

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 06965/12-13/ FS 1

FAIS 06997/12-13/ FS 1

In the matter between:

Trevor Hattingh

Complainant

and

Advice at Platfin CC

First Respondent

Abraham Jacobus Gouws

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] This determination follows a recommendation made in terms of section 27 (5) (c) of the Act on 15 December 2017. Section 27 (5) (c) empowers the Ombud to make a recommendation in order to resolve a complaint speedily by conciliation. This determination shall be read in conjunction with the recommendation and the latter shall form part of this determination.

[2] The respondent's reasons for not accepting the recommendation are dealt with in the paragraphs following below.

B. THE PARTIES

[3] Complainant is Trevor Hattingh, a semi-retired adult male whose full particulars are on file with this Office.

[4] First respondent is Advice at Platfin CC, a close corporation duly incorporated in terms of South African law, with registration number (1993/017920/23). The first respondent is an authorised financial services provider (FSP) (license number 11991), with its principal place of business noted in the Regulator's records as Negotium Building, C/O De Kaap en Buiten Street, Welkom, 9459. The license has been active since 13 October 2004. At the time the advice was provided the entity traded as Abe Gouws Makelaars.

[5] Second respondent is Abraham Jacobus Gouws, an adult male, key individual and representative of the first respondent. The Regulator's records confirm his address to be the same as that of first respondent. At all times material hereto, second respondent rendered financial services to the complainant.

B. RESPONDENT'S REPLY TO THE RECOMMENDATION

[6] Respondent confirms that complainant had informed him that he could not afford to lose any capital, and that this declaration by complainant had been the reason why he had recommended that complainant invest in both Sharemax and PIC. Respondent stands by his recommendation and is of the view that he did not

breach his agreement with complainant as his advice had been in line with the needs of complainant, which was an investment that provided a monthly income.

[7] Respondent was satisfied that both entities had had been in operation for at least 10 years with a clean track record of successful investment transactions and claims to have even taken complainant to both the Sharemax head office to meet with the directors, and the construction site of The Villa Ltd. Subsequent to this visit, it is alleged that complainant had taken a few days to consider all the information provided, after which he had confirmed that he would be proceeding with the investments as discussed. The PIC investment had also been considered a low risk investment as it was an investment into established shopping centers situated all over the country all with existing tenants.

[8] Respondent claims that he explained both the Sharemax and PIC prospectuses to complainant, who was allegedly also provided with copies to study at home. Respondent is adamant that complainant was well aware of the nature and risks involved with the investments.

[9] Respondent also reiterates that complainant initially instituted legal proceedings against him on 12 June 2012. Respondent does, however, also concede that the complainant had withdrawn the application in favor of pursuing the matter through this Office.

[10] Respondent acknowledged not being licensed in terms of category 1.10; however he once again claimed to have been acting under supervision as a representative of USSA.

C. DETERMINATION

[11] As evidenced in the issues raised in the recommendation, which have not been disturbed by respondent, the respondent failed to appropriately advise complainant.

[12] Notwithstanding the evidence provided in the recommendation, pointing to the high risk involved in the Sharemax and PIC products, respondent remains of the view that the products were not high risk. This is further supported by both a copy the 'Client Advice Record' and 'Risk Profile Analysis' appended to the respondent's response, which confirm not only complainant's inability to sustain losses, but that both Sharemax and PIC had been recommended as appropriate to complainant's circumstances.

[13] Respondent still fails to see the contraventions and risks inherent in the recommended scheme. He could not see the poor governance that was demonstrated in the prospectuses which also contributed to the high risk. The conclusion is ineluctable that respondent could not have appropriately advised complainant of the risks involved in the two investments.

D. CAUSATION

[14] It is not sufficient to merely point to the violations of the Code without dealing with the question of whether such violations caused the loss. The recommendation dealt extensively with the risks involved in the product, risks respondent either refuses to acknowledge or was oblivious to. Whatever the reasons, respondent could not have appropriately advised his client. As a result of the failure to disclose the true nature of the risk involved, complainant accepted respondent's advice and made the investments. It is highly probable that no investment would have been made in either Sharemax or PIC had respondent disclosed the risks. In a recent decision of the Appeals Board¹ it was stressed:

'43....In the case of a provider under the Act more is required, namely, compliance with the provisions of the Code. Failure to comply with the code can be seen in two ways. The Code may be regarded as being impliedly part of the agreement between the provider and the client and its breach a breach of contract. The other approach is that failure of the statutory duty gives rise to delictual liability.

44. In both instances the breach must be the cause of the loss. We stress this point because the Ombud's reasons give the impression that any breach of the Code makes a provider liable for damages without due regard to this aspect of causation, namely did the failure to comply with the Code cause acceptance of the advice.'

[15] Respondent's failure to appropriately advise complainant caused the loss.

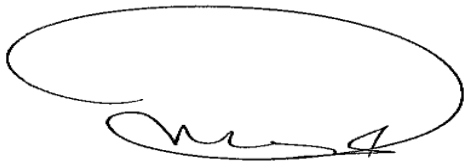
J & G Financial Services Assurance Brokers (Pty) Ltd & O v Dr Robert Ludolf Prigge Case No FAB 8/2016 – para 43 to 44

E. THE ORDER

[16] 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 complainant the amount of R500 000 in respect of The Villa Ltd and R500 000 in respect of PIC HS 21;
3. Interest on this amount at a rate of 10.25% per annum from the date of determination to date of final payment.
4. Complainant, upon full payment, is to cede his rights, title and any further claims in respect of this investment to respondent.

DATED AT PRETORIA ON THIS THE 22nd DAY OF MARCH 2018.



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