

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

CASE NUMBER: FAIS 00512/11-12/ GP 1

In the case between:

CATHARINA MARIA SYMINGTON

Complainant

and

Johanna Susanna Petronella du Preez

t/a Du Preez Finansiële Adviesdienste

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 10 October 2017, a recommendation in terms of section 27 (5) (c) of the Act was made to the respondent. The respondent did not respond to the recommendation. This determination therefore, shall be read in conjunction with the recommendation and shall form part of this determination.

B. THE PARTIES

- [2] The complainant is Catharina Maria Symington, a female retiree at the time of advice and aged 62. Her full details are on file in this Office.
- [3] The respondent is Johanna Susanna Petronella du Preez t/a Du Preez Finansiële Adviesdienste of 549 Farm Road, 16 Sandalwood, Willows 0184, Pretoria, Gauteng. The respondent was an authorised financial services provider (FSP) at the time of advice, with license number 21116. The license was issued in March 2005 and it lapsed in August 2011.

C. CORRECTION

- [4] In paragraph 14.8 of the recommendation the statement is made thus: 'Then the respondent states that it was not necessary for her to be told that the complainant could afford to lose her capital because she already knew that the complainant was a widow and was already retired at the time. Notwithstanding that the complainant was viewed as conservative, her ultimate choice showed she has a high-risk tolerance.' The correct statement should read: '.....it was not necessary for her to be told that complainant could **[not]**¹ afford to lose her capital.....'
- [5] The question of interest as recommended in the recommendation also requires correction. According to the FAIS Act, interest runs from date of determination.

¹ The word in braces should be inserted in the original statement

[6] The point about the respondent having acted as a representative of USSA deserves further attention. In addition to what has already been set out in the recommendation, it must be stated that the question of whether a representative [and not the provider] should be held liable in this context was again dealt with by the Board of Appeal in the second *Black v Moore* Appeal². Appellants, relying on Board Notice 95 of 2003 argued that the responsibility lay not with the appellant as a representative but rested solely with the financial services provider. In dismissing the argument, the Board concluded, '*the effect of the Exemption Notice thus allows a representative (due to his minimum experience) to market products subject to a supervisor's guidance. Apart from this exemption, he has to comply with the Code of Conduct.*'

[7] Section 13(2)(b) of the Act states:

"An authorised financial services provider must take such steps as may be reasonable in the circumstances to ensure that representatives comply with any applicable code of conduct as well as with other applicable laws on conduct of business" (underline supplied).

[8] It is clear that there is a duty imposed not only on the provider but also the representative to comply with the provisions of the FAIS Act and Code of Conduct.

² In the Appeal Board of the Financial Services Board, John Alexander Moore and Johnsure Investments CC / Gerald Edward Black, 15 January 2013 at para 59 and 61

D. CONCLUSION

[9] Based on the information provided in the recommendation it follows that respondent's advice was inappropriate. Notwithstanding respondent's claims, she simply did not understand the nature of the risk carried by these investments. What complainant needed to know, in no uncertain terms, was that she could lose her capital owing to risks articulated in the recommendation. It is highly improbable, given her requirement for investments that would secure her capital, that complainant would have still made the investment had the risks been fully explained to her. The investments were made as a consequence of respondent's failure to advise complainant of the high risk involved in the investment.

E. CAUSATION

[10] On the facts of this case, the loss was foreseeable for the following reasons:

10.1 The violations of Notice 459 meant that investors would have no protection whatsoever, as did the poor governance practices, all of which were plain from the prospectus.

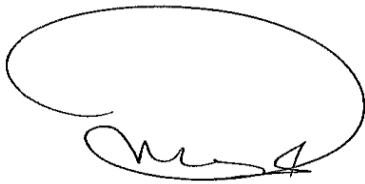
10.2 Respondent should have never advised complainant on this investment as she clearly could not understand it. Logically, she could not have appropriately advised complainant. Respondent's conduct caused the loss.

F. ORDER

[11] The complaint succeeds;

1. Respondent is hereby ordered to pay to complainant the full amount of R600 000 within SEVEN (7) days from date of this order.
2. Interest at the rate of 10.25% shall be calculated from date of determination to date of full payment.
3. Complainant is hereby ordered to cede to respondent her right and title in respect of this investment upon full satisfaction of this determination.

DATED AT PRETORIA ON THIS THE 25th DAY OF JANUARY 2018.



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