

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

CASE NUMBER: FAIS 03930/13-14/ GP 1

In the matter between

BHEKI ROBERT MKHUMBUZA

Complainant

and

LUCKY MOTSOLO

First Respondent

ZANELE ELSIE MOTSOLO

Second Respondent

DOLLY MOTSOLO

Third Respondent

MOTSOLO'S TRADING AND INVESTMENT (Pty) Ltd

Fourth Respondent

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

A. INTRODUCTION

[1] The complaint arises out of an agreement to invest in shares, following advice from respondent. Respondent was supposedly in the business of 'buying and selling JSE shares under high gearing securities (Contract For Difference and Currencies) to make profit in a short period'.

- [2] Complainant transferred funds into a Standard Bank account ostensibly controlled by the first and second respondents jointly as CEO and Executive manager, respectively.
- [3] Complainant received a copy of the 'Investment Club Agreement Application Form', duly signed by him and the third respondent.
- [4] It is an established fact that notwithstanding the respondents' claim that they were licensed financial services providers, with license number 44542 printed on their firm's stationery, none of the four were ever licensed according to the regulator's records¹

B. THE PARTIES

- [5] Complainant is Bheki Robert Mkhumbuza, an adult male residing in Gauteng.
- [6] First respondent is Lucky Motsoto, an adult male, Founder and CEO of fourth respondent, identity number 770205 5223 089, residing at 62 Duncan Street, Brenthurst, Brakpan, Gauteng.
- [7] Second respondent is Zanele Elsie Motsoto, an adult female, Executive Manager of fourth respondent, whose full and further details are unknown to this office. Second respondent's last known address is 62 Duncan Street, Brenthurst, Brakpan, Gauteng.
- [8] Third respondent is Dolly Motsoto, an adult female, Sales Executive Manager of fourth respondent, whose full and further details are unknown to this office.

¹ The Regulator has provided confirmation that the matter of the Motsotos have been referred to the SAPD and SARB for further investigation.

Third respondent's known address is 62 Duncan Street, Brenthurst, Brakpan, Gauteng.

[9] Fourth respondent is Motsoto's Trading and Investment (Pty) Ltd, a private company with registration number 2012/092047/07 duly incorporated in terms of the laws of South Africa, with its registered address being 62 Duncan Street, Brenthurst, Brakpan, Gauteng.

[10] I refer to all respondents simply as respondent. Where appropriate, I specify.

C. COMPLAINT

[11] According to the complainant, he concluded two investment agreements with the respondent on 9 April 2013. In terms of the first agreement, complainant invested an amount of R35 000 of which he would receive a 30% interest every 25 working days for three months. In terms of the second agreement, complainant invested an amount of R30 000 of which he would receive a 100% profit pay out after 75 working days.

[12] The contract term was for 15 weeks (75 working days) unless terminated earlier in which case a 25% penalty would be levied against the invested amount.

[13] Complainant presented proof to this Office that he indeed transferred the amount of R65 000 into an account known as Motsoto's Trading and Investment Pty (Ltd) on 8 April 2013.

[14] Complainant further states that he has not received a single payment in respect of his investments.

D. RELIEF SOUGHT

[15] Complainant seeks repayment of his capital of R65 000 with interest.

E. DETERMINATION AND REASONS

[16] The issues for determination are:

16.1 Whether the respondents rendered financial services at all? If they did, whether the rendering was in compliance with the FAIS Act;

16.2 Whether respondent's conduct caused complainant the loss complained of;

16.3 Quantum of such loss.

Whether the respondents rendered financial services at all? If they did, whether the rendering was in compliance with the FAIS Act?

[17] During September 2013, the complaint was referred to respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office, to resolve it with complainant. No response to this letter had been received.

[18] On 26 February 2016, a notice in terms of Section 27 (4) was issued to respondent advising them that the Office had accepted the matter for investigation and further informing respondent to provide all documents and or recordings that would support their case. The notice further indicated to respondents that in the event the complaint was upheld, they could face liability. Again, respondent failed to submit any response. The complaint is therefore decided based on the facts at hand.

[19] The regulator's records indicate that the Motsoto's had never been granted a license in terms of the FAIS Act. The representation that the respondents had an FSB license number 44542 must have been calculated to mislead investors to believe they are dealing with an authorised provider. It is reasonable to conclude that respondent knew that members of the public would have been induced by their false representation to invest their money with them.

[20] The application form briefly introduces the nature of the alleged investment activity. It reads:

'Our service: We are buying and selling JSE shares under high gearing securities (CFDs and Currencies) to make profit in a short period of time mainly up to three months....Our contract shall continue for 15 weeks which is 75 working days unless earlier termination is required and one week (5 working days) notice should be given and 25 % early termination would be charged from deposited money. Our bank details

[21] Out of what is set out in the application form, one can at least conclude that respondents represented that they were in the business of trading in high risk securities, such as, contracts for difference, (CFDs) and currencies. Based on what is in complainant's papers, it is not difficult to conclude that complainant in all probability did not understand what is meant and what risks are inherent in the activity claimed by respondents. A CFD is *'as an arrangement made in a futures contract whereby differences in settlement are made through cash payments, rather than the delivery of physical goods or securities. This is generally an easier method of settlement because losses and gains are paid in*

cash. CFDs provide investors with all the benefits and risks of owning a security without actually owning it².

[22] Futures are more eloquently described in the unreported judgment of *Absa Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd*³ where it is stated:

'Futures and commodity options trading is among humanity's more impenetrable concepts. It involves selling what one does not own, and as a rule buying what one does not want. It is deeply shrouded in terminology that conceals its meaning. It operates in an arena where opinion is everything, where supply and demand are hard to distinguish from supposition and doctrine, and where inherent uncertainty has spawned an endless holy war between two religious—sounding antagonists, the fundamentalists and the chartists, not to mention the new breed of computer dependent faithful. Into this world comes the general public, eager to enjoy its riches and often unprepared to become its poor.'

[23] The application form further provides complainant with no protection whatsoever. Ironically, at the bottom of the form it is noted that “*we are (sic) subscribe to the code of share trading practice of Johannesburg Stock Exchange of South African and Authorized Financial Service Provider*”.

It is unlikely that respondent ever had sight of the so-called code, if it exists at all. As already confirmed, respondent is also not an authorised financial services provider.

² Definition from Investopedia
³ case number 2009/354146 56 HC at para 1

[24] There are a number of issues which raise suspicion about respondents' conduct. The first is the claim to have been awarded licence by the regulator when respondent knew fully well that they had never been licensed. I have already concluded this was deliberately calculated to mislead unsuspecting members of the public into believing they were dealing with a legitimate entity. The second is the undisputed version of the complainant regarding the advice that led to this investment. All of these when looked in totality lead one to conclude that complainant did not lose his money in an investment through normal market movements. There is no information to conclude that respondents were conducting a business in the true economic sense. I therefore conclude that complainant's money was stolen through fraudulent means with no chance of recovering it.

[25] Complainant made the investment following the advice offered by respondent, which advice was in violation of the FAIS Act. What respondent did was entice complainant to invest in a scheme which had all the signs of a pyramid scheme. Respondent had no intention of complying with the so-called agreement he signed with complainant.

F. QUANTUM

[26] Complainant invested R65 000 and never received anything thereafter. There is no evidence that any economic activity was taking place to justify the excessively high returns promised to complainant.

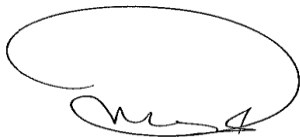
[27] Complainant lost his capital and any interest which he might have earned had his funds been placed in a legitimate entity. I therefore intend to award complainant his original capital with reasonable interest.

G. ORDER

[28] In the premises, the following order is made:

1. The complaint is upheld;
2. Respondents are hereby ordered to pay complainant, jointly and severally, the one paying the other to be absolved, the sum of R65 000;
3. Interest at the rate of 10.25% per annum, seven (7) days from date of this order to the date of final payment.

DATED AT PRETORIA ON THIS THE 24th DAY OF JUNE 2016



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS