

**IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS  
PRETORIA**

**Case Number: FAIS 00606/09-10 KZN (1)**

In the matter between:-

**KATIJA SUNKER**

**Complainant**

and

**SHEVGEM INVESTMENTS t/a RANDSURE BROKERS**

**1<sup>st</sup> Respondent**

**JAMEY RANDAL**

**2<sup>ND</sup> Respondent**

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

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**A. THE PARTIES**

[1] The Complainant is Mrs Katija Sunker, an adult female, residing at No. 38Mason Road Manor, Pietermaritzburg, 3201.

- [2] The 1<sup>st</sup> respondent is Shevgem Investments cc t/a Randsure Brokers, a duly registered close corporation and authorised as a financial services provider (with FSB license number (18857) of 1 Connor Road, Chase Valley, Pietermaritzburg.
- [3] The 2<sup>nd</sup> Respondent is Jamey Randall, an adult male, member and key individual of the 1st Respondent.

**B. BACKGROUND and UNDISPUTED FACTS**

- [4] Complainant's allegation is that she was misled by 1<sup>st</sup> respondent to believe that she was investing into a First National Bank investment. Only much later did she discover that contrary to what she had agreed she had invested her R70 000 into a high risk investment company called Edwafin Investment Holdings (Pty) Ltd. Her complaint is that she was not told that she was purchasing shares with Edwafin or that it was a high risk investment. She makes the statement 'I believe that this is a misrepresentation, tantamount to fraud.' She goes on to state that she as a pensioner a senior citizen had been taken advantage of.
- [5] Her introduction to respondent came via Terence Naidoo a representative of 1<sup>st</sup> respondent, who in conjunction with the 2<sup>nd</sup> respondent assisted respondent to surrender an existing life policy that had been in the name of her husband Mr Partapsingh Sunker. Mr Partapsingh Sunker and complainant are married in community of property.

- [6] Mr Naidoo acting on behalf of 1<sup>st</sup> respondent then went on to recommend that a portion of these funds be invested in 'First National Bank'.
- [7] Post the investment complainant met with 2<sup>nd</sup> respondent, who advised her that her investment was indeed with First National Bank.
- [8] This was not correct as evidenced by an Edwafin Investment Holdings Limited Debenture Certificate stating that she was the holder of 70 fully paid 15% unsecured F Debentures of R1000 each issued by the company in terms of the prospectus registered on 13<sup>th</sup> July 2006. The term of the debenture commenced on the 8<sup>th</sup> August 2006 with the redemption date being the 8<sup>th</sup> November 2011.
- [9] As part of her complaint complainant attached a bank deposit slip reflecting a transfer of R70 000 to Edwafin on the 8<sup>th</sup> August 2006. A note on the slip states that the beneficiary will receive payment on 10<sup>th</sup> August 2006.
- [10] Whilst over time complainant received an income totalling R23 399.19, this ceased in November 2008 when a delayed cheque from Edwafin meant to cover the November and December interest was stopped. Complainant has provided a copy of the cheque marked 'payment stopped.'
- [11] Despite assurances, as contained in correspondence from Edwafin, no further

interest was received.

- [12] Complainant's attempts to resolve the complaint with respondent have failed and she has requested that the matter be determined.

### **C. DETERMINATION**

- [13] In correspondence from the Office and addressed to respondents on 3<sup>rd</sup> August 2009, we advised in the event of the matter not being resolved by a pre-determined date respondent was to revert with a response which was to specifically deal with complainant's allegations as to misrepresentation. Respondent was also required to attach a copy of their entire file of papers.

- [14] In correspondence to respondent dated 4<sup>th</sup> August 2010 we again requested the complete file of papers including the record of advice and any other relevant documentation demonstrating compliance with the FAIS Act.

- [15] Other than correspondence relating to attempts to resolve the matter, respondent has provided neither a response nor documentation evidencing compliance with the provisions of the FAIS Act.

- [16] Given that despite being afforded ample opportunity respondent makes no attempt to refute complainant's version, I must accept her version that she was intentionally misled into making an investment in Edwafin in the belief that it was part of First National Bank.

- [17] Edwafin was of course nothing of the sort; as detailed in the determination of Mohanlal vs Chutterpaul<sup>1</sup>; Edwafin was by its nature an investment in a venture capital company through the purchase of debentures. This kind of investment requires a certain degree of sophistication and understanding. I have no evidence that complainant was made aware of the material aspects of this investment.
- [18] That this was a risky investment is clear from the minutes of a private meeting of Edwafin Investment Holdings Limited on 17 March 2009, I note the comments of Mr Don Hutchinson who is listed as the Chief Financial Director which I quote hereunder.
- [19] 'Don stated that when pensioners were considering and ultimately took out the debenture, it is anticipated that they would have looked at the nature of the debenture. It is an unsecured investment and carries a higher than normal risk. This is clearly stated in the Prospectus as well as the documentation. It is not a bank investment. It is also instilled in the training of the staff to inform people that it is a higher than normal risk investment and is not guaranteed.'
- [20] I note that a form dated the 8<sup>th</sup> August 2006 and signed by complainant, namely the Edwafin Official receipt form which states at para 2 that 'a full risk disclosure has been made at a presentation to debenture holders, by virtue of receiving and accepting the prospectus. Debenture holder acknowledges that all aspects of the debenture were fully explained, including costs,'

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<sup>1</sup>Vinesh Mohanlal vs Raj Chutterpaul and Raj Chutterpaul Brokers cc FAIS 05679-09/10 KZN 1para 46

- [21] Para 5 of the same form evidences the lack of liquidity when it states: 'Surrenders: the debenture holder may not at any time during the term of the debenture surrender nor withdraw funds from the debenture, nor use as security.'
- [22] Other than the fact that these are essentially after the fact, there is no evidence that any of this was conveyed to complainant. On the contrary her complaint that she was not told that this was a high risk investment is not disputed by respondent. There is no client advice record or any indication that even the lack of liquidity was pointed out to complainant. The actual application form for 15% F debentures in Edwafin Investment Holdings limited contains no such warnings.
- [23] When asked about her signature on the forms complainant stated that she was merely told to sign the forms, which she did in the belief that she was investing in First National Bank. The risk and structure of a venture capital investment such as Edwafin is so far removed from anything that the complainant should have been invested in, that this is entirely believable.
- [24] Respondent did not so much as furnish the Office with a copy of any documentation never mind a prospectus, which would indicate risk. Even had this been available, interactions between the Office and complainant patently revealed that complaint was in no position to understand the nature of what she was led into.

- [25] Additionally respondent was not licensed in terms of section of the FAIS Act to sell securities and debentures. In doing so respondent appears to have committed an offence in terms of section 36 of the FAIS Act.
- [26] This is but one of the many contraventions of the FAIS Act. The onus is on the financial services provider to evidence compliance therewith, and given that respondent has elected not to do so I have no option but to find that respondent contravened the following provisions of the General Code.
- [27] I have already stated that no record of advice was evident; section 9. (1) which deals with the record of advice requires that the said record must reflect the basis on which the advice was given, and in particular-
- (a) a brief summary of the information and material on which the advice was based;
  - (b) the financial products which were considered ; and
  - (c) the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the clients identified needs or objectives', all of which is based on the information gathered in terms of section 8. (1) of the Code which requires of a provider that prior to providing advice they gather appropriate information regarding a client's financial situation, financial product experience and objectives, and then conduct an analysis based on the information obtained. In terms of this section a provider must then identify the financial product appropriate to the client's risk

profile and financial needs.

- [28] In short based on the information obtained, which includes the risk profile and client's circumstances, from the record of advice one should be able to understand both why a particular product was chosen and exactly how this fits in with a client's needs and objectives. Section 8. (1) (c) of the Code requires that the product recommended be appropriate to the risk profile and financial needs.
- [29] Given the requirements of section 8 and 9 General Code and the nature of the Edwafin product it is not hard to understand why no such documentation exists. Quite simply given complainant's financial position the recommendation of such a product was untenable.
- [30] In the circumstances I have no doubt that respondent did not provide full and appropriate information as to 'any material investment or other risks associated with the product;' as required by section 7.(1) (c) (xiii) of the General Code.
- [31] These are but a few of the contraventions, to detail each and every one would be superfluous.
- [32] The loss of complainant's capital is intrinsically linked to the totally inappropriate advice rendered by respondent.



- [33] For the reasons which follow I have used the word respondent as opposed to differentiating between the 1<sup>st</sup> and 2<sup>nd</sup> respondent. Whilst Terence Naidoo may have rendered the initial advice he did so on behalf of respondents. Additionally 2<sup>nd</sup> respondent played a role in the surrendering of the policy and in a follow up meeting with complainant whereat he confirmed to her that the funds were invested with First National Bank.
- [34] Whilst he may not have been the initial face rendering the advice, this having been carried out by Mr Naidoo, 2<sup>nd</sup> respondent played a role in this investment, knowing full well that 1<sup>st</sup> respondent was not licensed to render advice in respect of securities and debentures.
- [35] As a key individual of 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent is an accountable person, ultimately responsible for ensuring that the financial service was rendered in the interests of client and the integrity of the financial services industry. Regrettably 2<sup>nd</sup> respondent failed in this respect.
- [36] As determined in *E Barnes vs D Risk Insurance Consultants*<sup>2</sup> at para 32 to 35 where a financial services provider is a body corporate, the applicant for licensing must satisfy the registrar that any key individual complies with the requirements of personal character qualities of honesty and integrity; competence and operational ability. In short given that authorization is personally approved through the key individual he must satisfy the registrar that he is fit and proper.

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<sup>2</sup> *Elise Barnes vs D Risk Insurance Consultants cc and Deeb Raymond Risk FAIS 6793/10-11/GP1(2)*

[37] When a key individual fails to meet these requirements his license can be withdrawn. The simple meaning of this is that the intention of the legislature is to hold both persons accountable. The General Code clearly envisages that the general and specific duties of a provider of financial services are those that are performed by a natural person as opposed to an artificial person.

[38] 1<sup>st</sup> Respondent is the licensed provider under whose name the financial service was rendered. 2<sup>nd</sup> Respondent is an authorised financial services provider and key individual of 1<sup>st</sup> respondent. Therefore it is necessary that I hold both respondents liable jointly and severally the one paying the other to be absolved.

#### **D. QUANTUM**

[39] Complainant invested R70 000 in Edwafin with the interest thereon ceasing in November of 2008.

[40] Edwafin was liquidated and there is no prospect of recovering her capital.

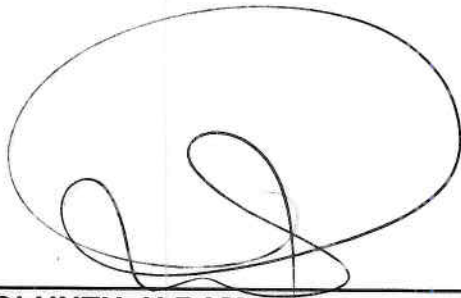
#### **ORDER**

The complaint is upheld and;

1. The respondents are ordered to pay, jointly and severally, the one paying the other to be absolved.

2. The sum of R70 000.00 plus interest thereon at the rate of 15.5%, seven (7) days from date of this order to date of final payment.
3. The respondents are to pay a case fee of R 1000, 00 to this office within 30 days of date of this order.

**DATED AT PRETORIA ON THIS THE 25<sup>th</sup> DAY OF JANUARY 2012**

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

**NOLUNTU N BAM**  
**OMBUD FOR FINANCIAL SERVICES PROVIDERS**

