

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 06866/10-11/ KZN 1

In the matter between:

ANDREW JAMES ALLAN

First Complainant

SUZANNE JOYCE ALLAN

Second Complainant

and

Midcoast Financial Services (Pty) Ltd

First Respondent

BRUCE GRIFFITHS

Second Respondent

**DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY
AND INTERMEDIARY SERVICES ACT NO 37 OF 2002 (the Act)**

A. INTRODUCTION

[1] On 26 January 2018, this Office made a recommendation in terms of section 27 (5) (c) of the Act. Section 27 (5) (c) empowers the Ombud to make a recommendation in order to resolve a complaint speedily by conciliation. Respondents filed their response objecting to the recommendation. Their reasons are dealt with in the paragraphs that follow. This determination shall be read in conjunction with the recommendation and the latter shall form part of this determination.

B. THE PARTIES

- [2] First complainant is Mr Andrew James Allan, a male retiree whose full details are on file with this Office.
- [3] Second complainant is Mrs Suzanne Joyce Allan, a female retiree whose details are on file in this Office. First and second complainants are married to one another and were retired at the time of advice by second respondent.
- [4] First respondent is Midcoast Financial Services (Pty) Ltd (2000/006698/07) a company duly incorporated in terms of South African law. At the time of advice, first respondent was an authorised financial services provider (FSP) (17641), with its principal place of business noted in the Regulator's records as 20 Hoskins Road Wembley, Pietermaritzburg, KZN. The licence had been active since 29 September 2004, however, it lapsed in April 2011 when respondent requested the regulator to remove him as a key person and representative of the first respondent as he had since become a representative of Momentum.
- [5] Second respondent is Bruce Griffiths, an adult male representative and key individual of first respondent at the times material hereto. The regulator's records confirm second respondent's address to be the same as that of first respondent. At all times material hereto, second respondent rendered financial services to the complainants.
- [6] I refer to the respondents collectively as "respondent". Where appropriate, I specify which respondent is being referred to.

C. RESPONDENT'S RESPONSE

[7] Before I deal with the points raised in the respondent's reply, it is useful to first note that the recommendation upheld the complainants' complaint and found, based on respondents' own version that:

7.1 The respondents failed to recognise the risk that was evidenced by The Villa Ltd prospectuses which conveyed violations of Notice 459 (the Notice). Instead, respondents persist with their argument that:

7.1.1 The prospectuses of The Villa Ltd complied with the Notice; and

7.1.2 Notice 459 did not prohibit the transfer of investor funds prior to the transfer of immovable property into the property syndication vehicle.

This, despite the clear wording of the provisions of Notice 459 and Annexure A, attached to the Notice.

7.2 The recommendation further points to investor funds being paid gratuitously to an entity known as Brandberg Consultante (Pty) Ltd (Brandberg) as commission, without regard to investors' interests and the law. Respondents have sought to characterise the nature of the commission as '*estate agents*' commission. This is despite the absence of the words '*estate agents*' in the SBA. Even if one accepts that the commission was indeed '*estate agents*' commission, respondents have still failed to explain why the '*estate agents*' commission had to be advanced to Brandberg, in light of the high risk to investors. Accordingly, this finding has also not been disturbed.

Respondents state that:

7.3 The complaint exceeds the jurisdictional limit of the FAIS Ombud (R800 000) and as the complainants are claiming for income (investment performance), the jurisdiction of the Ombud is excluded by Rule 4 (f).

7.3.1 First, respondent does not dispute that both the first and second complainants invested individual sums of money and that they each lodged complaints for the recovery of the amounts which far exceed R800 000. In order to bring their claims within the jurisdictional limits of this Office, complainants have abandoned the portion of their claims that exceed the R800 000 thereby bringing the complaint within the jurisdiction of this Office. This much is clear from the recommendation.

7.3.2 Second, Rule 4 (f) states that the complaint must not relate to investment performance of a financial product which is the subject of the complaint, unless such performance was guaranteed expressly or implicitly or such performance *'appears to the Ombud to be so deficient as to raise a prima facie presumption of misrepresentation, negligence, or maladministration on the part of the person against whom the complaint is brought, or that person's representative'*. There is no dispute that prior to investing, respondent negligently advised complainants that their capital was protected in Sharemax. Respondent had no basis to make such a statement in the face of the

risk demonstrated by the prospectuses and the SBA. The complaint is not based on investment performance.

7.4 The respondents argue that the Ombud cannot simply expand and include complaints not made by the complainants. This is with reference to the complainants' clarification that they have not, and do not, intend to issue summons for the recovery of their capital. (para 59 of the recommendation). The respondent, wisely, does not develop this remark any further.

7.5 The letter referred to in paragraph 14 (of the recommendation), was never made available to the respondent. Alongside this, respondents complains that they were not provided with the letter (Rule 5 (g letter) that led to complainant's response of 29 January 2013 as set out in paragraph 29 of the recommendation.

7.5.1 This Office has proof that the letter from the complainants in which they clarify the question of legal proceedings was made available to respondents together with the recommendation. All relevant information collated from the complainants was shared with respondents. Besides, the findings made in the recommendation are based on respondent's own version.

7.6. Respondent now claims to have discussed with complainants the USSA disclosure document and that due to the delays by this Office, he can no longer find the USSA disclosure document that is pertinent to complainants' case, which respondent claims spells out the risk.

7.6.1 The respondent is aware that the General Code of Conduct (Code), in section 3 (2) (b) requires that all such documents be maintained until five years from date of termination of the product. I add that notwithstanding, the USSA disclosure document cannot assist the respondent in view of the extensive violations of the law (Notice 459), manifested by the prospectuses and the SBA, all of which respondent never advised his clients of. In fact respondent has gone so far as deny that there were violations of Notice 459. Emphasising his expert's opinion, respondent affirms that Notice 459 did not prohibit the scheme from paying out investor funds prior to registration of transfer of the immovable property into the name of the syndication vehicle. Only that respondent, like the expert, fails to substantiate his claims.

7.7. Finally, respondent complained that the Ombud has hardly given reasons for dismissing the application.

7.7.1 This is not true. The application was dismissed because it has no place in the nature of enquiry that is conducted by the Office in relation to these complaints. This is adequately covered in the determination.

7.8 Respondent holds that complainants signed documents which clearly explain the risk. The document however is unnamed. Respondent cannot

expect this Office to speculate which documents he is referring to and his reliance on the *Kema t/a Kloof*¹ case is both vague and ill-conceived.

D. CONCLUSION

[8] Nowhere in their response do the respondents disturb the findings relating to their failure to provide suitable advice and the consequent loss which flows from their inappropriate advice. The findings set out in the recommendation are hereby confirmed. It follows that respondents are liable to pay complainants' claim.

E. THE ORDER

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

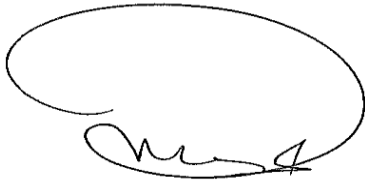
1. The complaint is upheld.
2. The respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the complainants' loss in the following manner:
 - 2.1 An amount of R800 000² to the first complainant; and
 - 2.2 An amount of R800 000 to the second complainant.
3. Interest on this amount at a rate of 10.25% per annum from the date of determination to date of final payment.

¹ Felicia Jacobs v Hans Kema t/a Kloof Financial Services FOC 413/06-07 GP 1

² The lost income in respect of each of the complainant's investments since October 2010 far exceeds the amount of R800 000. Each of complainants' investments constitutes a distinct cause of action.

4. Complainants, upon full payment, are to cede their rights, title and any further claims in respect of these investments to respondent.

DATED AT PRETORIA ON THIS THE 30th DAY OF APRIL 2018.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS