

14 December 2017

MR T Herselman

Teo Herselman Makelaars BK

Per email: teoh@brd.dorea.co.za

Dear Mr. Herselman

Emile Van Dyk v Teo Herselman Makelaars BK (first respondent) and Teo Herselman (second respondent): Recommendation in terms of Section 27 (5) (c) of the FAIS ACT (37 of 2002)

A. INTRODUCTION

1. On 20 January 2012, Mr. Emile Van Dyk (the “complainant”) filed a complaint with this Office against Teo Herselman Makelaars BK and Mr Teo Herselman (collectively referred to in this recommendation as the “respondent”). The complaint arose from a failed investment made by complainant, on respondent’s advice, into Highveld Syndication 21 (HS 21) promoted by PIC Syndications (Pty) Limited¹ (“PIC” or Pickvest)).

Delays in finalising this complaint

2. It is necessary to digress a little and explain the delays in finalizing this complaint, in view of the Office’s mandate to resolve complaints expeditiously. Sometime in September 2011, after the Office had issued the *Barnes* determination², the respondent in that matter brought an urgent application to set aside the determination³. Before the fate of the application could be known, respondents sought an undertaking from this Office that it would not proceed to determine any other property syndication related complaints involving them.

¹ registration number 2002/000736/07

² See *E Barnes v D Risk Insurance Consultants* FAIS-06793-10/11 GP 1

³ Respondent claimed that section 27 of the FAIS Act was unconstitutional

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3. Since no legal basis was provided for respondents' demands, the Office proceeded to determine further property related complaints involving the respondents. In reply, respondents launched an urgent application for an interdict to stop the Office from filing the determinations in court, until the main application had been disposed of. The decision in the main application was finally delivered in July 2012. See in this regard *Deeb Risk v FAIS Ombud & Others*⁴.
4. Following the decision of the High Court, which essentially dismissed the respondent's application, the Office continued to determine complaints involving property syndications. However, in 2013 following the *Siegrist* and *Bekker* determinations⁵ and the relevant appeal, a decision was taken by the Office to halt processing property syndication related complaints. The decision was not taken lightly, but it was a necessary risk management step. In both determinations, the Office sought, for the first time, to hold the directors of property syndication schemes liable for complainants' losses. The said appeal was finally decided in April 2015⁶, after which the Office resumed processing complaints involving property syndications, with due regard to the decision. As many as 2000 (mainly property syndication related) complaints had to be shelved pending the decision of the Appeals Board.

B. THE PARTIES

5. Complainant is Emile Van Dyk, an adult male pensioner whose full particulars are on file with this Office.
6. First respondent is Teo Herselman Makelaars BK, registration number 1995/055067/23, a Close Corporation duly registered in terms of South African laws. The Regulator's records indicate first respondent's last known address as No. 42 Church Street, Bredasdorp, 7280. First respondent was

⁴ Gauteng High Court Division, case number 50027/2014

⁵ See in this regard FAIS-00039-11/12 and FAIS-06661-10/11.

⁶ See in this regard the decision of the Appeals Board date 10 April 2015.

an authorised financial services provider with license number 9400. The license lapsed on 22 November 2016.

7. Second respondent is Teober Herselman, an adult male member, key individual and representative of first respondent. The Regulator's records indicate respondent's address as No. 42 Church Street, Bredasdorp, 7280. At all material times, second respondent rendered financial services to complainant. I refer to first and second respondents as respondent. Where appropriate I specify which respondent is being referred to.

C. THE COMPLAINT

8. During February 2009, complainant, then a 65 year old retiree, approached respondent after having seen an advertisement about the Marriot Income Fund. Complainant wanted respondent to provide him more information with regards to the Marriot product, as an option to invest R100 000, which comprised the proceeds of the one third lump sum from his Sanlam retirement annuity.
9. Respondent claimed that he had a 'better' opportunity and proceeded to recommend an investment into Highveld Syndication 21 (HS 21), which would provide an annual interest at 12.5% and the guaranteed return of capital after 5 years. It was explained to complainant that PIC had purchased properties from a certain company which would then rent these properties from PIC, with the proviso that this company then repurchase the properties from PIC at the end of 5 years. The investment was, according to respondent, safe as a result of this because it was guaranteed.
10. Complainant was happy with the fact that he could then access his capital at age 70 and make use of any new investment opportunities at that time. He signed the application on 12 February 2009 and invested a sum of R100 000. Complainant subsequently received a monthly income of R1040, 62. It must, however, be appreciated that even at the inception of the investment, the return of his capital at the end of the 5 year term was important to complainant.
11. During February 2011 complainant's income was drastically reduced to R499.50, and he states that respondent was unable to provide any information or guidance in this regard. During April 2011,

complainant received correspondence from PIC that the guarantee had been cancelled and that going forward the interest would be 6%. PIC was, from September 2011, subsequently placed under Business Rescue and complainant was then also prevented from accessing his capital as guaranteed by respondent.

12. Complainant currently receives an income from the PIC investment of R598 per month, which is his only income in addition to the R1 817 per month he receives from his Sanlam annuity and a SASSA grant of R1 600 per month.
13. Complainant believes that respondent presented information that was untrue and requires the return of his capital invested as promised by respondent. After having exhausted all attempts to resolve this matter with respondent as is required in accordance with Rule 6(b) of the Rules on Proceedings of this Office, complainant approached this Office for assistance.

D. RESPONDENT'S VERSION

14. Respondents' reply was received on 23 March 2012 following our Rule 6 (b) letter of 3 February 2012. The response is summarised below:

14.1 Respondent claimed that complainant wanted not only an income from the investment, but an investment which would increase his monthly income. He confirms that he had recommended PIC HS 21 as it provided a 12.5% annual income, with a Head Lease Agreement for the 5 years until the buyback of the investor's shares.

14.2 Respondent claims that the prospectus not only disclosed the risks involved in the syndication, but that it complied with the regulations of the property syndications industry and that PIC complies with all the requirements stated in the Government Gazette of 30 March 2006 (Notice 459). Not only is respondent incorrect with regards to the prospectuses compliance with Notice 459, as will be dealt with below, there is no indication that respondent ever explained the prospectus to complainant or highlighted the risks involved in such an investment, specifically with regards to liquidity.

14.3 The response records that business rescue proceedings had been put in place on 14 December 2011 and that complainant had been one of the clients that had voted in favour of this.

14.4 Respondent's entire response has been summarized above, and there is no justification as to why the recommendation was considered appropriate to complainant other than that it would provide an increased income. Remarks made with regards to the prospectus and the contents thereof highlight the lack of appreciation of the risk involved in this product. Attachments to the response included the application form and a copy of the prospectus for HS 21.

E. INVESTIGATION

15. On 9 June 2012 and 1 July 2015, this Office sent correspondence to respondent in terms of section 27 (4) of the FAIS Act (the Notice), informing respondent that the complaint had not been resolved and that the Office had intentions to investigate the matter. Responses to the Notices were received on 18 June 2012 and 14 July 2015 respectively, which is summarised below:

15.1 Respondent claimed that his recommendation was based on the fact that on 7 May 2008, when the retirement annuity with Sanlam had matured, the complainant had a taxable income of R200 000. The investment into HS 21 allowed complainant to maintain his standard of living by actually increasing his taxable income to R216 286.30. It is evident that respondent (apart from considering the supposedly attractive return from the investment) gave no thought as to whether the investment was appropriate to complainant's needs, and simply sought to provide him with the highest income possible regardless of the risks posed by the investment. Respondent had a duty to preserve the capital of a client, such as complainant, who did not have the capacity to regain any losses sustained.

- 15.2 Respondent also claims that complainant had done his own research into property syndications; not only is this disputed by complainant, but there is no documentation to support the claims made.
- 15.3 In fact the only documentation provided in the response was a copy of the prospectus for HS 21.
- 15.4 Respondent also made reference to a class action established by investors against Highveld Syndications 15 – 22, and that complainant was one of the individuals that had attended the meeting and is supporting the class action.
- 15.5 Documentation provided was limited to the application form, a copy of a quotation for PIC HS 21 and details of the business rescue plan. No documentation was provided showing what disclosures had been made to complainant with regards to the nature of the investment, the risks involved and why this investment was deemed to have been appropriate to complainant's specific needs and circumstances.
16. On 20 September 2017, this Office, in the interests of resolving the matter informally, sent a third and final notice to respondent in terms of section 27 (4) of the FAIS Act, (the Notice) informing respondent that the complaint had not been resolved and that the Office had intentions to investigate the matter. The letter read (omitting for now words not material to the essence):
- 16.1 The prospectus is a formal legal document which provides details about the investment offering to the public. The question that should be answered is whether the content of the prospectus and the legal requirements that it had to adhere to in order to make appropriate recommendations was understood and explained to complainant?*
- 16.2 Property syndications are high risk investments for a number of reasons amongst which are the complicated structure and the nature of the investment (being unlisted securities). Being unlisted means that there is a lack of regulatory oversight over these investments. Investors*

are at risk as unlisted shares are not readily marketable and the value is also not readily ascertainable. Should the company fail, this may result in the loss of the investor's entire investment. Was the aforesaid explained to the complainant? We require proof that the risks were explained to the complainant?

16.3 Notice 459 of Government Gazette 28690, (section 2 (b) of the Notice) mandates that investor funds must be kept in a registered trust account until registration of transfer into the name of the syndication vehicle, or upon underwriting by an underwriter, whose name must be made public. Given that the prospectus makes it clear that investors' funds will be withdrawn to fund various activities, what made you recommend the product to your client, in the face of this high risk?

16.4 What information did you rely on to conclude that this investment is appropriate to your client's risk profile and financial needs? In this regard your attention is drawn to the provisions of sections 3 (2), 8 and 9 of the Code. We need a record that shows that you elicited personal information from your client, including his financial circumstances, to demonstrate that you understood his circumstances prior to advising him.

17. Respondent was invited to substantiate his answers with documents compiled at the time of providing advice to his client.

18. Respondent provided a response to the Section 27(4) Notice on 9 October 2017. The response is summarised below:

18.1 The response referred this Office to the previous response dated 18 June 2012 and the fact that there was a business rescue plan in place in addition to the fact that clients such as the complainant still receive interest from the syndication. No further details are provided and there is no response to the specific issues raised in the Notice.

19. I highlight in the paragraphs that follow that respondent's advice was fundamentally flawed in that the scheme guaranteed neither the investor's capital nor the income payable. If anything, the

prospectus of the scheme made it plain that the investment was far too risky and in that case unsuitable to complainant's needs.

The law

20. I deem it necessary to first refer to the relevant parts of the General Code (the Code).
- a. Section 7 (1)(a), which calls upon providers other than direct marketers to provide “*a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision*’
 - b. Section 2, part II of the General Code of the Conduct (the Code) states that a provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.
 - c. Section 8 (1) (a) to (c) of the General Code states that:
“*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...”
 - d) Section 9 (1) (a) to (c) of the General Code states that:

“A provider must, maintain a record of the advice furnished to a client as contemplated in section 8, which 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;*
- c) the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the client's identified needs and objectives;*

21. The questions posed in the notices in terms of section 27 (4) sent by this office to respondent had their answers provided for in the prospectus, such that, if respondent had read the prospectus, as he claimed to have done, he would have understood that the investment was not suitable for complainant. I refer in this regard to the attached annexures A1 and A2 being summaries of the HS 21 prospectus, and Government Notice 459, (Notice 459) as published in Government Gazette 28690.

Highveld Syndication No. 21 Prospectus (HS 21)

22. I refer to the summary of HS 21 disclosure document annexed hereto and note the following.
- a. Page 6 of the prospectus carries a risk warning that states that the shares are unlisted, thus the adviser will assist in the resale of his client’s shares. Market related fees are payable by the seller. This would however appear to be in stark contrast to statements made on page 21 of the same prospectus which states that PIC Syndications (Pty) Ltd. (PIC) is not responsible to find a suitable buyer should the investor wish to sell his shares. It will be the sole responsibility of the investor to find a prospective buyer.

The statement does not accord with the requirements of Notice 459. According to the Notice, investors shall be advised that there is substantial risk in that investors may not be able to sell their shares should they wish to do so. In this regard, it is not the function of the

promoter to find a buyer should the investor wish to sell⁷. There is no indication that respondent brought this complainant's attention. The guarantee of his capital was important to complainant and had this been adequately explained to him he would in all probability not have accepted the recommendation.

- b. Funds received will be deposited in the trust account of Eugene Kruger & Co Attorneys. The funds will be utilised to enable the syndication to take occupation of the properties. The funds will be drawn on the instruction of PIC as per agreement between PIC and the investors. The unencumbered properties will be transferred into Highveld Syndication no 21, Ltd (HS 21 Ltd)⁸.

Notice 459 states that investor funds shall be deposited into a registered trust account of a registered attorney or chartered accountant and shall be withdrawn only in the event of registration of transfer or upon underwriting by a disclosed underwriter.⁹ Not only was the prospectus in breach of the Notice but respondent failed to recognize this fact as evident in his response to this office that the prospectus complied with Notice 459. I conclude in that case that respondent could not have appropriately warned complainant of the risk implications of the violation of the Notice.

- c. It is noted in paragraph 1 of page 40 of the prospectus that the Company, HS 21 Ltd, has never conducted any other business before the purchase of the properties noted on page 18 of the prospectus, on 1 August 2008.
- d. The prospectus issued by Pickvest carried a clear message of how the directors intended to deal with investors' funds. Respondent, ought to have been aware of the regulations pertaining to this investment, and it is clear from his responses to this office that he had never read the prospectus.

⁷ Section 1 (b) (ii) and (iii)

⁸ Page 17

⁹ Section 2 (a) & Section 2 (b) Notice 459

F. FINDINGS

23. On the basis of the reasoning set out in this recommendation, the risks in the investment were not disclosed, in violation of Section 7 (1). The section calls upon providers other than direct marketers to provide *“a reasonable and appropriate general explanation of the nature and material terms of the relevant contract [or transaction to a client], and generally make full and frank disclosure [of any information] that would reasonably be expected to enable the client to make an informed decision”*
24. Respondent further violated the Code in terms of section 8 (1) (a) to (c) and section 2. The investment represented a significant portion of the complainant’s accumulated savings. Furthermore, complainant was a 65 year old pensioner who could ill afford any loss of capital as he did not have the capacity to make up any losses sustained and these funds were to last him for the remainder of his life. Whilst complainant may still be receiving a nominal income from the syndication, he requires access to his capital which is a significant portion of his retirement savings; the recommendation to place complainant in an investment as risky and with such limited liquidity as that of HS 21 was blatantly inappropriate.
25. Respondent, as mentioned above, failed to provide complainant with a recommendation that was appropriate to his needs and circumstances, as is required by section 8(1) (a to c) of the Code. This was despite the fact that complainant had made enquiries with regards to the Marriot Income Fund, which at the very least should have resulted in a recommendation as to why the syndication investments were deemed to have been appropriate to the needs of complainant. There is however no indication that respondent had adhered to the provisions of section 8 (4) of the Code in this regard.
26. The representations made to complainant were incorrect and in violation of section 3 (1) (a) (vii) of the Code. There is no doubt that had the complainant been made aware of the risks involved in these investments, they would not have invested in any of the schemes.

27. Respondent also failed to maintain any records as required in terms of section 9 (1) (a) to (c) of the Code, or provide this Office with any details of the advice he claimed he provided, the reasoning behind this investment having been deemed appropriate, and the disclosures made with regards to the risks involved in the investment and the lack of liquidity.
28. As a consequence of the breach of the Code, the respondent committed a breach of his agreement with complainant in that he failed to provide suitable advice. The respondent must have known that complainant would rely on his advice as a professional financial services provider in effecting the investment in Sharemax

G. CAUSATION

29. The question that must be answered is whether respondent's flawed advice caused complainant's loss. Had respondent complied with the Code and sought investments that were in line with complainant's circumstances, there would have been no investments in Pickvest. Respondent must have known that his client was going to rely on his recommendation in making the investment. It stands to reason that the respondent caused the complainant's loss, which loss must be seen as the type that naturally flows¹⁰ from the respondents' breach of contract.

H. RECOMMENDATION

30. The FAIS Ombud recommends that respondent pay complainant's loss in the amount of R100 000.
31. The respondents are invited to revert to this Office within TEN (10) working days with their response to this recommendation. Failure to respond with cogent reasons will result in the recommendation becoming a final determination in terms of Section 28 (1) of the FAIS Act¹¹.

¹⁰ *Administrator, Natal v Edouard* 1990 (3)SA 581 (A); *Thoroughbred Breeders' Association of SA v Price Waterhouse* [2001] 4 All SA 161 (A), 2001 (4) SA 551 (SCA), paragraphs 46-49; Compare in this regard, *First National Bank v Duvenhage* [2006] SCA 47 (RSA).

¹¹ *"The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5)(c) has not been accepted by all parties concerned, make a final determination, which may include-*
(a) the dismissal of the complaint; or
(b) the upholding of the complaint, wholly or partially...."

Yours sincerely

A handwritten signature in black ink, appearing to read 'Marc Alves', written over a light blue horizontal line.

Marc Alves

Team Resolution Manager