IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA **CASE NUMBER: FOC5452/07-08/EC (1)**

In the matter between:-

WILHELM JULIUS MALAN **Complainant**

and

WILLIE ADRIAAN JORDAAN **Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')

A. PARTIES

[1] The complainant is Mr Wilhelm Julius Malan ("Malan"), a property services superintendent of 4, Tulip Avenue, Willowpark, EAST LONDON, 5201.

[2] The respondent is Mr Willie Adriaan Jordaan ("Jordaan") who was previously an authorised Financial Services Provider but whose licence has since been withdrawn by the Financial Services Board. He resides at 21 Trafalgar Road, Cambridge, EAST LONDON, 5241.

B. THE BACKGROUND

[3] Jordaan had been Malan's financial advisor for over twenty years. During this time Malan made a number of investments on the advice of Jordaan. In October 2006, Malan sought Jordaan's advice once again as he had R 80 000, 00 to invest. Malan thought of investing in either retail bonds at 8.5 per cent per annum or in a Nedbank two year fixed deposit at 9.57 per cent per annum. Jordaan however introduced him to what was in effect a bridging finance scheme.

[4] Jordaan assured Malan, who was risk averse that there was little or no risk attached to the investment. Malan took his advice and invested the money and (also on Jordaan's advice) withdrew R 30 000, 00 from a unit trust investment and thus invested a total of R 110 000, 00 in the bridging finance scheme.

[5] About a year later the scheme collapsed and Malan's total investment (including interest which was re-invested) was lost. Although liquidators were appointed there appears little chance that any monies will be recovered.

[6] Complainant believes that it was respondent's advice which caused him loss and therefore seeks to recover the loss from either Jordaan's employer – Sanlam – or Jordaan himself.

The relief sought by complainant

[7] Complainant seeks to recover the capital of R 110 000, 00 from Sanlam or Jordaan.

Investigation by this Office

[8] Both Jordaan and his employer, Sanlam, were asked respond to the complaint firstly by resolving it with the complainant and failing that, by furnishing this Office with full details and records of advice in terms of the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and Representatives ("the Code") framed under the FAIS Act.

[9] Sanlam's response in effect was that its employee – Jordaan – went on a frolic of his own and it should therefore not be held liable for his actions. I will revert to this later.

[10] Jordaan's somewhat cryptic response was that bridging finance was not a financial product as defined in the FAIS Act and therefore this Office had no jurisdiction to entertain the complaint. He does not dispute any of the complainant's allegations as set out above in the background and they must therefore be regarded as common cause.

[11] The bridging finance was ostensibly to be provided to estate agents who were owed commission by sellers of property. The commission would only be paid to the agents on registration of transfer of the property by the conveyancing

attorneys. As property transfers usually take some time to be registered in the Deeds Registry Office and estate agents want immediate access to their commission, bridging finance is a means by which the agents are paid their commission (minus a discount) immediately. The discounted amount accrued to the benefit of the person or entity providing the bridging finance, usually a bridging finance company. In this case before me it was an entity called Auctum Capital (Pty) Ltd (Registration No. 2005/013301/07) of which the sole director – according to its letterhead dated 12 October 2006 – is a Hermann Heydenrych. This appears to be the same individual who recruited investments for the now spectacularly failed Fidentia Group. There the recruitment was done through a company called Antheru Trust. In the said letter Heydenrych welcomes Malan "as a participant in the Joint Venture with Auctum Capital." He somewhat convolutedly goes on to say that "your participation should not be seen as an investment, but rather a contribution to the Joint Venture, thus ensuring profit sharing in the venture."

The Issues

[12] The crisp issue to be decided is whether the respondent had complied with the FAIS Act when rendering this financial service. In particular is his defence that the bridging finance product is not a 'financial product' as defined in section 1 of the FAIS Act, and thus not within the jurisdiction of this Office, tenable? There is also the additional question of whether Sanlam or Jordaan should be held liable, if at all, for complainant's loss.

C. DETERMINATION AND REASONS THEREFORE

[13] The question to be determined is whether, given that bridging finance does not seem to fall within the strict definition of a financial product in the FAIS Act, this Office has jurisdiction to entertain the complaint against the respondent.

[14] On a strict interpretation of the FAIS Act it would appear that bridging finance does not fall within the definition of a 'financial product'. Section 1 of the Act provides a long list of products that are defined as financial products. 'Bridging finance' does not appear there. However, in my view the matter does not end there.

[15] Mr Heydenrych, as mentioned above, refers to the scheme as participation in a "Joint Venture" and profit sharing and that it should not be regarded as an investment. The dictionary definition of "invest" means "put money into financial schemes, shares, or property with the expectation of achieving a profit."[1]

[16] The attempt to make a distinction between "participation in a Joint Venture . . . ensuring profit sharing" and an "investment" is therefore clearly artificial or contrived. Why call it "profit sharing" and say it is not an investment? The inevitable conclusion is that it is an attempt to circumvent the provisions of the FAIS Act as it could then be claimed that bridging finance or profit sharing do

[1] *Concise Oxford English Dictionary, eleventh edition, revised.*

not fall within the definition of a “financial product” as defined in the Act. I say this because, as mentioned above, Jordaan claims this Office does not have jurisdiction to entertain the complaint precisely because bridging finance is not included in the definition of a financial product in the FAIS Act. This Office is often faced with situations where consumers of financial products are presented with what appears to be a financial product when in fact it does not fall within the strict definition of a financial product. These take the form of investments in risky bridging finance or so called ‘investment clubs’- often positioned as actual financial products.

[17] Section 1 of the FAIS Act has a defined list of financial products. But, importantly, it also provides for the recognition of ‘any other product similar in nature to any financial product’ under sub-section *(h)* thereof wherein it states:

> “any other product similar in nature to any financial product referred to in paragraphs (a) to (g), inclusive, declared by the registrar, after consultation with the Advisory Committee, by notice in the Gazette to be a financial product for the purposes of this Act;”

[18] This Office is seized with several cases where we have found that intermediaries hide behind the fact that ‘this is not a financial product’. This Office pronounced on one such case in the matter of *Nebbe vs Oosthuizen FOC 2243/07-08 (KZN) (1).*

[19] One may also look at general principles of interpretation where one of the issues one looks at in interpreting legislation is what mischief the particular

piece of legislation was designed to prevent. If schemes such as bridging finance and so-called investment clubs were to be allowed to be marketed by financial services providers (FSPs) on the basis that they fell outside of the FAIS Act then it would frustrate the very purpose for which the FAIS Act was designed. Unscrupulous financial advisors will continue to ensnare unwary investors who may then have no recourse against the provider concerned. It may be tempting for the FSP to market products that do not fall within the definition in the Act in the knowledge that they may not be called to account by this Office or the Financial Services Board for that matter for the financial service rendered in that regard.

[20] In this matter before me the product bears all the hallmarks of a financial product i.e. an instrument marketed to the public as worthy of investing in to earn a profit, or some benefit - convoluted attempts to distinguish between profit sharing in a joint venture and an investment notwithstanding. To put it colloquially, if it looks like a duck, walks like a duck, squawks like a duck, then it must be a duck.

[21] Turning to the facts of this case, Jordaan was complainant's financial advisor for over twenty years. Therefore, when the latter sought his services again in October 2006 he expected Jordaan to render his services as an FSP on the basis of the established professional relationship. Added to that is the fact that complainant wanted to invest in one of two defined financial products when

Jordaan advised him to invest in one which was not so defined. As I said in the *Nebbe*[2] determination:-

"*That professional contractual relationship was to give advice. This is particularly so because the respondent is an authorised financial services provider and with such authorisation has agreed to comply with the various provisions of the FAIS Act and its sub-ordinate measures.*

"[38] Respondent is by the very nature of her work entrusted with the financial well being of those who consult her. Parliament has thus seen fit to ensure through the provisions of Section 8 (1) of the FAIS Act that only those individuals who can satisfy the registrar that they comply with the requirements for fit and proper financial services providers can be so authorised. Inherent to this requirement is the personal character qualities of honesty and integrity.

"[39] In rendering financial services to her clients, respondent would at all times have to ensure that complainant as a consumer of financial services is assured of the protection of his investment. Thus any advice that she offers would have to be in the interests of the client and the integrity of the financial services industry. To do otherwise would immediately defeat the objectives of the FAIS Act."

"[40] The definition of advice in terms of the FAIS Act is:

'any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients –

[2] *Supra at par 37ff.*

(a) In respect of the purchase of any financial product...'

"[41] When the aforesaid is read with Section 27 (3) (a) (i) of the FAIS Act which states:

'The Ombud must decline to investigate any act or ***omission*** *(my emphasis) which occurred on or after the date of commencement of this Act...'*

it becomes clear that Parliament intended not only to deal with conduct where a financial adviser acted contrary to the FAIS Act but also by omission when they ***failed*** *to act in the manner expected of them in the circumstances.*

"[42] Whilst the General Code of Conduct for Authorised Financial Services Providers and Representatives (Board Notice 80 of 2003) (the Code) has various specific provisions the general duty of a provider is summed up in Clause 2 of the Code which requires 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'"

[22] It is important to note that section 8(1) (c) of the Code provides that after seeking information about a client's financial position and conducting an analysis thereof the adviser must "*identify the financial product or products that will be appropriate (emphasis added) . . ."* In other words the adviser is not to give advice on a product that is not a defined financial product. If he or she does, they are clearly acting in contravention of the FAIS Act and this Office is, in my view, duty bound to determine such a matter not on the basis

whether it does or does not have jurisdiction but on the basis that the FSP is falling foul of the FAIS Act in recommending a product not defined in the Act. As was stated in Nebbe[3] -

> *"[44] The financial products referred to above are those listed under the definition of financial product in Section 1 (1) of the FAIS Act. It is important to note that Parliament has, in its wisdom, defined the list of financial products that a financial adviser can recommend by way of advice to a potential client. The intention of Parliament is very clear. It means that authorised financial services providers are confined to recommend those products as defined. They simply cannot recommend any other investments not defined as financial products. To do so will immediately defeat the objectives of FAIS Act to ensure consumer protection and to safeguard the integrity of the financial services industry."*

[23] Another issue to be determined is whether Sanlam may be held vicariously liable for complainant's loss. Complainant says he was risk averse and had wanted to invest in retail bonds or a two year fixed deposit with Nedbank - a major bank. This means he obviously must have been aware that those were not Sanlam products. This in turn means that he was prepared to enlist Jordaan's help to invest in products that were not from the Sanlam stable. The probabilities therefore are that he was aware that the eventual product sold to him by Jordaan was not one from Sanlam. Sanlam should not therefore be held liable in this instance.

[3] *Supra par 44.*

[24] Jordaan, on the other hand, not only went on a frolic of his own by advising clients to invest in financial products that he was not authorised to market by his employer but went further and advised the complainant to invest in a product that he, as a registered FSP, knew was not a financial product as defined and then raises that very point in his own defence.

[25] Given the common cause facts and for the reasons set out in this determination, Jordaan should be held liable for complainant's loss.

D. QUANTUM

[26] The amount of complainant's loss has not been disputed save that a dividend *may* be paid by the liquidators. It is doubtful that the complainant would recoup any of his capital. However, if he does then it stands to reason, if the respondent has in the meantime compensated him for his loss that he would have to reimburse the respondent for any amount that would constitute a double payment to him of his capital and interest. It is left to the respondent to enter into an appropriate agreement with the complainant in this regard when settling the claim.

THE ORDER

I make the following order:

1. The complaint is upheld;

2. Respondent is ordered to pay complainant the amount of R 110 000, 00 within 14 days of date of this order together with interest thereon at the rate of 15.5 per cent per annum from 14 days after date of this order to date of payment;

3. The respondent is ordered to pay the case fee of R 1000, 00 to this Office within 14 days of date of this order.

Dated at PRETORIA this 20 day of January 2010.

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CHARLES PILLAI

OMBUD FOR FINANCIAL SERVICES PROVIDERS