IN THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

In the matter between:

FIRST NATIONAL BANK, A DIVISION Appellant

OF FIRSTRAND BANK LIMITED (FNB)

and

REGISTRAR OF FINANCIAL SERVICES PROVIDERS

NM BAM – OMBUD FOR FINANCIAL

SERVICES PROVIDERS Respondent

DECISION

A. INTRODUCTION

1. This appeal is brought against the determination of the Ombud dated 7 September 2011 where the Ombud upheld the complaint lodged by the complainant (Newlove).

- **Point in Limine**

2. The appellant's counsel brought it to the attention of the Appeal Board that the correct description of the appellant is "***First National Bank a division of FirstRand Bank Limited***" (FNB). This has not been

challenged and for the purposes of this decision, same title has been adopted.

B. BACKGROUND

3. The salient facts which are not in dispute are the following:

3.1. Naaym Mooi was employed by the appellant in their Financial Planning and Advisory Services Department, at its branch in Wynberg, Cape Town. He was employed in his capacity as a "Financial Planner";

3.2. Mooi's employment contract explicitly set out the scope and ambit of his authority when rendering financial services and advice. The contract clearly stipulated that Mooi was only allowed to deal with investments and/or services authorised by FNB;

3.3. Mooi had not acted in accordance with his mandate in that he marketed a product which emanated from a pyramid scheme, known as the "***Delwray cc***" textile investment (Delwray product). Such product was not an authorised FNB product. This caused Newlove to deposit (loan) substantial amounts into the accounts of Delwray cc and/or New Market Clothing and/or Mr Delmaine de Klerk. The total sum "loaned" was R340,000.00;

3.4. The only documents which the appellant furnished regarding this transaction were in the form of three (3) different versions of documents purportedly titled "Acknowledgement of Debt" (pp. 139-144 of the record). They obtained these documents from Mooi;

3.5. It was the fraudulent and dishonest conduct of Mooi in this "pyramid scheme" which led to the prejudice of not only the complainant but other members of the public as well;

3.6. This caused his resignation after disciplinary proceedings were initiated against him by FNB.

C. THE APPLELLANT'S CASE

4. The appellant's legal argument essentially are the following:

4.1. The Ombud's finding was a legal misdirection – ***"the fact that Mooi went beyond his scope of authority is irrelevant because in rendering the financial service to the complainant, he was doing what he was appointed to do, namely to advise clients"***;

4.2. The appellant contended that the Ombud erred in finding that Mooi's conduct was attributable to the appellant. In other words, the appellant was vicariously liable for the actions of Mooi.

5. The appellant contended that the correct test is ***"Whether the employer could be said by a third party dealing with an employee of the employer to have***

accepted the outward manifestations of authority of the employee to do all things related to the employer free of limitation".

6. The facts and circumstances essentially indicate that Newlove was aware of Mooi's absence of authority, as it had specifically been brought to her attention.

7. The nature of the documents presented to her previously, namely the "Statutory Disclosure Notice" specified the products which FNB authorised.

8. Mooi had already dealt with her on the previous occasions with legitimate products, which were authorised by FNB in accordance with the "Statutory Disclosure Notices".

9. Therefore when Mooi advised Newlove on the Delwray product, it should have raised some awareness. At that time, she should have enquired whether the Delwray product was an FNB authorised product.

10. Having regard to the previous occasion where she was made aware of the limitations as per the "Statutory Disclosure Notice", she was made aware that Mooi's mandate was limited to authorised financial products. Newlove had read the aforesaid notices and was aware of their contents.

11. An additional factor causing suspicion was the fact that the Delwray product had not endorsed FNB‘s name on any of the documents she signed.

12. Newlove had through her previous dealings become aware of the extensive procedure and checks in place when investing in financial products with FNB.

13. Therefore the appellant by virtue of these procedures and checks had undertaken to inform investors and/or clients at all times of the nature of the financial products authorised. The appellant could do no more than it has done in making her aware of the limitations of the authority of Mr Mooi;

14. Thus when it came to FNB’s attention that Mooi was marketing a fraudulent product, they debarred Mooi and reported this matter to the Financial Services Board.

15. Since the Delwray product was not an authorised FNB product and was certainly not dealt with in accordance with the Financial Advisory and Intermediary Act, 37 of 2002 (FAIS Act), FNB was unable to find any records regarding the transaction with Newlove apart from debit and credit transactions appearing on her respective bank accounts.

D. COMPLAINANT'S VERSION

16. The following argument and facts were presented by Newlove:

16.1. It was Mooi who approached Newlove and introduced himself as FNB's financial advisor;

16.2. Subsequently it was Mooi who made contact with her once again regarding the Delwray Investment;

16.3. She was aware of the "Statutory Disclosures" presented to her during the marketing of the RMB and Retirement Annuity products by Mooi;

16.4. With regard to the Delwray product, she did not query this product as she assumed it was ***"something new that they brought in"***. ***"I didn't think it would be suspicious. I really trusted him. I know nothing about finances and what goes on... I just accepted that was another one that had been added"***.

16.5. ***"I trusted that he was doing this for my good and he was still working for FNB. I didn't see him as separate from FNB"*** (p. 69 of the record). She always associated him with FNB even in respect of the Delwray product;

16.6. At the time she signed the documents regarding the Delwray product, it had not occurred to her that this investment was a suspicious transaction (p. 71 of the record).

16.7. She further stated in evidence that she was not aware that the ambit of his authority was limited when he was advising her on financial planning;

16.8. She later became aware that there were other FNB clients who Mooi approached and who subsequently also invested in the Delwray product;

16.9. In her Heads of Argument, she made the following representation:

> ***"(1) I simply believed his investment advice was for my benefit and within the scope of his employment. Re RMB, I initially noted the entities FNB dealt with, but by the time Naaym advised the transfer to Delwray, I really trusted him and assumed this was a new additional investment"***.

16.10. She had subsequently asked Mooi for the documents regarding the "Delwray product". He assured her that the relevant documents were filed with FNB and she accepted his explanation.

16.11. She was not aware that it was an investment into a "pyramid scheme" at the time Mooi presented the Delwray Investment to her;

16.12. She made the last R40,000.00 payment upon Mooi's advice – that is if she invests more it will maintain her interest rate which she had previously earned. During the course of September 2007 to June 2009, the respondent received regular interest in payment of approximately R6,000.00 per month. Thereafter the interest payments became irregular;

16.13. Mr Baxter, who represented Newlove at the time, advised the appellant that they are liable:

> ***"At all relevant times, negotiations relating to the investment with Delwray cc was conducted at the offices of First National Bank in Claremont with an investment advisor employed by the Bank. I sincerely believe that the Bank is estopped from denying that Mooi was authorised to act on their behalf. In the premises, I believe that the Bank is liable to refund to Fiona the losses suffered by her as a result of Mooi's negligent investment"***.

E. ANALYSIS AND FINDINGS

17. The Appeal Board has considered the factual evidence before it and established that the complainant's version has not been contradicted on the evidence and on the representations made by her at the hearing. There has also been no contradiction in the factual evidence of the appellant. Hence, this appeal in our opinion is based on the application of the legal principles to the facts.

18. The following legal issues have to be determined:

18.1. Whether the FAIS Act is applicable?

18.2. If so, had Mooi complied with the respective provisions of the FAIS Act;

18.3. Can the appellant be vicariously liable for Mooi's conduct?

19. It is common cause that Mooi had marketed a fraudulent product to the respondent, one which was not authorised by FNB in respect of his mandate.

20. Mooi was appointed as a financial planner by FNB and in terms of the FAIS Act, he is deemed to be a "representative" of the Financial Services Provider (FNB).

21. The nature of Mooi's relationship with the bank was one of an employer-employee relationship. His contract of employment clearly stipulated that he was obliged to carry out his duties in accordance with the provisions of legislation relevant to the Financial Services Industry. The relevant clauses of the employment contract stipulated the following:

> ***"4.1 The Financial Planner shall observe and be subject to all Legislation as amended from time to time relevant to the Financial Services Industry"***.
> (p. 195 of the record)

> ***"15.3 The Financial Planner confirms that he conforms to the "Fit and Proper requirements" as per the subordinate legislation under FAIS"***.

22. It is only appropriate that the facts and circumstances of this matter must be viewed cumulatively. It is common cause that Mooi marketed two

legitimate products: One being an RMB Investment and the other being a Retirement Annuity.

23. During the marketing of these two products, Newlove was presented with *inter alia* all the relevant disclosure material namely:

23.1. The “Statutory Disclosure Notice”;

23.2. The “Investment Risk Analysis”;

23.3. The “Client Needs Analysis and Service Instruction”.

24. It is further common cause that when the Delwray product was marketed, none of the aforesaid documents which were FAIS compliant were presented to Newlove.

25. It is also pertinent to note that the products which were authorised by FNB differed from time to time. Reference is made to the contents of the “Statutory Disclosure Notices” appearing in the record which illustrates that FNB authorised various products from time to time.

26. The client/advisor relationship between Mooi and Newlove developed over a period of three (3) years. The chronological sequence of their interaction appear as follows:

26.1. 15/06/2007 - RMB Investment of R300,000.00;

26.2. 21/09/2007 - Delwray Investment of R50,000.00;

26.3. 22/02/2008 - Retirement Annuity with Momentum;

26.4. 04/06/2008 - Delwray Investment of R50,000.00;

26.5. 31/08/2008 - Delwray Investment of R200,000.00;

26.6. 15/06/2009 - Delwray Investment of R40,000.00.

(i) The Applicability of the FAIS Act

27. The Appeal Board has taken cognisance of the relevant applicable authorities that was referred to by counsel for the appellant and have duly considered them in this decision.

28. The Ombud stated in her findings that the scheme sold by Mooi had all the trappings of FNB's sanctioned product (p.23 of the record). However, the Appeal Board is of the view that the proper enquiry should be whether the "product" and the "advice" in issue was of the nature and type envisaged by the FAIS Act.

29. The appellant argued to the contrary that:

29.1. The Ombud did not have jurisdiction to adjudicate on the matter. It was therefore suitable for the Ombud to refer this matter in terms of section 27(3) of the FAIS Act to the High Court due to a material dispute existing;

29.2. The scheme marketed by Mooi, being a credit and/or loan arrangement, ultimately a "pyramid scheme" was not an authorised product as envisaged in section 1 of the FAIS Act.

a. The Jurisdiction of the Ombud

30. The FSB is empowered by section 21 of the FAIS Act to appoint a person with a legal qualification (the Ombud) who possesses adequate

knowledge of the rendering of financial services to resolve certain disputes. The FAIS Ombud deals with complaints relating to financial services rendered by a Financial Service Provider (FSP) or representative to the complainant.

31. Essentially, the complainant should allege that the provider or representative had committed an act whereby there was:

31.1. A contravention of the FAIS Act or failure to comply with a provision of the aforesaid Act which has led to the complainant suffering financial prejudice or damage or where he had not already suffered financial prejudice or damage, he is likely to do so in future;

31.2. Wilful or negligent rendering of a financial service to the complainant which has caused prejudice or damage to the complainant or which will cause prejudice or damage in future; and

31.3. Unfair treatment towards the complainant.[1]

32. The FAIS Ombud derives its authority to adjudicate from the FAIS Act and more specifically the Rules on Proceedings of the Office of the Ombud for FSPs, 2003 (Ombud Rules) promulgated by virtue of section 26 of the FAIS Act. Rule 4 of the Ombud Rules, "Type of complaint justiciable by Ombud" makes clear that:

[1] Hattingh W and Millard D, *The FAIS Act Explained*, 1st Edition (Lexis Nexis, 2010) at pp. 159-160

"For a complaint to be submitted to the Office –

(i) The complaint must fall within the ambit of the Act and these Rules;

(ii) The person against whom the complaint is made must be subject to the provisions of the Act (hereafter referred to as "the respondent");

(iii) The act or omission complained of must have occurred at a time when these Rules were in force; and

(iv) The respondent must have failed to address the complaint satisfactorily within six weeks of its receipt."

b. The FAIS Act

- ***Representative***

33. Mooi is deemed in terms of the FAIS Act to be a "representative". The definition-

"'representative' means any person, including a person employed or mandated by such first-mentioned person, who renders a financial service to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity, which service –

(a) does not require judgment on the part of the latter person; or

(b) does not lead a client to any specific transaction in respect of a financial product in response to general enquires."

34. In order to understand the services and products that are regulated by the FAIS Act, reference must be made to *inter alia* the statutory definitions of “advice” and “financial product”.

- ***Advice***

35. It is clear that the intention of the legislature was to lend an extensive application to the term “advice” in order to include as many recommendations, guidance and proposals as possible under the FAIS Act. Therefore, in order to determine whether advice was in fact given, the factual situation between the client and the “advisor” should be analysed.

36. Advice is defined as follows in section 1 of the FAIS Act.

> ***‘“advice’ means, subject to subsection (3) –***
>
> ***(a) any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients –***
>
> ***(a) in respect of the purchase of any financial product; or***
>
> ***(b) in respect of the investment in any financial product; or***
>
> ***(c) on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or***

(d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product,

and irrespective of whether or not such advice –

(i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or

(ii) results in any such purchase, investment, transaction, variation, replacement or termination, as the case may be, being effected."

37. As aforesaid, the FAIS Act defines "advice" as any recommendation, guidance or proposal of a financial nature furnished by any means or medium, to any client or group of clients. The advice must pertain to the purchase of any financial product or the investment in any financial product. It includes any recommendation, guidance or proposal of a financial nature on the conclusion of any other transaction including a loan or cession, aimed at the incurring of any liability or acquisition of any right or benefit in respect of any financial product. Therefore anyone who enters into a loan incurs a liability or acquires a right.

38. **Section 1(3)** of the FAIS Act particularly sets out exclusionary provisions where it identifies situations when it is not considered to be "advice" as contemplated in the FAIS Act;

- ***"Factual advice given merely on the procedure for entering into a transaction in respect of any financial product, in relation to the description of a financial product, in answer to routine administrative***

queries, in the form of objective information about a particular financial product or by the display or distribution of promotional material;

- ***An analysis or report on a financial product without any express or implied recommendation, guidance or proposal that any particular transaction in respect of the product is appropriate to the particular investment objectives, financial situation or particular needs of a client;***

- ***Advice given by the board of management or any board member of any pension fund organisation or friendly society to members of the organisation or society on benefits enjoyed or to be enjoyed by such members;***

- ***Advice given by the board of trustees of any medical scheme or any board member to the members of the medical scheme on health care benefits enjoyed or to be enjoyed by such members; or***

- ***Any other advisory activity exempted from the provisions of the FAIS Act by the Registrar, after consultation with the Advisory Committee, by notice in the Gazette".***

- ***<u>Financial Products</u>***

39. A number of products are listed under "financial products" but the exact definitions of these products do not occur in the FAIS Act. Instead, the FAIS Act consistently refers to other current legislation, with the result that definitions contained in other legislation should be read into the FAIS Act. Should the FAIS Act not refer to another statute for a definition, the common-law meaning of the concept is used. Hence, any financial

services rendered in connection with these products fall within the ambit of the FAIS Act.[2]

40. **Section 1** defines "financial product" extensively:

'"financial product' means, subject to sub-section (2) –

(a) securities and instruments, including –

(i) shares in a company other than a 'share block company' as defined in the Share Blocks Control Act, 1980 (Act 59 of 1980);

(ii) debentures and securitised debt;

(iii) any money-market instrument;

(iv) any warrant, certificate, and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments referred to in subparagraphs, (i), (ii) and (iii);

(v) any 'securities' as defined in section 1 of the Securities Services Act, 2002;

(b) a participatory interest in one or more collective investment schemes;

(c) a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act,

[2] Hattingh W and Millard D, *The FAIS Act Explained*, *supra* at p. 45

1998 (Act 52 of 1998), and the Short-term Insurance Act, 1998 (Act 53 of 1998), respectively;

(d) a benefit provided by a pension fund organisation or a friendly society...;

(e) a foreign currency denominated investment instrument, including a foreign currency deposit;

(f) a deposit as defined in section 1 (1) of the Banks Act, 1990 (Act 94 of 1990);

(g) a health service benefit provided by a medical scheme as defined in section 1 (1) of the Medical Schemes Act, 1998 (Act 131 of 1998);

(h) <u>any other product similar in nature to any financial product referred to in paragraphs (a) to (g)</u>, inclusive, declared by the registrar, after consultation with the Advisory Committee, by notice in the Gazette to be a financial product for the purposes of this Act;

(i) any combined product containing one or more of the financial products referred to in paragraphs (a) to (h), inclusive;

(j) any financial product issued by any foreign product supplier and marketed in the Republic and which in nature and character is essentially similar or corresponding to a financial product referred to in paragraphs (a) to (i), inclusive."

41. The definitions of the aforesaid products indicated their wide application. I refer to certain of the products below:

- **Securities and Interests**

41.1. Securities and instruments are not specifically defined in the FAIS Act or in other statutes. It is from all the constitutive elements of "securities and instruments" that one gathers that this term refers to cash, evidence of an ownership interest in an entity, or a contractual right to receive or deliver cash, or another financial instrument.[3]

- **Debentures and securitised debt**

41.2. Once again the FAIS Act mentions that debentures are included in "financial products" but does not define the concept. Benade *et al* defines a debenture by explaining it in the following terms:

> ***"It follows that a debenture embraces all debt issues, whatever the name, by a company, and that the statutory provisions governing debentures cannot be avoided by calling the debt issue by another name, for example notes, bonds or loan stock..."***[4]

- **Bonds**

41.3. Bonds are debt securities and are similar to long-term loans where the issuer (borrower) owes the holder (lender) a debt, and pays interest. Bonds are normally for a fixed interest rate over the term of the bond.[5]

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[3] Hattingh W and Millard D, *The FAIS Act Explained*, *supra* at p. 46
[4] Hattingh W and Millard D, *The FAIS Act Explained*, *supra* at p.48
[5] Hattingh W and Millard D, *The FAIS Act Explained*, *supra* at p.50

42. The FAIS Act aims at including as many financial products and services as possible. In the event of someone creating a product that is in essence similar to a product that is within the ambit of the Act, it is irrelevant what this new product is called. What is of importance are the characteristics of the new product and where these characteristics resemble an existing product, it follows that the new product, regardless of what it is called, might fall within the ambit of the FAIS Act.[6]

43. The Appeal Board is in agreement with the Ombud that Newlove's complaint was certainly under the jurisdiction of the Ombud to adjudicate upon Mooi as a "representative" of the appellant (the financial services provider) had rendered financial advice and services which caused financial prejudice to the complainant.

44. Such financial advice was rendered in respect of a financial product which in its nature was a "loan". The definition "advice" as aforesaid covers a wide category. The advice may pertain to any "financial product" or the investment in any "financial product".

45. The "advice" rendered by Mooi certainly does not fall in any of the categories which highlights the exclusions set out under section 1(3) of the FAIS Act.

[6] Hattingh W and Millard D, *The FAIS Act Explained*, *supra* at p.69

46. As aforesaid, the intention of the Legislature was to cover as many financial products as possible. One must not lose sight of the fact that at the time the product was marketed, it was presented to Ms Newlove as a "loan" where she would benefit from high interest rates. The "pyramid scheme" only unravelled itself subsequently when investigations began regarding this investment.

47. For instance "bonds" fall under the category of "Financial Product". Bonds are treated as debt securities and are similar to long-term loans where the borrower owes the lender a debt and pays interest thereon.

48. As aforesaid the Delwray product is in essence similar to a loan. The essential characteristic of this product resembles existing defined products, regardless of what it is called.

49. The enquiry is a factual one where one has to consider recognized definitions of products and services whether contained in the FAIS Act, in other legislation or in common law.

50. The FAIS Act makes provision for this when one has regard to section 1(6) of the FAIS Act:

> ***"This Act must be construed as being in addition to any other law not inconsistent with its provisions and not as replacing any such law."***

51. Even though limited documents formed part of the record regarding the nature of the Delwray loan, the Appeal Board is able to draw an inference from the evidence it has before it, that it finds application in the

FAIS Act in respect of the definitions of “advice” and “financial products” as envisaged in particularly paragraph (h) under the definition of “advice”.

52. Hence, the General Code of Conduct is applicable to Mooi. His failure to execute these duties satisfies the delictual requirement in that his act of furnishing advice was wrongful; which caused damage. The Appeal Board is therefore in agreement with the Ombud that Mooi did not comply with the relevant provisions of the General Code of Conduct namely: section 7(1) - Part VI, section 3 - Part II and section 9 thereof.

(ii) <u>Was FNB vicariously liable?</u>

53. Although the FAIS Act does not deal with vicarious liability, common law dictates that an employer is liable for the wrongful culpable acts of his employees where that caused harm to third parties.

54. The Ombud found the employer to be vicariously liable. Vicarious liability was imposed on innocent employers by a rule of delictual law. The reason for the rule was based on public policy considerations. The pertinent question is what was the employee employed to do.[7]

[7] **<u>Feldman (Pty) Ltd v Mall</u> 1945 AD 733** at p.775
“It is within the master’s power to select trustworthy servants who will exercise due care towards the public and carry-out his instructions. The third party has no choice in the matter and if the injury done to the third party by the servant is a natural or likely result from the employment of the servant, then it is the master who must suffer rather than the third party. The master ought not to be allowed to set up as a defence secret instructions given to the servant where the latter is left as far as the public concerned with all the insignia of a general authority to carry on the kind of business for which he is employed”.

55. The risk creation basis of liability has been adopted in South Africa. The *dictum* of Watermeyer CJ., in **Feldman (Pty) Ltd v Mall** *supra at p.741* is indicative thereof:

> ***"It appears from them that a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm".***

56. The issue whether an unauthorised act is within the course of his employment will depend on the facts of each case. In **Feldman (Pty) Ltd v Mall** *supra* at p. 737 the following was stated:

> ***"Whether the act then was done in the affairs or the business of the master to which the servant had been appointed is a question of fact in every case, and can only be answered by determining what was the business of the master, or viewed from a different angle, what was the servant's employment".***

57. The concept "scope" and "course of employment" has to be understood before one can even determine whether FNB was vicariously liable. This was deliberated in **Feldman (Pty) Ltd v Mall** *supra* at p.762:

> ***"It is, I think, clear from the references I have just given that it makes no difference whether the words used are "scope" or "sphere" or "course" of employment, or "the exercise of functions to which the servant is appointed" or "the service to which he was appointed". Whatever phrase is used, the***

ambit within which the master is liable for the acts of his servant depends on the duties imposed on the servant by the contract of employment, but in this connection a word of caution is necessary".

58. Caution should be exercised when employees commit unauthorised acts. There are instances when the employer is held accountable even when the employee commits unauthorised acts. I refer to **Feldman (Pty) Ltd v Mall** *supra* at p.739:

"In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in".

59. This same *dictum* was adopted in **Minister of Police v Rabie 1986 (1) SA 117 (T)** at p. 134:

"It has also been suggested that while the scope of employment may be governed by the contract of service, the character of the deviation is not, and that it is the character of the deviation which determines whether the master is liable for the servant's conduct during such deviation; if the deviation is such that it can be said to be a natural or likely result of the employment of the servant, then the master or is liable.

60. Zulman JA., in **ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd 2001 (1) SA 372 (SCA)** at p. 378 adopted the principle of the **Rabie** matter. The enquiry when determining if the employee was acting in the "course" and "scope" of his employment should be whether at the relevant time the employee was about the affairs, or business, or doing

the work of, the employer. He further referred to the *locus classicus* on vicarious liability of **Feldman (Pty) Ltd v Mall** *supra* at p.756:

> ***"In my view the test to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time that it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case the master is not liable. It seems to me not practicable to formulate the test in more precise terms; I can see no escape from the conclusion that ultimately the question resolves itself into one of degree and in each particular case a matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed."***
>
> (Our underlining)

61. Before determining whether the employee committed fraud in the "course and scope" of his employment one firstly has to ascertain whether actual or ostensible authority with which the employee is clothed existed.

62. Notionally "ostensible authority" may exceed the scope of actual or implied authority. Howie JA., in **Ess Kay Electronics PTE Ltd and Another v First National Bank of Southern Africa Ltd 2001 (1) SA 1214 (SCA)** at p. 1222 made particular reference to *Clerk and Lindsell on Torts, 17th edition at p.188 (paragraphs 5-38):*

> ***"Of its very nature fraud involves the deception of the victim and by that deception his persuasion to part with his property or do some other act to his own detriment and to the benefit of the person practising the fraud, and for this reason the decision whether an employee committed fraud in the course of his employment can only be made after the authority; actual and ostensible, with which the employee is clothed, has been ascertained. For there to be***

ostensible authority the employer must, by words or conduct, induce the victim's belief that the employee was acting within the latter's authority".

63. Since Mooi had no "actual authority" to market the Delwray product, the next inquiry is whether FNB can be held accountable on the basis of "ostensible authority". In other words, essentially the principal becomes liable if the principal by words or through conduct represents to the outsiders that the agent had authority to act as he had done.

64. The onus to prove that ostensible authority existed was on Ms Newlove.

65. The following enquiry has to be conducted in order to establish if ostensible authority existed:

65.1. This test was laid down **NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others 2002 (1) SA 396 (SCA)** at p.412 and was subsequently adopted in **Glofinco v ABSA Bank t/a United Bank 2002 (6) SA 470 (SCA)** namely:

65.1.1. there must be a representation by words or conduct;

65.1.2. it must be made by the principal and not merely by the agent that the latter had the authority to act as he did;

65.1.3. the representation must be in a form such that the principal would reasonably have expected that outsiders would act on the strength of it;

65.1.4. there must be reliance by the third party on the representation;

65.1.5. the reliance on the representation must be reasonable;

65.1.6. there must be consequent prejudice to the third party.

66. In summary, a claimant who relies on estoppel will have to show that he or she was misled by the principal into believing that the party, who purportedly acted on the principal's behalf, had authority to conclude the act, that the belief was reasonable and that the claimant acted on that belief to his or her prejudice.

67. The Supreme Court of Appeal in **NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others** *supra* at paragraph 25 thereof, referred the dictum of the **Hely-Hutchinson v Brayhead Ltd and Another [1967] 3 All ER 98 at 102A-E**.

> ***"As Denning MR points out, ostensible authority flows from the appearances of authority created by the principal. Actual authority may be important, as it is in this case, in sketching the framework of the image presented, but the overall impression received by the viewer from the principal may be much more detailed. Our law has borrowed an expression, estoppel, to describe a situation where a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong... But the law stresses that the appearance, the representation, must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself,***

impose liability on him... And it is not enough that an impression was in fact created as a result of the representation. It is also necessary that the representee should have acted reasonably in forming that impression..."

(Our underlining)

68. An instance where the application of "ostensible authority" principle was further illustrated with regard to the specific facts in **South African Broadcasting Corporation v COOP and Others 2006 (2) SA 217 (SCA)** at paragraph 65:

"Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the "holding-out". Thus, if he orders goods worth £1 000 and signs himself "Managing Director for and on behalf of the company", the company is bound to the other party who does not know of the £500 limitation..."

69. In **Glofinco v ABSA Bank Ltd t/a United Bank** *supra* at p.492, Judge Nugent made a further qualification regarding a "ostensible authority":

"By establishing branches for the conduct of its business the bank represents to the public at large that the bank conducts its ordinary business from those branches and that its manager is authorised to conduct that business on its behalf. No doubt there are generally internal limitations placed upon the authority of the manager (as there were in this case) but, as pointed out by Nienaber JA, those limitations are immaterial if they are not brought to the notice of the public. Members of the public are thus entitled to assume, when they transact business at the branch which is of the kind that falls within the scope of the ordinary business of the bank, that they are dealing with the bank and not with an unauthorised third party".

(Our underlining)

70. Nugent JA., **Glofinco v ABSA Bank Ltd t/a United Bank** *supra* at p.493 further qualified that the public cannot be at the losing end if the Bank creates the impression:

"The public know what kind of business is undertaken by a bank and they are entitled to feel safe when they undertake business of that kind with a bank manager. They are not to know in what circumstances the bank considers it to be commercially desirable or beneficial to undertake a particular contract, or what will be inimical to its interests, and in my view they are not called upon to enquire. Members of the public who deal with a bank manager are entitled to assume that he knows what he is doing when he transacts business of the kind that one transacts with a bank. If in truth the transaction would not ordinarily have been concluded by the bank and was concluded only because its appointed agent went beyond his authority, I can see no reason why the loss should fall upon the innocent party who was ignorant of that fact and, in my view, that is what estoppel sets out to avoid".

(Our underlining)

71. What Newlove had to establish was that FNB created the impression that Mooi was authorised to deal with Delwray products.

72. The next inquiry is, whether Newlove acted reasonably when she relied on Mooi's representation.

73. Once it is established that there were representations made by the Bank, it should be distinguished as to whether such representation can reasonably be expected to mislead Newlove who relied upon it. **Glofinco v ABSA** *supra* at p.496 it was held:

> ***"When a representation has been made that can reasonably be expected to mislead (as it was in this case), it ought to follow that a person who relies upon it will ordinarily be acting reasonably in doing so. The requirement that the reliance must be reasonable thus mirrors to a large extent the requirement that the representation must be one that is reasonably capable of misleading".***

74. Certainly what has emerged from the evidence was the following:

74.1. The complainant at all relevant times:

74.1.1. was under the impression that the Delwray product was an FNB product;

74.1.2. that Mooi represented FNB when he marketed the Delwray product;

74.1.3. at the time the Delwray Investment was made no "Statutory Disclosure Document" was presented to

her, neither had Mooi disclosed to the Newlove the authorised products of FNB at the time;

74.1.4. Newlove had dealt with Mooi on previous occasions and came to trust his advice in his position of a financial planner;

74.1.5. Newlove prior to Mooi approaching her had no or little knowledge on investing and hence she relied solely on his investment advice.

75. In our view, FNB created the “aura of authority” with which it enveloped Mooi as its financial planner. When having regard to the extensive authorities cited above and the “aura” of appearance created by FNB, ostensible authority has been established. The representations *inter alia* were*:*

75.1. When Mooi approached Newlove, he did so as a financial planner of FNB;

75.2. That Mooi was appointed as FNB’s financial advisor;

75.3. Mooi advised the respondent on three (3) separate investments, two (2) of which were authorised products of FNB;

75.4. The financial advice was provided by Mooi on FNB’s premises;

75.5. At no stage had Mooi informed Newlove that he dealt with the "Delwray product" in his personal capacity. Neither was any evidence forthcoming that the complainant was aware that "Delwray product" was not an FNB authorised product;

75.6. Mooi advised Newlove that the "Delwray product" records are with FNB.

76. In the same light, it is crucial for purposes of the enquiry whether FNB should reasonably have foreseen that outsiders might be misled. In our finding the following representations were made that we would have expected Newlove and the public to act upon the representation:

76.1. FNB certainly presented Mooi as their financial advisor to Newlove and to the public at large;

76.2. FNB was aware that members of the public were not aware of their internal rules and procedures and would thus not be protected by them should they be presented by a dishonest advisor.

77. Hence, on all the evidence before us, the preponderance of probabilities justifies the conclusion that throughout their negotiations, Mooi had been shown to have been an employee of FNB and in his course and scope of employment was "authorised" to deal with the "Delwray product".

F. QUANTUM

78. It was confirmed at the hearing that the complainant received certain interest amounts which should be considered in determining the actual loss suffered by the complainant.

79. The complainant loaned a total amount of R340,000.00 to the “Delwray product scheme”. The complainant received interest and/or repayment totalling to R186,200.00 and a further R20,000.00.

80. Therefore, the ultimate loss suffered by the complainant is R154,780.00.

G. ORDER

81. The order of the Ombud is varied in terms of the FSB Act. The amended order is as follows:

1. This appeal is dismissed;

2. the appellant is ordered to pay the complainant the amount of R154,780.00;

3. interest on the capital amount at a rate of 15,5% calculated from one month (30 days) from the date of this order to date of final payment;

4. the appellant is ordered to pay the costs of this Appeal.

DATED at PRETORIA on this the day of June 2012.

H Kooverjie

Advocate HK Kooverjie
(Chairperson)

G Madlanga

Mr G Madlanga
(Member)

Z Mabhoza

Mr Z Mabhoza
(Member)