IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 09156/10-11/ FS 1

FAIS 09159/10-11/ FS 1

In the matter between

CAREL JACOBUS VAN ZYL **First Complainant**

HESTER DORETHEA VAN ZYL **Second Complainant**

and

PIETER CRONJE MAKELAARS **Respondent**

DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS ACT')

A. INTRODUCTION

[1] This determination follows a recommendation made in terms of section 27 (5) (c) of the Act on 13 April 2018. (The recommendation is attached for ease of reference).

[2] The recommendation upheld the complaint of inappropriate advice and found that a sufficient link between the inappropriate advice and the loss suffered by the complainants existed. The respondent did not accept the recommendation

B. THE PARTIES

[3] The first complainant is Mr Carel Jacobus van Zyl, an adult male pensioner. The second complainant is Mrs Hester Dorethea van Zyl, an adult female pensioner. Their particulars are on file with this Office.

[4] The respondent is Pieter Cronje Makelaars, a partnership according to the regulator's records. The respondent's address is noted as 4 Liebenberg Street, Nelspruit, 1200. The

respondent is an authorised financial services provider with licence number 19980. The licence has been active since 9 November 2005.

[5] I refer to the first and second complainants as "the complainant". Where appropriate, I specify.

C. THE RESPONDENT'S REPLY TO THE RECOMMENDATION

[6] As previously mentioned, the respondent did not accept the recommendation, and instead filed a lengthy response (27 pages), raising amongst others issues of bias, lack of fair process and an infringement of constitutional rights.

[7] The aforesaid arguments are not new to this Office and have been raised on many occasions by the respondent's attorneys. I need only to refer to the latest ruling[1] of the Financial Sector Tribunal (the Tribunal) following an application for leave to approach the Tribunal, to put to rest the arguments raised by the respondent. The deputy chairperson noted that:

"The time has unfortunately arrived to inform the instructing attorney that too many of the applications that emanate from his office are, prima facie, vexatious and amount to an abuse of process. The issues raised in this application have nearly all been raised in previous applications and appeals - unsuccessfully. The applications are on a template and more often than not deal with generalities and not with the particular facts of the case.
The application is dismissed".

[8] The respondent claims that he had no participation in the process leading up to the issuing of the recommendation. (Note: This assertion is simply not true. The respondent had ample opportunity to respond to the notices issued and in fact did so but expressed no interest in resolving the complaints. The Office utilized his responses, as well as the supporting documentation in reaching the findings in the recommendation. The Office did not rely on any information that was not available to the respondent when he rendered the advice.)

---

1 *Koch & Kruger Brokers and Others v DS van Rooyen and the FAIS Ombud* FAB40/2018

[9] The remainder of the respondent's reply, are dealt with below:

Notice 459 not applicable

[10] The respondent is of the view that Notice 459 did not apply to the Sharemax Zambezi and The Villa investments. There is no legal basis for this claim, and the respondent has not provided any documentary evidence to confirm that the respective schemes were exempt from the application of the Notice. This Office also saw no direct representation from Sharemax to the FSP's that Notice 459 did not apply.

[11] On a reading of the Sharemax prospectus, it becomes clear that the scheme intended to contravene Notice 459. Again, this Office has not seen any credible legal opinion that states that the Notice does not apply to Sharemax.

[12] In this response, the respondent submits that Sharemax was governed by the provisions of sections 145, read with sections 148 to 161 of the 1973 Companies Act, and submits that the information required by the Companies Act adequately covers the requirements of the Notice. The Companies Act does not deal with the requirements of Notice 459, for example, the requirement that investors' funds have to be protected from being transferred out of the protection of a trust account.

[13] The respondent further submits that it was not unreasonable for him to accept that he can rely on the provisions of the Companies Act in confirming that the prospectus complied with the law. In other words, he cannot be negligent in not verifying the truthfulness of what was conveyed by Sharemax. There is no merit in this statement. It is tantamount to saying that ignorance of the law is a good excuse.

[14] An FSP is obliged by the Code to be familiar with the product, and the legality thereof, before recommending it to a client. In advising clients to invest in any property syndication, FSP's are obliged to point out that the promoter either did, or did not comply with Notice 459. Failure to do so amounts to negligent conduct. I refer in this regard to the judgments of *J & G*

Financial Service Assurance Brokers (PTY) Ltd and another Vs Robert Ludolf Prigge[2] and *CS Brokers and others v James Bruce Wallace*[3].

Risk

[15] The respondent relies on the fact that the complainants received a prospectus, and signed documentation which confirms that the risks were explained to them. This Office however maintains its position that the respondent himself did not appreciate the risks inherent to these investments.

[16] By the respondent's own admission[4], his clients were lending their money to a company that did not own a property yet, and the complainant's money was subsequently lent to the developer to build the property. There is no indication in the advice record, that this was explained to the complainants. Instead, it was noted in the record that the complainants invested in "unlisted property shares".

[17] A "claim" is defined in the Sharemax prospectus as an "*unsecured subordinated floating interest rate acknowledgement of debt made by the company in favour of the shareholder".* In other words, what complainants acquired, are nothing else than debentures[5].

[18] I also highlight the following from the advice record dated 18 March 2008:

18.1 Point 3.7 notes that the capital is invested in cash, bonds, property and / or equities / a combination of these asset classes. Taking into account what is noted above, this statement is incorrect.

18.2 Point 4.3 provides that the capital invested is guaranteed over the selected investment term, but the investment term may be volatile and subject to market conditions. The

---

2 FAB 8/2016

3 FAB 5/2016

4 Paragraph 14.10 of the respondent's reply

5 A debenture is used by companies to borrow money, at a fixed rate of interest. The debenture is a document that either creates a debt or acknowledges it. A debenture is a certificate evidencing the fact that the company is liable to pay a specified amount with interest. Although the money raised by the debentures becomes a part of the company's capital structure, it does not become share capital.

respondent in his response dated 5 March 2012, categorically stated that he relied on the track record of Sharemax and was confident that it was a safe option. These statements contradict the respondent's reply to the recommendation where he relies on the content of the prospectus, claiming that the risks were explained to his clients.

[19] The aforesaid confirms the submission of this Office that the respondent could not have explained a risk that he did not appreciate or understand himself, in contravention of section 7 (1) of the Code.

Pacta sunt servanda

[20] As far as the material factual disputes are concerned, the respondent is of the view that the complainants' allegations are contradicted by the documents they signed. The respondent claimed that the principle of *pacta sunt servanda*[6] applies. This argument however is misplaced. The complainants are not disputing the validity of the contracts entered into to make the investments, but rather the appropriateness of the advice that persuaded them to conclude the contracts.

[21] A signature by an investor does not equate to an understanding of the risks in the investment, and that they were willing to invest from a position of being able to make an informed decision. The client questionnaire dealing with risk assessment relied on by the respondent, contains a set of irrelevant questions and does not specifically inform the investor that there is a risk of losing all their funds. Had the respondent truly understood the investments, he would have realised that it was not suitable for any investor.

[22] Under the circumstances, the respondent cannot merely rely on an investor's signature to absolve him from any liability. The respondent had to show that he in fact complied with the Code.

6 The common law principles that agreements are binding and must be enforced.

Due diligence

[23] The respondent incorrectly interprets "due diligence" to be an expert or forensic investigation found in the commercial sector. This interpretation is not correct. The Act and Code requires an FSP to act with due diligence. This is found collectively by reading sections 2, 7 and 8 of the Code, with Section 16 of the Act. "Due diligence" in law means the care that a reasonable person exercises to avoid harm to other persons, or their property. Here, the test is of a reasonable FSP. This Office did not in any way unreasonably raise the standard; it only called for the standard which is required by the Act and the Code[7].

"The liability of a provider to a client is usually based on a breach of contract. The contract requires of a provider to give advice with the appropriate degree of skill and care, i.e., not negligently. Failure to do so, i.e., giving negligent investment advice, gives rise to liability if the advice was accepted and acted upon, that it was bad advice, and that it caused loss. And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs."

[24] It cannot be argued that this standard is too high.

Single need

[25] The respondent makes an unsubstantiated submission that section 8 (1) did not apply, since the complainants had a "single need". The concept of a single need does not exist, and is not defined in either the Code, or the FAIS Act. The respondent admitted to rendering advice, and therefore section 8 of the Code applied. In fact, the provision of section 8 (1) is peremptory.

[26] Since the respondent replaced an existing financial product, the provisions of section 8 (1) (d) of the Code was applicable. Again, the respondent failed to provide the necessary records confirming that the implications of the change had been explained to the complainant.

---

[7] See the decision of the Board in Prigge; case number FAB 8/2016 at paragraph 42

[27] The record in terms of section 9 falls short of the requirements, as explained in paragraph 50 of the recommendation. Because the respondent failed to take reasonable steps to seek appropriate and available information regarding the complainants' financial position, and further failed to conduct an analysis, he was unable to identify products suitable to his client's risk profile and financial needs. More specifically, there is no indication that the complainants' needs could only be addressed by means of property syndication products. The need for a higher income alone is not sufficient to recommend high risk products where the complainants could lose their entire capital.

D. FINDINGS

[28] The complainants relied on the expertise of the respondent to guide them. On a balance of probabilities, had the complainants been fully aware of the risks inherent to the investments, they would not have placed such a substantial amount of money at risk. It is disingenuous of the respondent to imply that because the first complainant was a healthcare consultant that he was subject to the FAIS Act and the Code and therefore, understood the investments made. The two products cannot be compared. Furthermore, the first complainant sought the advice of the respondent, not of himself.

[29] The findings made in the recommendation letter are confirmed.

E. CAUSATION

[30] The principles of causation were explained in *International Shipping Co (Pty) Ltd v Bentley*[8]*: "The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question".*

[31] As was explained by the court in *Minister of Finance & others v Gore NO*[9]*,* "*Application of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of*

8 1990 1 SA 680 (A) [700 E-G]

9 Minister of Finance v Gore NO 2007 (1) SA 111 (SCA) para 33.

common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experiences".

Or, as was pointed out in similar vein by *Nugent JA in Minister of Safety and Security v Van Duivenboden*[10]*:*

"A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics[11]*".*

[32] Had the respondent truly appreciated what he was advising the complainants to invest in, he would have steered them in a different direction. Not only was the loss to investors reasonably foreseeable, it was inevitable. If the respondent had adhered to the Code, no investments would have been made in Sharemax and Propspec. There was a substantial risk that the complainants could lose their money. This risk was always evident from the prospectuses.

F. THE ORDER

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

1. The complaint is upheld.

2. The respondent is ordered to pay the following amounts:

   2.1 R337 000 to the first complainant

   2.2 R412 000 to the second complainant

3. Interest on this amount at a rate of 10% per annum from the date of determination to date of final payment.

4. The complainants are to cede their rights in respect of any further claims to these investments to the respondent.

---

10 Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) para 25.

11 Crafford v South African National Roads Agency Limited (215/2012) [2013] ZASCA 8 para 7

DATED AT PRETORIA ON THIS THE 6TH DAY OF AUGUST 2018.

_____

NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS