

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

Case Number: FOC 1368/08-09/GP/(1)

In the matter between:-

Cassandra Néthesha Yolé Warriès

Complainant

And

Ultimassure

First Respondent

Julica Lezaan Groenewald

Second Respondent

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

A. The Parties

[1] The complainant is Mrs Cassandra Néthesha Yolé Warriès (Warriès), an adult female, residing at, No.9 Impala Park, The Wilds, De Ville Bois Street, Pretorius Park, Pretoria.

[2] The first respondent is Lets Trade 1326 CC trading as Ultimassure (Ultimassure), a Close Corporation duly incorporated in terms of South African laws with registration number CK 2003/07888/23 with its principal place of business in 30 Mulbarton Street, Robindale, Randburg. The first respondent is an authorised financial services provider as provided for in the FAIS Act with licence number 3194.

[3] The second respondent is Mrs Julica Lezaan Groenewald (Groenewald) the Key Individual and authorised representative of the first respondent whose address is care of the first respondent.

B. The Background

[4] Warriess had an amount of R 500 000.00 which was generated from the sale of immovable property. During November 2006 Warriess sought financial advice on how to invest the aforesaid amount. Her goal was to pay this amount into a mortgage loan account which was to be registered over a new property. She was introduced to Groenewald by her brother Roger Warriess, (Roger). At the time, Groenewald was handling Roger's insurance matters. During her consultation with Groenewald complainant was introduced to an investment vehicle called Malokiba.

[5] On the 11th of January 2007 Warriess transferred an amount of R 500 000.00 to KLS Attorneys as an investment into Malokiba. Warriess thereafter received a signed share certificate, with a promise contained in the client advice record that she would receive interest of R 12 500 per month on the investment. She was advised by Groenewald that the capital could easily be withdrawn after a 45 day notice period.

[6] On the 2nd of November 2007 complainant received a letter from Malokiba advising her that Malokiba has been placed under provisional liquidation and that no payments would be made.

C. The Complaint:

[7] Groenewald introduced Warriess and her husband to Malokiba Trading 19 (Pty) Ltd. The investment offered by Malokiba was described as “bridging finance in property related transactions”. Groenewald advised Warriess and her husband, (who was also present during the consultation) that the investment was built on “a critical network of business components to ensure extremely lucrative profit margins”. In addition, Warriess was informed by Groenewald that Malokiba had:

- “A well established brand name
- Established practices, procedures and strong internal controls in order to avoid high risk transactions
- Experienced staff compliment and
- Experienced external legal council”[sic]

[8] According to complainant, she and her husband specifically asked Groenewald whether she had investigated Malokiba, in particular, looked into the company’s financial status. Furthermore, complainant asked whether the company was licensed with the Financial Services Board, to which Groenewald responded that it was and it was financially sound.

[9] Complainant alleges she specifically asked Groenewald what the risks were, if they were to invest in Malokiba. Groenewald informed her that there was absolutely no risk involved. In fact, according to Warriess, Groenewald informed the latter that she

had checked on Malokiba and that the investment was “iron clad and guaranteed”. Complainant stated that based on this information and the fact that the respondent was registered as an FSP with the Financial Services Board; they were convinced that this was a good investment. According to complainant, she was persuaded to invest because there was no risk involved, the investment was guaranteed and the respondent was licensed by the Financial Services Board.

[10] The return, according to complainant, represented the best performing investment that they had been introduced to. This fact coupled with Groenewald’s assurances persuaded complainant to invest into Malokiba. Post investment, complainant received a *pro rata* amount for the month of March 2007 in the sum of R 7 589 and thereafter R 12 500 per month until August 2007.

[11] Complainant states that during August 2007 they heard that Malokiba was insolvent. She immediately contacted Groenewald about her suspicions. Groenewald assured her that there were no problems with the investment and that people were spreading false rumours, or that Malokiba was being confused with another investment called money skills.

[12] On the 7th of September 2007 Groenewald and her father in law, apparently, another Key Individual of the first respondent, met with complainant at her home. At this meeting complainant was presented with an unsigned letter from Malokiba dated 6 September 2007. The letter suggested a proposed restructuring of the investment due to a cash flow problem which was created by a defaulting client. The letter

further advised that income would be reduced to R 3 240 per month and a portion of the capital would be converted to preference shares.

[13] Groenewald encouraged complainant to sign an amendment to the contract which would, according to complainant, allow the company to trade outside its then existing position. Complainant refused to sign the documents. Then in September and October complainant received income of R 3 240.00 for each of the months and subsequently nothing. On the 2nd of November 2007 complainant received 2 letters from Malokiba, one letter sought to cancel the proposed restructuring and the other informed her that Malokiba was placed under provisional liquidation; therefore no income would be paid.

[14] Complainant states that they then discovered that Malokiba was in fact insolvent since the day it started operating and that the directors were operating a pyramid scheme. It came to the complainant's attention that the agents who sold the Malokiba investments also received a handsome commission.

[15] Of importance for purposes of this determination, the respondents are alleged to have failed to make the following necessary disclosures:

- That as a licenced FSP, she was not licenced to sell the particular product; and
- Commission.

[16] Complainant's case is that it was as a result of advice provided by respondents that she invested into Malokiba. She further states Groenewald's conduct in

recommending the investment to her was negligent and in violation of the provisions of the FAIS Act and General Code. She states:

“it is clear that Ultimasure C.C. (Mr. J vd Walt and Ms J Groenewald) did not perform their duties as financial advisors by conducting a thorough investigation into the financial affairs of Malokiba, as is required by them by the Financial Services Board (FSB 3194), before they offered the product to us as a no risk investment”. [sic]

D. Relief sought

[17] Complainant wants her capital amount of R 500 000 plus interest thereon refunded to her by the respondents.

E. The Issues

[18] The issues to be determined are:

[18.1] At the time the financial service was rendered, were Ultimasure and Groenewald licenced to do so in terms of the FAIS Act?

[18.2] Did Groenewald conduct a due diligence to establish the sustainability of the investment?

[18.3] Was Groenewald capable of giving advice in respect of this particular product?

[18.4] Did Groenewald act negligently and/or recklessly in advising the complainant?

[18.5] Was there any disclosure made to complainant that this product was not regulated by the Financial Services Board?

[18.6] Was Groenewald's conduct in advising Warriess a contravention of the FAIS Act and the General Code?

[18.7] Did Groenewald's conduct cause the loss suffered by Warriess?

F. The complainant's version

[19] The complainant's version has been adequately described in the details of the complaint in paragraph C above.

G. The Respondents' version

[20] In response to the complaint the 2nd respondent wrote to this office on the 26th of March 2009 stating her version of events. In addition a letter dated 2nd June 2009, written by the respondents' attorneys addressed to the Registrar of the Financial Services Board was handed to this Office. For purposes of this determination submissions made on behalf of the respondents were taken into account.

[21] Groenewald referred this Office to section C of the complaint registration form, where Warriess stated that her funds were invested in a scheme which was technically insolvent. She argued that Warriess had no basis or reason to suspect this, as she had a presentation as a sales tool and a contract. She further stated that she invested her own father in law's money in Malokiba. Following the father in law's investment, he (the father in law) also visited Malokiba's Offices during July

2007 and he was re-assured by senior management that all was in order and running well. Groenewald stated that no financial advisor would willingly place their client's money in jeopardy.

[22] Groenewald denied the statement by the complainant, that the product was approved by the Financial Services Board. She further stated that the presentation from the product provider promised investors that they would receive 6 monthly financial statements, and that promise was not made by the respondents. The presentation further referred to words such as; "guarantee, safety of capital, capital protected fixed investment, indemnity insurance, trust account protection, bank guarantee, etc." She therefore believed that this was an 'iron-clad' guaranteed investment.

[23] Groenewald stated that she had given complainant a copy of the contract and presentation for consideration over a period of one month. She informed complainant to take the contract to her own lawyers. Groenewald concluded that complainants paid the R 500 000 into KLS attorneys trust account on their own accord.

[24] Groenewald denied that Malokiba was insolvent from the date the investment was made and that she did not see the Malokiba investment as a pyramid scheme. She then explained why the scheme failed and blamed this on unauthorised transactions on the side of the conveyancing attorney, one Mrs Kretzman.

[25] Groenewald averd that part of Malokiba's appeal to the investors was that there were no start-up costs and that commissions were not deducted from clients'

capital. The initial invested capital would not decrease with the monthly interest amount.

[26] In addition to the abovementioned correspondence the respondents' compliance officer, Mr Stutterheim, wrote to this Office as follows:

'We maintain that neither of the two complaints fall within the jurisdiction of the FAIS Ombud, reason being that:

- *The product is not regulated by the FAIS Act as contemplated in section 1(1) of the Act.*
- *Secondly that it cannot be construed that the FSP gave advice as contemplated in the FAIS Act. In this regard I would like to draw your attention to the article by Mr. Louis Wessels, senior legal consultant of the FSB, as relates to the Ombud's determination in the Gumedde v JDG Trading case, as published in the FSB's 3rd quarterly Bulletin of 2008. I refer specifically to his comments under the heading "**When is an activity 'advice' and when is it not?**" '*

'With all due respect to the Ombud, Mr. Wessels' view in this case, in my view also supports the arguments of the FSB's Appeal Board against the Ombud in the Leadergaard [sic] case that was overruled by the Appeal Board recently as it concerns what constitutes advice.'

'I respectfully request that you provide us with an answer as soon as possible. I terms of FAIS the complaints resolution process must be equitable and fair to all parties. At the moment the suspense that my client has to operate under is neither fair nor equitable!

Regards

Robbie Stutterheim

Compliance officer; CO 51"

[27] In summary, Groenewald consistently denied that she acted negligently and in contravention of the FAIS Act and General Code. Respondents denied any responsibility for the loss suffered by the complainant.

H. Findings

[28] It is not in dispute that 1st respondent is a licensed financial service provider in terms of the FAIS Act. Equally it is not in dispute that at all material time respondents were bound by the provisions of the Act and the General Code. According to the records at the Financial Services Board the 1st respondent is licenced to render financial services in relation to the following:

- Long-Term Insurance: Category A
- Long-Term Insurance: Category B

- Long-Term Insurance: Category C
- Retail Pension Benefits
- Pension Funds Benefits (excluding retail)
- Participatory interests in Collective Investment Schemes

Plainly the respondent is not authorised to sell shares or give advice thereon.

[29] Respondent was unlicensed to sell this product and was acting contrary to the terms and conditions of its licence.

[30] In her letter of introduction, dated 7th of December 2006 Groenewald details the companies for whom she may market products. Malokiba is not one of those companies. In the same letter Groenewald states the details of her qualifications as follows:

- “Associate of the Financial Planning Institute
- 10 Years Relevant Insurance Industry Experience
- Life Intermediary Certificate
- INSETA NSRC NQF Level 4”

These qualifications do not qualify Groenewald to deal in the product she sold to the complainant. In fact Groenewald provided no information which suggests that she was competent to provide advice on the said product.

- [31] Mr Stutterheim's objection that the product in question as well as the respondents' conduct falls outside the jurisdiction of the FAIS Ombud is unsubstantiated. In the contract that was signed by the complainant, which is described as "a sale of shares and investment agreement", it is stated in section "E" of the agreement, "Each Subscriber will purchase 1 ordinary par value share of R 1, 00 and provide a loan account of R 500 000 (Five hundred thousand rand) to the Investment Company". [sic] Furthermore, a share certificate was issued to complainant on the 11th of January 2007. This makes the product sold to complainant a combination of shares and a loan agreement. In terms of the definition of a financial product provided in section 1 of the FAIS Act "*any combined product containing one or more of the financial products*" is a financial product. The contract further defines (A financial service provider) as "a person who furnishes advice or renders an intermediary service to the subscriber as contemplated in the Financial Advisory and Intermediary Services Act (Act 37 of 2002)". In short, description of the investment clearly brings this investment within the jurisdiction of the FAIS Ombud.
- [32] On Groenewald's own version this particular investment was attractive because it paid R 12 500 per month on an investment of R 500 000. This represents a return on investment of 30% per annum. This is without taking into consideration the administrative costs and the commission paid. Groenewald, using reasonable skills as an FSP, ought to have realised that this investment was offering extravagant returns. Second respondent, acting prudently, should have questioned the viability of such a return.

[33] From the documents furnished to this Office it is clear that complainant was promised that the investment amount would not depreciate with the monthly interest payments. Therefore, this investment should during any period have an annual growth of almost 40% in order to sustain the promised return. By any standard this is simply too good to be true. Groenewald should have realised same as she is a financial services provider.

[34] The respondents were not and are still not licensed with the Financial Services Board to market or give advice in relation to shares. If Groenewald had the necessary experience and qualifications to market these products, she would have been aware that in terms of the Companies Act, shares cannot be sold without a prospectus. There is no evidence that Groenewald ever called for a prospectus nor does it appear that she is capable of reading a prospectus even if one was provided.

[35] On Groenewald's own version she failed to take reasonable steps to satisfy herself first, that the investment was viable economically and second, that Malokiba was financially sound. There is no evidence that Groenewald called for and considered audited financial statements of Malokiba. It appears from Groenewald's version that she was satisfied that Malokiba was sound merely from assurances given in brochures and promotional material used by Malokiba and from the directors of Malokiba, which assurances, she received through her father in law who had visited the Offices of Malokiba.

[36] Plainly, and by all accounts, the promised returns on this investment were extravagant. If Groenewald applied her mind to this investment she ought to have

realised that this did not make sense. If indeed she applied her mind to this investment and did not realise that the promised return was extravagant or possibly unsustainable then she was clearly unqualified to give advice and she acted negligently.

[37] In the light of the above respondents' conduct violated the provisions of the FAIS Act. Further, Groenewald, in giving complainant advice contravened the Code as follows:

- Section 2

"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."

On the facts before me Groenewald failed to act with due skill, care and diligence in selling the Malokiba product to Warriess.

- Section 7 (1) (a)

"A Provider must provide a reasonable and appropriate general explanation....., and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision;"

On Groenewald's own version she did not have enough information to make a full disclosure to Warriess about Malokiba and therefore she, (Groenewald) made an investment purely on the recommendation of her father in law and Malokiba.

- Section 8 (1) (a)

“..... provide the client with appropriate advice;”

On the Groenewald’s own version the advice was inappropriate.

[38] I find that the complainants’ loss was caused by the conduct of the respondents’. In the premises the respondents’ must be held liable for the consequences of such conduct.

I. Recommendation

In the light of the facts of this determination the Financial Services Board is hereby requested to consider whether both respondents are fit and proper to conduct business as FSPs as contemplated in the FAIS Act.

J. Quantum

[39] The amount of R 500 000 is the capital which the complainant lost as a result of the insolvency of Malokiba. This amount must be recovered by the complainant. Until the end of October 2007 complainant received interest payments in respect of the capital. The complainant is entitled to be compensated for the loss of interest. However it would be inappropriate for this Office to award the rate of interest that was promised by the investment. This Office is able to do award the legal rate of interest of 15, 5%.

K. Order

1. The complaint is upheld;
2. The first and second respondents are ordered to pay to the complainant the amount of R 500 000, jointly and severally the one paying the other to be absolved.
3. Interest is payable on the amount of R 500 000 at a rate of 15, 5% from the 1st of November 2007 to date of payment.
4. The 1st and 2nd respondents are to pay a case fee of R 1000, 00 to this Office within 30 days of date of this order.

DATED AT PRETORIA ON THIS THE 10TH DAY OF SEPTEMBER 2010.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS