IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 01444/11-12/ WC 1

FAIS 02545/11-12/ WC 1

In the matter between

BAREND JOHANNES VILJOEN **First complainant**

HERMINA FRANCISCA VILJOEN **Second complainant**

and

WANADOO 30 CC t/a

MARTIN HOLTZHAUSEN FINANCIAL SERVICES **First respondent**

MARTIN HOLTZHAUSEN **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 from a recommendation made in respect of section 27 (5) (c) of the Act on 7 November 2017. The recommendation is attached for ease of reference.

B. THE PARTIES

[2] The first complainant is Mr Barend Johannes Viljoen, an adult male pensioner. The second complainant is Mrs Hermina Francisca Viljoen, an adult female pensioner. Their particulars are on file with this Office.

[3] The first respondent is Wanadoo 30 CC, t/a Martin Holtzhausen Financial Services, a close corporation duly incorporated and registered with registration number 2001/062169/23. The regulator's records confirm the first respondent's principal place of business as 14 Ronald Street, Dormehlsdrift, George, 6529. The first respondent is an authorised financial services provider with licence number 13006. The licence has been active since 15 December 2004.

[4] The second respondent is Martin Holtzhausen, an adult male and key individual and representative of the first respondent. The second respondent's address is the same as that of the first respondent. I use respondent or respondents interchangeably in this determination. Where necessary I specify which respondent is referred to.

C. RESPONDENT'S REPLY TO THE RECOMMENDATION

[5] The salient points of the respondent's reply are summarized below:

5.1 The respondent believes that it is unfair that he is blamed for the loss the complainants suffered when it was the Financial Services Board (FSB) and the South African Reserve Bank who had failed in their duties. In this regard, the respondent alluded to litigation that is set to take place in January 2018 against the Reserve Bank and others. The respondent however, provides no explanation as to how such litigation is likely to influence the outcome of the complaint in this matter and in what respects.

5.2 He provided his clients with a prospectus that was, according to the information contained in the prospectus, audited and registered with the Department of Trade and Industry (DTI). The respondent fails to

recognize that the registration of the prospectus by CIPC (then CIPRO) does not mean the risk inherent in the product is in line with the client's risk tolerance. It is his duty to carry out such work, in line with section 8 (1) (a) to (c).

5.3 The respondent stated that he had done everything possible to point out the risks, and how the investment worked.

5.4 The respondent indicated that to the best of his knowledge, the Sharemax product was approved by the necessary authorities, including the FSB.

5.5 The money was not received by him, but by the promoters.

5.6 There was a ruling by the High Court that the Nova and Frontier companies should pay back investors in accordance with a schedule.

D. FINDINGS

[6] It is concerning to note that, despite the overwhelming evidence provided in the recommendation letter which included a summary of the relevant prospectuses, (and pointing to the provisions that conveyed the directors' intention to pay investor funds to a multiplicity of third parties to fund amongst other, marketing costs, and commission to agents such as Brandberg), that the respondent still fails to see the obvious high risk, and therefore the inappropriateness of the product in relation to complainants' specific circumstances, and specific requests for safe investments.

[7] It is furthermore evident that the respondent had no appreciation for the risks in respect of the investments, and that he did not have sufficient understanding of the prospectuses in order to explain it to his clients.

[8] Below, I briefly comment on the remarks made by respondent:

8.1 Despite the respondent's contention that a payment plan is in place, the complainants have not seen a single cent of their monthly payments, nor a return of their capital since the scheme of arrangement failed. I refer in this regard to the communique circulated to share and debenture holders by Nova during May 2016, confirming that the Nova Board made a decision in 2013 to reduce and / or cease the projected monthly return payments in order to utilise these funds for repairs and maintenance. There can be no other conclusion than that the complainants lost their investments.

8.2 I reject the respondent's statement that he cannot be held liable for the alleged failures of the Reserve Bank, the FSB and the DTI. The respondent still fails to see that this case is about the advice that was rendered by him. The respondent had the necessary tools available to him to recommend an appropriate investment/s, but he persisted with the Sharemax investments, despite the overwhelming evidence of conflict of interest as far as the directors are concerned and despite the glaring high risk. If the respondent did not understand the content of the prospectuses, even a basic knowledge of corporate governance should have alerted him to the fact that the investment was high risk as the directors wore too many hats, spelling trouble for investors.

8.3 The respondent cannot claim that he received no benefit from the investments. The prospectuses made provision for 10% of the investors' funds to be released to the promoter, in order to pay the 6% commission that brokers received.

E. CAUSATION

[9] The principles of causation were explained in *International Shipping Co (Pty) Ltd v Bentley*[1]*:*

"The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question".

[10] As was explained by the court in the *Minister of Finance & others v Gore NO*[2]*:* "*[A]pplication of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experiences".*

Or, as was pointed out in similar vein by Nugent JA in *Minister of Safety and Security v Van Duivenboden*[3]*: "A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be*

1 1990 1 SA 680 (A) [700 E-G]

2 Minister of Finance v Gore NO 2007 (1) SA 111 (SCA) para 33.

3 Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) para 25.

expected to occur in the ordinary course of human affairs rather than metaphysics[4]*".*

[11] Had the respondent truly understood what he was advising the complainants to invest in, he would have considered other more appropriate alternatives. Not only was the loss to investors reasonably foreseeable, it was inevitable.

[12] The complainant's loss was not caused by management failure at Sharemax or the intervention of the Reserve Bank, but by the respondent's inappropriate advice. The respondent knew that the complainants were reliant on him for advice and in investing in these schemes, they were following his advice. If the respondent had adhered to the Code, no investments would have been made in Sharemax. The complainants sought investments that would keep their capital intact. The prospectuses are clear: the shares on offer are unlisted and the investments must be therefore be seen as a risk capital.

[13] That is not all: for all the reasons mentioned in the recommendation, the investments were high risk and inappropriate for the complainants. That the risk actually materialized, for whatever reason, is not important. Otherwise the whole purpose of the Act and the Code would be defeated. Every FSP can ignore the Act and Code in advising clients and hope that the investment does not fail. When the risk materializes and results in loss, they can hide behind unforeseeable conduct on the part of product providers or other interested parties.

[14] The findings made in the recommendation letter are hereby confirmed.

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[4] Crafford v South African National Roads Agency Limited (215/2012) [2013] ZASCA 8 para 7

F. THE ORDER

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

1. The complaint is upheld.

2. The respondents are ordered to pay the complainants, jointly and severally, the one paying the other to be absolved, the amounts set out below:

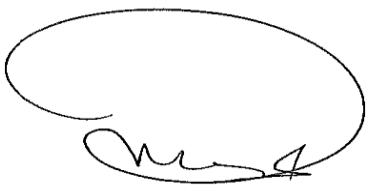
   R400 000 to the first complainant

   R120 000 to the second complainant

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

4. The complainants are to cede their rights in respect of any further claims in respect of the investments to the respondents.

DATED AT PRETORIA ON THIS THE 18TH DAY OF DECEMBER 2017.



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