

IN THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

Case no. FAB7/2016

In the matter between:

ACM GOLD AND FOREX TRADING (PTY) LTD)

Appellant

AND

MIKE LERATO MOGADIMA

First Respondent

GO DIRECT STOCK MARKET INVESTMENTS (PTY) LTD **Second Respondent**

DECISION

A. INTRODUCTION

1. This appeal is against the determination made by the Ombud for the Financial Services Providers ("the Ombud") dated 29 July 2016, in terms section 28(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 ('the FAIS Act').
2. The Ombud ordered the appellant and the second respondent to pay the first respondent jointly and severally the one paying the other to be absolved, the

amount of R70 000 plus interest at the rate of 10.25% per annum from 18 November 2012 to date of payment.

3. The Ombud found that there was a relationship between the appellant and the second respondent and that the conduct of such relationship led to the first respondent's loss.

B. BACKGROUND

4. The first respondent, Mike Lerato Mogadima ('Mr Mogadima') obtained a loan in the amount of R120 000 from Capitec Bank. He invested R70 000 of that money and used the rest to assist his parents to do some home improvements.
5. Mr Mogadima made the investment after he had a meeting with one Mr Bezu of Go Direct Stock Market Investments (Pty) Ltd ('Go Direct') where Mr Mogadima's sister was employed at the time. Apparently Mr Bezu assured Mr Mogadima that his money would be invested with the appellant, ACM Gold and Forex Trading (Pty) Ltd ('ACM Gold').
6. It appears that the investment terms allowed Mr Mogadima to access some of the funds invested from time to time. We glean this from Mogadima's statement of complaint to the Ombud. We were not provided with the policy in respect of the investment or any other document in that regard apart from the statement in which Mr Mogadima states that:

"In 2012 I bought shares from ACM GOLD and Forex Trading in the amount of R70 000 deposited into FNB account 273311115. In terms of the signed agreement with them me are [sic] allowed to borrow part of the investment when required ...".¹

7. The transfer instruction from Capitec Bank shows that the invested amount was deposited on 18 November 2012 into Bank Account: 273311115 held by Go Direct.² It is important to bear this date in mind as the main thrust of ACM Gold's argument rests on it as shall be seen below.
8. When Mr Mogadima wanted to make a withdrawal in 2013 he approached ACM Gold who advised him that they did not have his money, that Go Direct had no dealings with ACM Gold and that he ought to look to Go Direct for repayments of the monies invested.
9. Mr Mogadima lodged a complaint against both ACM Gold and Go Direct for the recovery of the full amount invested plus interest on the strength that at the meeting he had with Go Direct he was told that the investment was made with ACM Gold and further that he had seen ACM Gold stationery in the documents that Go direct brought to the meeting and on which he signed. Again, no copies were furnished in this regard.
10. ACM Gold participated in the enquiry. However, the directors of Go Direct were nowhere to be found. Therefore, Go Direct did not participate in the complaint and the appeals. As such ACM Gold were effectively the only party

¹ Record of proceedings, P. 4

² Record of proceedings, P. 6

that had to answer the Ombud on what had happened to Mr Mogadima's money.

11. ACM Gold furnished the Ombud with various documents among which was an Introducer Broker agreement (IB agreement) entered between ACM Gold and Go Direct. It is dated 22 April 2013. A certain Kelvin Dube on behalf of Go Direct signed the IB agreement and one Zainab Kahaar signed on behalf of ACM Gold.
12. At the end of its enquiry the Ombud made a finding against Go Direct "in absentia". The basis, in a nutshell, was that Go Direct had received the funds from Mr Mogadima with no intention of making an investment on his behalf; that Go Direct never deposited the funds into the banking account of ACM Gold and; that as such its directors had committed a common law fraud. The Ombud reached the conclusion that the directors of Go Direct appropriated the funds for themselves.³
13. The Ombud also made a finding against ACM Gold. Amongst other things, the Ombud's overall view was that Go Direct provided financial services on behalf of ACM Gold under circumstances in which ACM Gold ought not to have allowed and as such ACM Gold permitted provision of services in contravention of the FAIS Act. In particular the Ombud ruled that ACM Gold breached Section 7 of the FAIS Act and Section 2, 3(1), 3A(2), 4, 5, 7, 8(2) and 11 of the Code. As a result, the Ombud continued, ACM Gold was

³ See paragraphs 18 to 20 of the Ombud's Determination, record of proceedings, P. 208

equally liable for the conduct of Go Direct and thus jointly and severally liable for the loss suffered by Mr Mogadima.

14. ACM Gold applied for leave to appeal the Ombud's ruling on 25 August 2016. The Ombud refused leave to appeal on 2 November 2016 and gave a set of reasons for its refusal. ACM Gold then sought leave to appeal from this Board on 22 November 2016, which was granted on 9 January 2017. The chairman of the Board noted a disconnect between the Ombud's reasons in the [first] ruling and the Ombud's reasons in response to ACM Gold's application for leave to appeal.

C. THE APPEAL

15. The appeal was first heard on 11 April 2017. Mr Mogadima was not represented on that date. Consequently a lot of time was consumed by having to explain the process to him through an interpreter. As a result the matter was part heard. Much to our relief, when the matter resumed Mr Mogadima had legal representation throughout the proceedings.
16. The Ombud was not party to the appeal and was not invited to partake in the proceedings. Go Direct did not participate in the hearing and had not, in any event, applied for leave to appeal. We have been made to understand that its directors are still at large.
17. ACM Gold's grounds of appeal against the Ombud's determination can be

summarised as follows, that the Ombud erred in finding that:

- 17.1. ACM Gold was required to appoint Go Direct in terms of Section 13 of the FAIS Act in order for Go Direct to market ACM Gold's services;
 - 17.2. Go Direct was not an authorised service provider and marketing of ACM Gold's services amounted to the provision of financial services and therefore Go Direct was required to be licensed to market ACM Gold services.
 - 17.3. ACM Gold doing of business with Go Direct was unlawful;
 - 17.4. Go direct was authorised to receive funds into its bank account on behalf of ACM Gold in terms of the IB agreement between the two companies.
18. ACM Gold submits in response to the findings that:
- 18.1. Go Direct was at no time mandated by ACM Gold to provide financial advice and/or intermediary services in terms of the Act and that the marketing of ACM Gold services did not amount to the provision of financial services and/or intermediary services as set out in terms of the Act. Go Direct was not required to be licensed in terms of the FAIS Act;
 - 18.2. At no point prior to 22 April 2013, the date of the execution of the IB agreement, had Go Direct ever rendered any service to ACM Gold in any capacity whatsoever.
 - 18.3. The entering into an IB agreement between ACM Gold and Go Direct could not have been the cause of the Mr Mogadima's loss as the IB agreement was executed 5 months after the date of the loss complained of, namely on 18 November 2012.

D. THE ISSUE

19. Issues for determination are as follows:

19.1. Whether the relationship between ACM Gold and Go Direct was such that ACM Gold could be held responsible for the actions of Go Direct;

19.2. If yes, whether ACM Gold should, on the facts, be held accountable for the conduct of Go Direct on the basis of the IB agreement;

19.3. Whether the conduct of ACM Gold caused the loss suffered by Mr Mogadima.

E. ANALYSIS

20. During argument it transpired that the core of the appeal lies in the manner in which the Ombud arrived at the conclusion that ACM Gold had a relationship with Go Direct prior to the date on which the IB agreement was signed.

21. The Ombud's first correspondence to ACM Gold dated 18 September 2014 required ACM Gold to "address us on the complainant's submission that your representative assisted him in buying shares in an amount of R 70 000. He was subsequently informed that the investment was made in the name of an advisor (Kelvin Dube) and not his name".⁴

⁴ See record of proceedings, P. 7

22. A Mr Justin Paulsen of ACM Gold replied on an email the same day. ACM Gold explained: who they were, that Mr Mogadima was never a customer of ACM Gold, the process on the basis of which they deal with clients particularly the fact that the individuals they deal with deposit moneys directly into their own account, that the relationship they have with Go Direct exists by virtue of the IB agreement. ACM Gold then attached the IB agreement and asked to be informed if the Ombud required anything further.⁵
23. The Ombud thereafter seemed to have pursued the matter with Go Direct. As has been stated, Go Direct did not respond despite repeated requests for a response from the office of the Ombud.
24. The Ombud then reverted to corresponding with ACM Gold. The correspondence culminated in the Ombud's letter dated 14 April 2016⁶ which contained the main charge against ACM Gold. Below we deal with the salient points emanating from that letter.
25. First, the Ombud stated that Go Direct was able to successfully conduct their business because of the agreement that it had with ACM Gold. The Ombud was careful not to state that the agreement it was referring to was the IB agreement. Second, the Ombud stated that Go Direct was able to mislead members of the public due to its association with ACM Gold. Third, the Ombud ventured to conclude that an indirect relationship existed between

⁵ Record of proceeding, P. 9

⁶ Record of proceedings, P. 83

ACM Gold and Mr Mogadima because ACM Gold had a business relationship with Go Direct.

26. ACM Gold's response to this is contained in its letter dated 25 April 2016. In short, ACM Gold does not deny that a relationship between itself and Go Direct existed. The letter reiterates that ACM Gold's relationship with Go Direct existed in terms of the IB agreement, which it only entered into in April 2013. ACM Gold further stated that in the time that it had dealt with Go Direct, there were no records showing that Mr Mogadima was their customer.
27. The Ombud not satisfied with the response then proceeded to make a determination. In the determination the Ombud only refers to three written responses from ACM Gold dated 18 September 2014, 18 April 2015 and 11 May 2015. Therefore the letter dated 25 April 2016 referred to above appears, on the face of it, to not have been considered.⁷
28. The Ombud's reasons in respect of the determination dated 29 July 2016 particularly as set out from paragraphs 21 to 36, run on a common thread that ACM Gold had entered into an agreement with Go Direct and that there was no dispute regarding that fact. It begins by stating that ACM Gold admitted a relationship with Go Direct and that she [the Ombud] was putting that relationship under scrutiny.
29. The Ombud then proceeds to scrutinise the relationship. In doing so, it appears that the Ombud does not accord sufficient weight to the fact that

⁷ Record paragraph 15, P.111

ACM Gold admits the relationship with Go Direct only in respect of the IB agreement. The Ombud rests her entire finding on the fact that the IB agreement reflected the relationship between ACM Gold and Go Direct at the time that Mr Mogadima suffered loss. The Ombud does so without showing any evidence that the relationship in fact existed prior to the IB agreement.

30. ACM Gold applied for leave to appeal and pointed out this issue in particular stating that the IB agreement did not afford Go Direct scope or opportunity to commit fraud given that it had been signed 5 months after the fraud. ACM Gold also stated, among other things that the Ombud ought to have exercised its discretion to discuss the matter with it [ACM Gold] and to request further information in terms of rule 6(3) of the Rules of Proceedings of the Office of the Ombud if its version required further clarity.

31. The Ombud responded on 2 November 2016. Some of the issues raised in its response, as will be shown below, were never put to ACM Gold. They arose for the first time after the Ombud had made her finding. ACM Gold had never been given a chance to reply to them. This Board has recently dealt with the duties of the Ombud in **SHAREMAX INVESTMENTS (PTY) LTD**⁸ and stated that section 20(3) of the FAIS Act, requires the FAIS Ombud to consider complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances. Failure to afford a party, in this case ACM Gold, an opportunity to respond was inequitable.

⁸ FAIS 00039/11-12/GP1 and FAIS 06661/10-11/WC1

32. Similarly in **CS Brokers CC and Others**⁹ this Board expressed its displeasure regarding the Ombud's reluctance to implement appropriate procedures to deal with complaints. It is not clear to us why, for instance, Mr Mogadima's sister whom the Ombud says is the one who introduced her brother to the investment world was not asked to make a statement especially because she worked for Go Direct whose directors are now nowhere to be found. Her statement may have clarified a few matters. For instance, the statement may have explained what relationship existed, if any, between ACM Gold and Go Direct at the time the investment was made. It may have established or clarified the reason Mr Mogadima's sister referred him to Go Direct instead of recommending that he invests directly with ACM Gold assuming Mr Mogadima had a choice between the two companies.
33. In paragraph 14¹⁰ of the Ombud's response to appellant's leave to appeal, the Ombud refers to ACM Gold's correspondence dated 25 April 2016.¹¹ Here the Ombud stated: "All this time, since September 2011, they [ACM Gold] were still doing business with the frauds at Go Direct."
34. Despite diligent search, nothing in the record shows any evidence of any dealings between ACM Gold and Go Direct especially in relation to the date September 2011. Pressed, Mr Mogadima's representative conceded during proceedings that nothing in the record factually indicated the existence of a relationship between ACM Gold and Go Direct prior to the IB agreement.

⁹ Appeal No. Fab 5/2016

¹⁰ Record of proceedings, P. 151

¹¹ Record of proceedings, P. 88

35. The Ombud's reference to September 2011 therefore remains a mystery to us. More worrying though is the fact that the Ombud never gave ACM Gold the opportunity to respond to the statement that it had dealings with Go Direct before Mr Mogadima deposited the money and that ACM Gold did so as early as 2011. This arose for the first time in the reasons for refusing to grant leave to appeal.
36. We have looked at the IB agreement. It is not an overstatement to say it is an appalling piece of work. Its definitions are incomplete, it has pages missing or incorrect page numbers, and it is signed only on two pages. The list goes on. Generally, it is a poorly drafted document and is difficult to read. Counsel for ACM Gold was prepared to admit its failings. However, one cannot shy away from the fact that despite its many shortcomings, the IB agreement, *ex facie*, reflects the relationship between the parties as at 22 April 2013. Any suggestions that it should be considered to apply prior to its signature requires proof.
37. Mr Mogadima's representative argued that the IB agreement although seemingly 15 pages long contained page 15 of 19. He submitted that this was indicative of the fact that it was incomplete and perhaps we should not rely on it or its purported date of signature. There was also argument regarding the fact that annexure A of the IB agreement showed the date, "30.07.2012" while the main agreement showed the date, "12.09.2012". The significance of this was that both dates preceded the date of the investment. The Ombud raised a similar point at some stage. However, it became clear

during evidence that these dates simply showed the date of the "version" or the template date of the IB agreement.

38. Mr Mogadima's representative also submitted that we ought to make an inference that a relationship between ACM Gold and Go Direct existed prior to the signing of the IB agreement and that the IB agreement was a mere formality indicative of a long standing agreement. He further submitted that this approach was supported by the fact that Mr Mogadima had seen and signed a document that had ACM Gold's letterhead. Again, this argument was an extension of the Ombud's finding.

39. We could find no basis for such inference particularly given the fact that no information was placed before us of any record, agreement or policy perhaps generated from the consultation that resulted in Mr Mogadima making the investment. Further, Mr Mogadima's representative conceded that it was possible that Go Direct was in possession of ACM Gold's documents as part of the fraud it intended to perpetuate against Mr Mogadima.

F. CONCLUSION

40. The evidence before us indicates clearly that Go Direct took Mr Mogadima's money without any intention of ever investing it on his behalf. In this regard we fully agree with the Ombud.

41. However, we are of the view that if reliance must be placed on the IB agreement as being indicative of the existence of a relationship between ACM

Gold and Go Direct prior to its signing, then in that event evidence ought to be shown for such conclusion. We could find no such evidence.

42. The Ombud's insistence that the signature of the IB agreement did not establish the relationship but that it formalised it cannot hold without evidence supporting such assertion. The evidence before us does not support the existence of such relationship prior to the signing of the IB agreement.
43. In light of the foregoing, the question of whether or not Go Direct was providing financial services on behalf of ACM Gold falls away as there is no proof that these parties had any relationship prior to signing the IB agreement. Consequently, factual causation between the conduct of ACM Gold and the loss Mogadima suffered has not been established.
44. On the facts presented to us, the loss suffered was occasioned solely by the conduct of Go Direct. That being the case there is no basis on which factually it could be said the relationship between ACM Gold and Go Direct was the cause of Mr Mogadima's loss.
45. ACM Gold is therefore not liable to Mr Mogadima for any amount.

G. ORDER

46. In the premises, we make the following order:

46.1. The appeal is upheld.

46.2. The order of the Ombud contained in the determination dated 29 July 2016 is varied as follows:

46.2.1. The first respondent, namely Go Direct Stock Market Investments (Pty) Ltd, is ordered to pay the complainant the amount of R70 000.00; and

46.2.2. Interest on this amount at the rate of 10.25% per annum from 18th November 2012;

46.3. No order as to costs.

Dated at Pretoria on 02 August 2017

L Dlamini

L Dlamini: Chairperson

W Ndinisa

Adv W Ndinisa: Member

N P Dongwana

N P Dongwana: Member