arises in the so-called fiduciary relationship such as between attorney and client. Such a duty also arises where, because of the facts of any case, there is an involuntary reliance of the one party on the other for material information.'

The Complainant, in my view, relied on the representations made by Maharaj about the product and its suitability for his circumstances.

[69] The Complainant's assertion that the product was misrepresented to him is bolstered by Maharaj's failure to spell out on the documents exactly what the investment is. His way of describing the product is simply not sufficient to ensure that the Complainant understood the product. Based on the false representations made by Maharaj, which the Complainant relied on, he purchased the product. The truth is, that the product is not what Complainant was led to believe it is. The insightful comments of Denning LJ in *Curtis v Chemical Cleaning & Dyeing Co Ltd* 1951 1 All ER 631(CA), quoted with approval in *Du Toit v Atkinson's Motors BPK 1985 2 SA 893 at 905* F – G bear mentioning:

'In my opinion, any behaviour by words or conduct is sufficient to be a misrepresentation if it is such as to mislead the other party..... If it

conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation. But either is sufficient to disentitle the creator of it to the benefit..... It was held in R v Kylsant (Lord) (3) that a representation might be literally true but practically false, not because of what is said, but because of what is left unsaid. .....'

[70] In *Orban v Stead and Another, supra* E, King AJ stated at 719 D:-

'If a seller stands by with full knowledge that a purchaser is acting under an erroneous belief and the seller relies upon that self deception to entice the purchaser into the contract, then the seller is guilty of fraud. It is no answer for such a seller to say that the purchaser might have discovered the truth by exercise of reasonable diligence.'

[71] The Complainant acted on the false representations when he signed the documents concluding the investment. Thus, the assertion by the Respondent that the documentation signed by the Complainant clearly indicate that the investment is a unit trust cannot avail it; for the Complainant did not at any stage sign for what he actually bought, rather he signed for what he was misled into believing he was buying.

Whether this was an innocent misrepresentation on the part of Maharaj or an endeavor to ensure that the Complainant is kept ignorant about the true nature of the investment is unknown and indeed irrelevant to the present inquiry. The truth is, the investment was no longer with Nedbank and it is certainly not a money market account.

NON - DISCLOSURE OF FEES AND CHARGES

[72] The Complainant contends that he was never informed of the charges relevant to the investment. It is only when he met with Rasool on the 23 November 2004 to request a letter confirming his investment with the Respondent that he learnt of the charges. The Respondent denies that fees and commission were not disclosed. According to the Complainant, Maharaj is alleged to have remained adamant that he would not be reversing any costs, because, he claimed, he had e - mailed the fund fact sheet. Further, the Respondent, in annexure 'K' relies on the fact that the complainant signed the buying form and had confirmed receipt of the Fund Fact Sheet. This letter further reads:

'Client confirmed receipt of the Fund Fact Sheet per E-mail and although he stated it was illegible once printed, the original (in electronic format) was legible. Client confirms having read the Fund Fact Sheet.'

[73] The Respondent re-iterates in Annexure 'O' that the costs were disclosed in the Fund Fact Sheet. In its letter of the 8 April 2005 an attachment to annexure 'O', the Respondent states:

' the costs were disclosed on the fund fact sheet and although these were difficult to read according to the client, he was provided with these via e-mail in a pdf format and once opened electronically are very clear.'

[74] There can be no doubt that the e-mail to which the Fund Fact Sheet was attached was sent to the Complainant on the day after the investment was effected and after the false representation which made no reference to commission or any other charges according to the Complainant.

[75] To send an e-mail the day after the investment is concluded and thereafter claim that the fees have been disclosed is simply not disclosure in terms of the Code.

Section 3 (1) (a) (iv) provides that disclosures must be made 'timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction'. This sub-section is prefaced by the phrase in Section 3 (1) of the Code 'When a provider renders a financial service –'. This means at the time of rendering the service. This was not done by the Respondent. Instead, an e - mail referring to costs was only e - mailed to the Complainant the day after the investment was concluded. Based on the fact that no mention had been made of costs and the false representation that both investments were similar in nature, leads one to conclude that there was no reason for the Complainant to think that the Fund Fact Sheet contained fees as it is now claimed.

[76] Section 3 (1) (a) (vii) provides that there must be disclosures 'as regards all amounts, sums, values, charges, fees, remuneration or monetary obligations mentioned or referred to therein and payable to the product supplier or the provider, be reflected in specific monetary terms: Provided that where any such amount, sum, value, charge, fee, remuneration or monetary obligation is not reasonably predeterminable, its basis of calculation must be adequately described; ...'

Nothing has been provided to support the claim that these disclosures were made to the Complainant prior to concluding the investment. On the contrary, the only proof before me, confirms that the disclosure was made after the conclusion of the investment.

THE APPROPRIATENESS OF THE ADVICE

[77] The steps to providing appropriate advice to a client are set out in Part VII, Section 8 of the Code. This section provides:-

'(1) A provider other than a direct marketer must prior to providing a client with advice –

a) take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;

b) conduct an analysis, for purposes of the advice, based on the information obtained;

c) identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangement; and.....'

[78] In addressing this issue, I refer to annexure 'E' being the e-mail dated 19 January 2005 by Taryn van Wyk, to the Complainant. The e-mail carries an attachment marked 'F'. The fourth paragraph of annexure 'F' reads:

"**THE BASIS OF ADVICE** :

We wish to ensure that you have been provided with objective and comprehensive financial planning. The advice given has been summarised

in the attached document and is based on the information provided by you regarding your financial situation, financial product experience and objectives. It is imperative that you review this analysis regularly to ensure that the current recommendation remains appropriate to your financial situation.

The financial products we recommend have been identified as being appropriate to your risk profile; financial needs and objectives.'

[79] Taking into account the circumstances surrounding this complaint, it is evident that the author of this letter failed to apply her mind to the facts peculiar to this case. Had she done so, she would have realised that the advice provided was not based on a needs analysis at all.

[80] In fact, it can be concluded that the advice and recommendations were made long before the Complainant met with Maharaj. This is confirmed by Maharaj in his statement, the opening line of which reads:

'I telephoned client and discussed the money market option with him'.

He says further in this opening paragraph:

' I discussed Financial Planning during which the client stopped me and told me he is not interested in a financial needs analysis, as he already has his own financial advisor. I proceeded with the client's request left contact stage disclosure for the client to read but client was busy with work and was trying to get fica documents ready for transaction...'

[81] What exactly was discussed as Financial Planning is not clear as there is no record of communication to support this allegation.

[82] What is clear however is that:-

[82.1] there appears to have been a premeditated idea to sell the Complainant the product without due regard to his needs;

[82.2] no information was asked of client in pursuit of the provider's duty to do a needs analysis;

[82.3] the basis on which Maharaj steered clear of the duty to do a needs analysis is the 'waiver by the client'. This is confirmed by Maharaj on the first page of annexure 'G'.

[83] An apparent conflict evident in annexure 'G' is the Respondent's reliance on page one thereof on the 'waiver' and the further assertion on the last page that:-

i) all information requested was not provided and

ii) in the light of the surrounding circumstances there was not reasonably sufficient time to conduct the analysis.

This apparent contradiction casts serious doubt on the credibility of the Maharaj's version as to the real reasons for his failure to conduct a needs analysis as required by the Code.

[84] Similarly, Maharaj in his statement mentions that the Complainant was busy getting FICA documents, yet in annexure 'G' it is stated that the transaction is FICA exempt. Either the Complainant was exempt from FICA requirement or he was not. It cannot be both as appears from these contradictory statements.

[85] Material though to this inquiry, and supporting the Complainant's version that the Respondent knew of his needs to use the funds at short notice, is the Respondent's conduct in sending the selling form to the Complainant in Maharaj's e- mail of the 2nd of November 2004 being annexure 'C'. Although the Respondent claims that this was more for the convenience of the client, it is more indicative of the fact that the Respondent had been aware of the Complainant's need to withdraw funds at short notice but nevertheless concluded a transaction that did not satisfy this need.

Can a benefit or right provided for in the Code be waived?

[86] The question which squarely confronts one then is, "Can the benefit of having a needs analysis prior to being advised be waived by the client?"

[87] The rationale behind the FAIS Act and this includes the various codes promulgated there under is both to ensure the protection of the consumer and to uphold the integrity of the financial services industry. Had a needs analysis been conducted, the Complainant's need to use funds within a short space of time would have been taken into account. Thus, advice provided would have had to take these needs into account. However, due to the fact that no needs analysis had been conducted, the Complainant found himself faced with difficulties when he needed to access his funds. These included, the costs attendant to disinvesting in a unit trust investment.

[88] It is necessary to examine the provisions of section 21 of the Code to answer the question as to whether the client can simply waive the requirement of the necessity to do a needs analysis and whether the provider can rely on such waiver.

Part XIII, Section 21 of the Code provides:-

'No provider may request or induce in any manner a client to waive any right or benefit conferred on the client by or in terms of any provision of this Code or recognise, accept or act on any such waiver by the client, and any such waiver is null & void.'

[89] Maharaj's statement makes it clear that he acted on the waiver. The question which, therefore, remains to be answered is whether such waiver will necessarily be null and void as provided in section 21 of the Code.

Consequences of non compliance with section 21 of the Code

[90] In order to establish the consequence of non compliance with section 21, one needs to visit not only the intention of the legislature as set out in the plain language of the section but the purpose and the mischief which the legislature sought to address.

[91] In my view the section is peremptory. However, non compliance with a statutory provision whether peremptory or directory can no longer be resolved by merely looking at the label. It must ultimately depend upon the proper construction of the statutory provision in question. In this regard insightful guidance is provided in *Standard Bank v Estate Rhyn* 1925 AD 266 at 274 where the court stated:-

'.. when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law.'

The court went on to state that this principle is not, however, inflexible or inexonerable.

[92] In *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 2 SA 872 AD at 885, E – G, the court pointed out that:

'The prohibitions contained ... are reasonably clear. Moreover, they are couched in negative terms.....which is generally a factor strongly indicative of an intention that anything done in breach of the prohibition will be invalid. ....This, however, is no rule of thumb; the subject – matter of the prohibition, its purpose in the context of the legislation...., the remedies provided in the event of breach of the prohibition, the nature of the mischief which it was designed to remedy or avoid and any cognizable impropriety or inconvenience which may flow from invalidity, are all factors which must be considered when the question is whether it was truly intended that anything done contrary to the provision in question was necessarily to be visited with nullity.'

[93] In order to understand the purpose of the provision of the Code one needs to refer to section 16 of the FAIS Act which introduces the Code. Section 16 provides:-

'(1) A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions, that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied and that for those purposes authorized financial services providers, and their representatives, are obliged by the provisions of such code to -

a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;'

[94] That the purpose of the Code is to regulate the rendering of financial services for the protection of the consumer and the integrity of the financial services industry cannot be doubted.

This Office can take judicial notice of the fact that South Africans have been victims of misselling of financial products where the primary motivation is commission or some other financial incentive for the intermediary concerned. This has not only adversely affected consumers in the sense that they have experienced vast financial losses; but it has also had the effect that people in general are losing faith in the integrity of the financial services industry in this country.

[95] This provision is not meant to protect consumers only. It clearly is there also to uphold the integrity of the financial services industry.

[96] Having established the purpose of the section, one still needs to establish whether waiver is possible by an individual client, such as the Complainant. In this respect one can take note of what the court said in *SA Eagle Insurance Co Ltd v Bavuma* 1985 3 SA 42 AD at 49 I:

'The maxim of Civil Law..., that every man is able to renounce a right conferred by law for his own benefit was fully recognized.... . But it was subject to certain exceptions, of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit but in the interest of the public as well.'

[97] In *Road Accident Fund v Mothupi* 2000 (4) SA 36 AD at 49, Nienaber JA as he then was, pointed out,

'It is a well-established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory terms.'

[98] Clearly waiver is not possible as the section is not meant only for the benefit of the Complainant. Most importantly, if such waiver were to be accepted one would be opening the door to the very mischief that is sought to be addressed by the provision. This view is supported by what the court said in *Absa Insurance Brokers (Pty) Ltd v Luttig and Another NNO* 1997 4 SA 229 at 239 H:-

'The usual reason for holding a prohibited act to be invalid is ... the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent.'

[99] No doubt, the Legislature had intended that conduct in contravention of the section must be visited with nullity. Based on the aforegoing the waiver by the Complainant is null and void and of no force or effect.

[100] It follows then that the advice was inappropriate for the Complainant's circumstances. Due to the inappropriate advice, the Complainant suffered financial loss.

NON - COMPLIANCE WITH THE FAIS ACT

[101] A further concern is the extent of non - compliance with the FAIS Act exhibited by the Respondent.

Selective comparison of financial products

[101.1] It appears that the Respondent flouted the Code by comparing the two financial products only on the basis of the return without dealing with any other material differing characteristics. Amongst many differing characteristics, the issue of risk relevant to each of the products was not mentioned at all. In this regard Part III Section 4 (4) of the Code provides-

'A provider may not, in dealing with a client, compare different financial products, product suppliers, providers or representatives, unless the differing characteristics of each are made clear and may not make inaccurate, unfair or unsubstantiated criticisms of any financial product, product supplier, provider or representative.'

[101.2] Comparison of the two investments was made only on selective features, being the return, the method and the time involved in accessing the funds. This is not denied by the Respondent. Indeed it is affirmed in their letter dated 8 April 2005, where it is stated: "The improved interest rate is admitted however the recommendation to switch is denied."

[101.3] Providers are not allowed to compare financial products on the basis of selective characteristics as this can be grossly misleading.

Obtaining client's signature before all the information is inserted

[102] The complainant has alleged that at the time he appended his signature to the documents, most of the information had not been filled in. He specifically mentions that the buying form was virtually blank at the time he signed it. The Respondent has steadfastly disputed this allegation. However, a close examination of the form reveals the following:

[102.1] On the first page at the top, the question is asked whether the Complainant has Old Mutual Unit Trusts. The answer that is filled in is 'NO'. This is an incorrect answer. The Complainant does have unit trusts with Old Mutual.

[102.2] The next question asked in the same line is the unit trust number. This information is not filled in due to the preceding answer on the form.

[102.3] On personal details, the question is asked whether the Complainant is married. No answer is recorded. The Complainant is married.

[103] Whilst the above may not be material, it opens the door to a conclusion that, based on probabilities, that the Complainant's assertions are correct. It is improbable that if the question had been posed to him as to whether he has unit trusts, he would have said that he does not have any. It is

also improbable that had the question been posed to him as to whether he is married or not, he would not have provided an answer. The conclusion can therefore be drawn that the form was just furnished to the Complainant to sign without the relevant information being completed.

Failure to provide information in terms of Part III and Part IV of the Code

[104] Section 4 of the Code stipulates that a provider must, at the earliest reasonable opportunity and only where appropriate, furnish the client with full particulars of the information set out in the section and that where such information has been provided orally, it must be confirmed in writing within 30 days.

[105] A glance at annexure 'G' would confirm the information as required by section 4 was furnished to the Complainant. The truth of the matter is, that no such information had been furnished to the Complainant. The basis for this conclusion is that:-

[105.1] The Complainant had requested this information and other documents relevant to this case. Several documents were supplied to the Complainant under a letter marked annexure 'H' from Hoyle dated 1 March 2005. However, the information pertinent to this section was not amongst the documents.
Annexure 'H' states:

'Dear Sir

As per your request, herewith please find a copy of the documents:

- Client Broker Note and Letter of Authority;
- Summary of Proposal Investment Solution;
- Buying Form.(Old Mutual)

The Policy Holder Protection Rules document will be faxed to you as soon as I am in receipt of the document.'

[105.2] Secondly, another letter from Hoyle, dated 4 March 2005 marked annexure 'L' states:

'Dear Sir

You requested the dates of our meeting..... The Policy Holder Protection Rules document is proving to be a bit more difficult to obtain than I had hoped, because of a virus attack on our server that means the system is up and down. As soon as the document is available, which should be today or latest Monday, I will fax it to you.'

The Policy Holder Protection Rules (PPR) has no relevance whatsoever to the particular circumstances of this case. Indeed, all that was required was the disclosures stipulated in section 4 and 5 of the Code.

[105.3] Disclosures in terms of section 4 and 5 of the Code were only furnished to the Complainant on the 15 June 2005, some seven months after the transaction had been finalised. This is in clear contravention of the requirements of the Code.

[106] An examination of the disclosures referred to in paragraph 105.3 reveals that the Respondent has received more than 30% of its total commission and remuneration in the preceding calendar year from Old

Mutual plc and Nedbank Insurance Company Ltd. That Nedbank is a 100% subsidiary of Nedcor Limited and Nedcor Limited is a subsidiary of Old Mutual plc.

[107] The Code further provides in Section 3 (1) (b) that where there is conflict of interest it must be disclosed at the time of rendering the financial service and the section further cautions that providers must treat clients fairly.

[108] It is my conclusion that other products were not considered. The provider simply sold the Complainant a product from a product provider associated with the Respondent.

[109] In conclusion, I am satisfied that the Complainant has a valid complaint. At the very least, a clear case of negligence in the rendering of the financial service by the Respondent has been made as envisaged in the definition of complaint in the FAIS Act in that the financial product sold to the complainant was misrepresented. The evidence further leads to the conclusion that fees and charges were not disclosed as required by the Code. Finally, I am satisfied that the advice provided by the Respondent was inappropriate to the complainant's circumstances and needs.

[110] In judging what would be appropriate relief, one needs to consider that in the first place, the investment was not appropriate for the Complainant's circumstances. One therefore asks whether the Complainant's interests had been considered at the time of rendering the financial service. No such indication exists on the evidence before me.

[111] In arriving at what is equitable under the circumstances I would have to place the Complainant in the position in which he would have been had the transaction had not taken place. The Complainant has indicated, and this is clear from the evidence, that the sum of R13 465.68 was levied as commission and charges on his investment. Although the Complainant has claimed certain further amounts, I am not persuaded that they are warranted in the circumstances.

Accordingly, I hereby order:-

a) That the Respondent pay to the Complainant the sum of R13 465.68;

b) That the aforesaid sum of R13 465. 68 bear interest at the rate of 15.5% p.a. effective from the 24th November 2004 to date of final payment.

c) That the Respondent pay the case fee of R1000 plus 14% Value Added Tax thereon.

DATED AT PRETORIA ON THIS THE 4th day of AUGUST 2005

CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS