

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

CASE NO. FOC 658/05-06/WC(5)

In the matter between:

JOHANNES PETRUS HERMANUS LATEGAN

COMPLAINANT

and

JOHAN STANDER T/A JOHAN STANDER MAKELAARS

RESPONDENT

**DETERMINATION IN TERMS OF SECTION 28(1)(a) of the FINANCIAL
ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002 ("FAIS Act")**

A. INTRODUCTION

- [1] This is a determination relating to an investment made in the failed and now defunct forex services scheme known as Leaderguard Spot Forex. There have been many other investors who invested in this scheme. They have lost millions of rand in the process. Complaints and enquiries relating to the Leaderguard scheme were steadily coming into the Office since late 2005.

B. THE PARTIES

- [2] The Complainant is Johannes Petrus Hermanus Lategan, a 70 year old pensioner of 27 Thaba Nchu Avenue, HARTENBOS, 6520.
- [3] The Respondent is Mr Johan Stander ("Standar") conducting business as Johan Stander Makelaars, who on his letterhead dated 24 April 2006, provides no physical address or his Financial Services provider ("FSP") licence number. His Postal address is stated to P.O. Box 2704, MOSSELBAY, 6500.

C. BACKGROUND

- [4] Complainant's case is that there had been an existing business relationship between the Complainant and the Respondent. During 2002 the Complainant made certain switches to his investments portfolio on advice of the Respondent.
- [5] The Complainant went to see the Respondent in January 2002 and requested him to be his adviser. The Complainant and his wife had annuities at Liberty Life and Old Mutual. They were also trustees of a trust called Lapiko Trust. The trust's investments consisted of Old Mutual Guernsey Money Market and Old Mutual GKF.
- [6] The Respondent advised them to switch money out of Old Mutual GKF into Liberty UK Properties, Momentum INVESCO and into PSG GG. The Complainant monitored his investments on a regular basis and went to see the Respondent not less than 41 times during 2002 to 2005.

[7] The Complainant had worries about the poor returns he received on his annuities at Liberty Life, he then requested the Respondent to change his portfolios accordingly. The Respondent always advised him to rather wait as the market would turn. The Complainant had lost his PSG GG investment in 2003, the total amount lost was around R220, 000.

[8] According to the Complainant's calculations they lost R283 000 on the Liberty Annuity, R117 000 on the Momentum INVESCO investment, and R220 000.00 on PSC GG investment.

[9] The Complainant further makes mention of other investment losses suffered. These investments were made before 30 September 2004 which falls outside the jurisdiction of this Office.

D. COMPLAINT

[10] During the month of March 2004, the Respondent advised the Complainant to invest an amount of R263 000 which was invested in the Old Mutual Guernsey money market fund into LeaderGuard Spot Forex ("LSF"), an entity which was incorporated and registered in Mauritius. LSF together with its South African marketing arm, LeaderGuard Securities (Pty) Ltd ("LS") have since been liquidated. At the time, the Old Mutual Guernsey money market fund investment was held in the name of Lapiko trust of which complainant is a trustee and beneficiary.

10.1 The Complainant submits that prior to making the investment; he had expressed concerns about this product. The Complainant was however informed by the Respondent that the LSF investment was a safe investment and that the Complainant would get much higher returns on the LSF investment than the money market investment held in Lapiko trust.

10.2 The investments were made during 2005. The Complainant invested R263, 000.00 into LSF investment through the Respondent.

10.3 According to the Complainant, no proper needs assessment was carried out and no interviews were conducted to assess whether this investment was conducive for the Complainant and his family's future financial requirements or their then current financial position.

10.4 The Complainant contacted the Respondent on various occasions requesting documentation of proof of the investment. However, Complainant was always informed by the Respondent that he had not received anything from LSF. The only proof that the Complainant has of the investment is an e-mail received from Kerry Ould from LS addressed to the Respondent stating that *"Please be advised that the Funds for JPH Lategan in our account on Wednesday 9 March 2005*

GBP 22473.33. The funds will be swifted tomorrow to go into trade for the 15th of March 2005”.

10.5 On the 26th of May 2005, the Respondent informed Complainant that LSF was in trouble and that the Complainant might lose all his money. The Complainant further alleges that the Respondent admitted that he failed to inform Complainant of the problems although the Respondent was aware of same for more than a month.

10.6 On the 23rd of January 2006, the Complainant and his wife had a meeting with the Respondent, whereby they expressed their dissatisfaction as to how the Respondent had handled their investments and that they had requested him to change the investment portfolios on various occasions, which he did not.

10.7 On the 15th of March 2006 the complainant sent an e-mail to the Respondent requesting clarity and information in relation to the date of investment as to when was it made and all the costs involved. On the 16th of March 2006, there was a response from the Respondent informing the Complainant that there was no initial commission or costs involved with the said investment.

10.8 According to the Complainant, the Respondent admitted that he knew of the problems of LSF for more than a month before informing the

Complainant on the 26th of May 2006. He further alleges that the Respondent was scared to inform him (Complainant) of this because the Respondent also lost all his money at PSG GG. The Respondent blamed everything on the FSB due to them not informing the Brokers of the fact that LSF was not approved/ registered. The Respondent also told the Complainant that he and other brokers made use of lawyers to investigate the FSB and their conduct.

10.9 Regarding this complaint, investigations by this Office have revealed that the Respondent at the time of rendering the financial service, did not mention to the Complainant that:

10.10 The Respondent had not obtained approval of LSF from the FSB, contrary to the provision of the FAIS Act.

10.11 That the Respondent had no authority to render financial services in Forex in terms of Respondent`s own licence.

10.12 That LS were operating under an exemption and that its license application was still pending with the FSB at that time.

[11] Complainant wants to be placed in the position he was in prior to the negotiations with the respondent. The Complainant`s goal was to use the

money in PSG GG and OMG to fund their home in a retirement village. In simple terms, complainant wants the return of his capital together with interest.

E. RESPONDENTS' RESPONSE

[12] After receipt of the complaint a letter was addressed to the Respondent in accordance with the provisions of the Rules of Proceedings of this Office asking him to resolve the matter with the complainant. As the complaint could not be resolved between the parties, it proceeded to investigation at which point Respondent was requested to provide copies of his "entire file papers".

12.1 A further letter was sent to the Respondent in terms of section 27(4) of the FAIS Act requesting a statement from him together with all additional documents that might support his case.

12.2 The Respondent was also requested to submit a reply to the allegations, taking into account the requirements of the FAIS Act. In particular to provide a statement on how the investment was entered into, with supporting documentation if available; the exact commission earned; and specific details as to the source of the investments and the contact details of the individuals or entity that provided the investment.

12.3 The Respondent responded with a letter in which he provided a detailed response to the complaint. He made mention of other investments done prior to the 30th of September 2004 jurisdiction date. However he dealt with the mentioned LSF investment separately.

12.4 The respondent's response can be summarised as follows:

12.5 He was licensed by the Financial Services Board (FSB) to give advice on and act as intermediary for "Foreign currency denominated investments instruments, including foreign currency deposit" in terms of his FSP licence No. 11984.

12.6 His licence gave approval for him to market foreign exchange ("Forex") products and more specifically it approved Leader Guard Spot Forex. During his application in form FSP 11 he did mention that LSF was registered in Mauritius by implication this meant that the FSB had approved LSF as otherwise it would have not licensed him to do business with LSF.

12.7 He was sent an e-mail dated 1 November 2004 by a Rod Lowe ("Lowe") then of LS stating that LS had been "FSB approved". as it had issued Licence No. 17073 to the company. In the e-mail, which was addressed to one Schoeman Botha, he states the following:

“Leaderguard Securities Pty Ltd – attains FSB Approval – License No. 17073. Hi there everyone, Fantastic news!!!! Leaderguard Securities (Pty) Ltd – the SA marketing entity for Leaderguard Spot Forex (Mauritius) has been FSB approved. Our FSB license number is 17073. Congratulations to the Directors and Compliance team at Leaderguard for their hardwork (sic) and perseverance – to ensure that Leaderguard Securities (Pty) Ltd is the first FSB approved Managed Forex Company in South Africa. Regards Rod Lowe B Com (Hons.) CFP Leaderguard Securities”

12.8 During February 2003 the 4i Group of which Respondent says he was an “associate and director” sent two people to Mauritius to enable them to make an informed decision about LSF. A detailed investigation was carried out.

12.9 He also obtained a copy of the licence issued to LSF by Financial Services Commission of Mauritius

12.10 International companies with a reputation for integrity and reliability were LSF’s business partners. KPMG (Mauritius) was LSF’s auditing firm, Saxo Bank and Investec Bank (Mauritius) its bankers and Federal Trust the custodian trust company. In discussions with these firms they confirmed that the marketing material was true and correct.

12.11 At the time he recommended the investment to the complainants he had no reason to be suspicious of or concerned about LSF.

12.12 When the Respondent made a presentation entitled “Bleggingsbeplanning” to complainant during November 2004, he recommended LSF as an alternative investment to Old Mutual money market. He further gave a short explanation of the product in simple language.

12.13 On the 18th of November 2004, Christene Immelman a specialist of LSF explained the workings of the investment in detail to Complainant and his wife.

12.14 Complainant never indicated that he did not understand the LSF investment Company. He (Respondent) at all times placed his client’s interest and needs first. He did not act outside his mandate.

12.15 He did adhere to the requirements of FAIS and always acted within the spirit of the Act.

F. THE ISSUES

[13] The issues to be decided are :

13.1 Whether Respondent was authorised to market Forex products;

13.2 Whether Respondent acted in a manner which is not in compliance with the FAIS Act and/or negligently and if so, whether his conduct caused the complainants to suffer damage or financial prejudice; and

13.3 The amount of such damage or financial prejudice.

Whether Respondent was authorised to market Forex products

[14] It is not in dispute that, at all material times, the Respondent was a licensed FSP and was subject to the provisions of the FAIS Act and subordinate legislation.

14.1 Respondent is an authorised financial services provider. However, he is restricted to certain financial products. According to information furnished to this Office by the Financial Services Board, Respondent applied to be registered as a Financial services Provider ("FSP") and for authorisation to give advice on Forex on 2 August 2004.

14.2 He had mentioned in a supporting document (Form FSP 11) to his licence application that the foreign entity he would be dealing with was LSF. He was like many others given a blanket exemption to continue giving advice whilst his licence application and Forex authorisation was being processed. Respondent has not been forthright in this respect. In his response to the complaint he says he was licensed to give advice on Forex investments. But the rendering of the service to the

complainants took place during the period of the exemption, i.e. prior to 21 December 2004. The licence and authorisation were granted only on 21 December 2004 which was long after he had advised complainants to invest their money. The implications of this will be apparent below. The fact that LS – the marketing arm in South Africa of LSF – was operating under an exemption whilst its application for a licence was still being considered by the Financial Services Board, has been the subject of critical comment by this Office in its determination in another Leaderguard matter) **Sub-par 13.1 Selwyn Comrie and Another v Ewing Trust company Limited FOC 1807/05/KZN (5).**

I find that the Respondent, when he sold the investment, acted without a licence.

Whether the Respondent acted in a manner which was not in compliance with the FAIS Act and/or negligently

[15] The crisp question is whether the Respondent acted with due care skill and diligence when he advised complainants to invest in LSF given the complainants particular circumstances. They were old respectively and the Respondent, as will become apparent later, by his own admission, knew they had a conservative risk profile.

15.1 The Code *inter alia* provides: Section 2

"A provider must at all times render a financial service honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry"

15.2 Section 8(1)(c) "A provider must, prior to providing a client with advice identify the financial product or products that will be appropriate to the clients risk profile and financial needs"

Section 8(2) "The provider must take reasonable steps to ensure that the client understands the advice and that the client is in a position to make an informed decision"

15.3 Section 7(1): Subject to the provisions of this Code "a provider must –
... (c) in particular, at the earliest reasonable opportunity, provide, where applicable, full and appropriate information of the following: ...
(xiii) any material investment or other risks associated with the product, including any risk of loss of any capital amount(s) invested due to market fluctuations;

15.4 The Respondent failed to mention to complainants that LSF had not been approved by the FSB at the date (18 November 2004) when the investment in LSF was made. He also did not disclose that he himself was operating under an exemption pending the processing of his licence application. Disclosure of these facts was important. Rejection of either Respondent's or LS's licence applications would have meant that any monies invested by his clients during the period of exemption

would have had to be refunded to them. Failure to mention this meant that the complainants were not placed in a position to make an informed decision.

15.5 The Respondent also relies on the fact that in the FSP 11 form (which was part of his Licence application) he had mentioned LSF as the entity he would be dealing with. He says by implication this meant that the FSB had approved LSF as otherwise it would have not licensed him to do business with LSF. He cannot rely on any implied approval of LSF whilst his own licence had not yet been approved. Respondent also appears to rely on the e-mail dated 1 November 2004 from Rod Lowe where he (falsely) stated that LS had been granted a licence and thus obtained FSB approval. But that did not entitle him to assume that the FSB had approved LSF. In any event, it eventually transpired that the licence application of LS (which, like the Respondent, had been operating under an exemption whilst its licence was being processed) was declined on 18 April 2005. In an e-mail dated 26 August 2009, Mr Malimabe of the FSB informed this Office that Leaderguard Spot Forex (Mauritius) was never approved and never submitted an application

15.6 The monies invested in LSF were sourced from a foreign (Guernsey) money market fund managed by Old Mutual. The investment was held in the name of the Lapiko Trust of which complainant is a trustee. The total amount transferred from the Old Mutual Guernsey money market investment to LSF was R263, 000.

15.7 In a letter dated 29 November 2006 (Translated in Afrikaans), the Respondent contends that he did not perform a needs analysis before he recommended the LSF investment as the Old Mutual (Guernsey) money market investment was a cash investment and so was the LSF investment. It was purely one cash investment replacing another cash investment, because the return on the latter investment was considerably higher. The investment did not enhance Complainants' risk in respect of his investments. It is obvious that the Respondent did not appreciate the appreciable difference in risk between money market and Forex investments.

15.8 It is common cause that the Complainant had an existing investment which was then terminated in order for the funds to be invested in LSF. The General Code recognises the risks inherent in replacing existing investments with other investments; this is dealt with in Section 8 (1)

(d)..... "where the financial product ("the replacement product") is to replace an existing financial product wholly or partially ("the terminated product") held by the client, fully disclose to the client the actual and potential financial implications, costs and consequences of such a replacement, including, where applicable, full details of-

- (e) Take reasonable steps to establish whether the financial product identified is wholly or partially a replacement for an existing financial product of the client and if it is such a replacement, the provider must comply with subparagraph (d).

- (2) The provider must take reasonable steps to ensure that the client understands the advice and that the client is in a position to make an informed decision”

The Respondent was unable to provide any evidence that, in changing or replacing, the Complainant’s investment to LSF that he complied with this section of the code.

15.9 The Complainant was 66 years old at the time the investment in LSF was made. A risk analysis performed by the Respondent on the 18th of November 2004 indicates that the complainant had a moderate risk profile.

15.10 In an undated letter with a heading “Kommentaar op Mnr. Lategan se brief aan die FAIS Ombud- Gedateer 15 Maart 2006” the Respondent, inter alia, made the following comments, “after three different options were discussed in detail with the Complainant and the wife, they decided to invest in the Moderate Growth Fund” The main reasons for

choosing the investment above the Old Mutual Guernsey investment were:

- a) The fund matches their risk profile, 80% of the Leader Guard Moderate Growth fund is guaranteed and would at all times remain invested in the clients name at Saxo bank, only 20% of the funds are thus on risk ("trade"), there is no guarantee on the money market investment at Old Mutual Guernsey money market.

15.11 The Respondent goes on to argue that it is clear from the above mentioned that the Leaderguard investment was a much better and safer investment than the Old Mutual Guernsey money market fund, given the Complainant's and the wife's circumstances and risk profile.

15.12 Although the Respondent established that complainant had a moderate risk profile, he nevertheless proposed that Complaint invest in high risk Forex trading. The Respondent moved funds invested in low risk British Pound denominated money market fund to a high risk investment. That the Respondent moved funds invested in the Old Mutual money market fund to LSF indicates that he completely misunderstood the nature of the LSF product. This is apparent from his statement that LSF product constituted an 80% guarantee when in fact it was not.

15.13 In the circumstances, the Respondent's assertions that the 80% capital guarantee was better and safer than the Old Mutual money market investment is unconvincing, to say the least.

15.14 The Respondent says that he gave an explanation of the product to the complainant in simple language and that the complainant never indicated that he did not understand the LSF investment, or that the investment was not clear or that it was misleading. It has to be stated that Respondent himself did not fully understand how the investment worked, how then could he have explained the investment to the Complainant.

15.15 In the given circumstances, the Respondent's advice to complainants to invest in LSF was negligent and in breach of his duties as provider in terms of the Code. I am therefore of the view that the Respondent's inappropriate advice caused complainants their loss. Switching money market investments into currency speculation is in my view, negligent and not acceptable if the client had no knowledge of the factual risks involved or if he had a low risk profile, but that depends on the personal circumstances of the person, such as age, value of total assets, and so on.

15.16 As an experienced provider of many years Respondent surely knew or ought to have known that Forex trading is volatile, subject to the vagaries of almost daily fluctuations in value and is inherently a high

risk investment. So why did he recommend the LSF investment? I can find no reason other than his own misunderstanding of the nature of the product and self interest or commission to be earned that caused him to recommend it.

15.17 Respondent on the other hand, provided this Office with a document titled “Leaderguard Spot Forex” which, he says, was shown to the complainants (“wat aan die kliente voorgelê is”) and the contents explained to them. The problem with the document is that it makes no reference at all to the 1.85% per month commission paid by LSF to LS. What it says is that Leaderguard will levy a fee of US \$60.00 for every US \$100 000, 00 traded. This represents 0.06% per transaction and is the only cost that Leaderguard was charging. The 0.5% broker’s fee, it is further stated in the document, is also recovered from the \$60, 00 fee.

15.18 Section 7 (c) (iii) of the Code provides:

“where the financial product is marketed or positioned as an investment or as having an investment component –

(aa) . . .

(bb) separate disclosure of any charges and fees to be levied against the product, including the amount and frequency thereof . . . in such a manner as to enable the client to determine the net investment amount ultimately invested for the benefit of the client.”

15.19 The commission of 0, 5% per month was accepted by complainants as they do not dispute the annualised amount of 6%. But, they were perturbed by the fact (which first complainant found out about only later) that the total cost structure of LS was in fact a much higher 1.85% per month. However, I accept that in all probability the Respondent did not know of the other 1,35% monthly costs involved as this appears to have been arranged between LS and LSF. Having said that, I am of the view that Respondent, or, for that matter any provider, has a duty to find out what the total cost structure of an investment product is. It is only by taking all costs into account that one can determine whether they are sustainable or not. Again, the complainants could not have made an informed decision where there was non-disclosure of all the costs.

15.20 Respondent's actions lead to complainant's loss by advising them to invest in LSF. They should never have been placed there in the first instance. I am of the view that in the circumstances Respondent should be held liable for the full loss suffered by the complainants.

15.21 It is extremely doubtful, after almost four years since LS and LSF were placed in liquidation, that the complainants would recoup any of their capital from those entities. However, if they do then it stands to reason, if the respondent has in the meantime compensated them for their loss

that they would have to reimburse the respondent for any amount that would constitute a double payment to them of their capital and interest. It is left to the respondent to enter into an appropriate agreement with the complainants in this regard when settling the claim.

G. FINDINGS

For reasons set out in the determination of:

Selwyn Comrie and Another v Ewing Trust Company Limited FOC 1807/05/KZN(5) and for reasons set out herein, I find that the Respondent is in breach of the FAIS Act and Code of Conduct. Consequently:

1. The Respondent is to be held liable for the Complainant's loss;
2. As a result of such a breach the Complainant was induced into investing in a financial product that was high risk and entirely unsuitable for the Complainant's profile.
3. I also find that it was the result of such breach that Complaint lost his investment.
4. In the result I find that Respondent must be held liable for the Complainant's loss.

H. QUANTUM

1. The amount of the investment was R263, 000. 00. The investment was made in November 2004.
2. Since making the investment Complainant received absolutely no return from the investment and even lost the capital.
3. It would be appropriate to make an order that in addition to re-paying the capital, Respondent must be ordered to pay interest on the capital from January 2005 to date of payment.

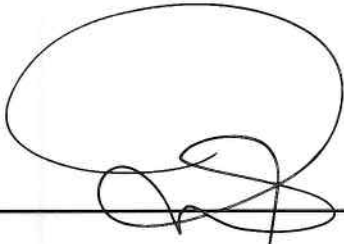
I. ORDER

I make the following order:

1. The complaint is upheld.
2. The Respondent is ordered to pay the Complainant:
 - 2.1 The amount of R263,000.00,
 - 2.2 Interest on the amount of R263.000.00 at the rate of 15,5% from 1st January 2005 to date of payment.

3. The respondent is ordered to pay the case fee of R1, 000.00 within 30 days of date of this determination.

DATED AT PRETORIA ON THIS 26th DAY OF JANUARY 2011

A handwritten signature in black ink, consisting of a large, loopy 'N' followed by a smaller, more complex flourish.

NOLUNTU N. BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS

