IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 05864/11-12/ GP 1

In the case between:

ARNOLD CORNELISSEN **Complainant**

and

PSG KONSULT CORPORATE LTD **Respondent**

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

A. THE PARTIES

[1] The complainant is Arnold Cornelissen an adult male of whose details are on file in this Office.

[2] Respondent is PSG Konsult Corporate Ltd a company duly incorporated in terms of South African laws, with its principal place of business set out as Unit 1, Ground Floor, Trident Office Park, 2 Niblick Way Somerset West, Western Cape. Respondent is a licensed provider in terms of the FAIS Act and holds license number 33657.

[3] According to complainant, the complaints are directed at the conduct of Mr. Neels Brink (Brink) who is an employee of respondent. The significance of this will emerge later.

B. INTRODUCTION

[4] During 2007 complainant was the Chief Operations Officer of a company called Transtel. This company was acquired by another corporate, being Neotel. At that stage Brink's previous company, NNB Financial Services ("NNB") was engaged by Neotel as their designated financial advisor. The appointment was to advise on the Neotel retirement fund and medical aid. NNB was a licensed FSP with FSP number 14537.

[5] Early in 2008 Neotel began the process of acquiring Transtel. NNB was requested by Transtel to advise on employee benefits. Brink made a presentation and prepared information packs for the employees of Transtel. More than 200 employees accepted Brinks offer and this included complainant. This is how the relationship was established.

[6] Whilst Brink processed the employee's requirements, he was called by complainant who requested to use Brink's services to preserve his own funds. To this end complainant renegotiated Brink's advice fee by decreasing it from 0.50% to 0.30%. Complainant indicated to Brink that he also had discretionary money that he would like to invest using Brink's services. Brink pointed out that he does not normally handle discretionary funds. Complainant's response was that he

merely needed access to the platform and will manage the portfolio himself. Complainant stated that he did not expect Brink to provide investment advice.

[7] On the 7th July 2008 complainant emailed a letter to Brink confirming the terms of their agreement. Relevant to this determination is the following extract from that letter:

"The *Investment Management fees on the different portfolios in the Preservation fund is unique but generally the investment management fee will be a function of the type of investment. If for instance I choose the typical investor portfolio (say the life stage portfolio) the fee will be 1.25%. If I choose individualized equity portfolios it will be different according to the fund, but the most expensive option is 1.4%. The money market fund at present is 0.29%*

Your annual advisory fee for me will be at 0.3%

All switching fees between different funds will be at no costs" (sic)

Brink confirmed these terms.

[8] The relationship between complainant and Brink was good until November 2011 when complainant was requested by respondent to make different arrangements for advisory services. It is then that Complainant started, what he calls, a detailed investigation of his investments account. According to complainant he found a number of items with which he did not agree and attempted to resolve his problems through correspondence with respondent. This resulted in the parties meeting in order to resolve the issues. The meeting was unsuccessful and complainant was advised to file a formal complaint. This he did on the 9th

November 2011. On the 22nd November 2011 respondent responded to the complaint.

[9] There was no resolution and a formal complaint was made to this Office. Broadly, the principal complaint revolves around the fees charged by respondent on complainant's account. Complainant submits that, contrary to their agreement, the fees charged were in excess of the agreed rates. Complainant made a calculation of the overcharges and seeks payment of the amount together with interest. He also complains that respondent failed to inform him appropriately with regard to some of his investments and failed to take instructions, thereby causing loss.

C. THE COMPLAINT

[10] At the outset it must be stated that this complaint is not about any financial advice pertaining to investment performance. It is common cause that complainant was accountable for his own investment decisions. The complaint is confined to a dispute over fees and related charges and the provision of certain material information by respondent.

[11] Complainant's complaint can be summarized as follows:

a) He was charged costs against his equity based investments that were placed with respondent at a rate ranging between 1.1% and 4.55%. Some of these charges exceeded the rates agreed on. This resulted in what complainant describes as "a negative financial impact of R116 000 – 00".

b) He was charged costs against his money market related investments at a rate ranging between .6% and over 10%. That lead to “a negative financial impact of R47 000 – 00”.

c) Certain “administrative entries” on his investment accounts were incorrect; leading to “a negative financial impact of R18 500”.

d) The impact of withdrawing certain money from his Preservation fund to his Flexible Investment Fund was not explained. This resulted in a “negative financial impact of R18 100”.

e) He was poorly informed about exiting an offshore investment which resulted in a “negative financial impact of R18 800”.

There are thus five separate complaints. I was not certain as to what complainant meant by “negative financial impact”. However it appears from his complaint that this is the amount by which he was overcharged plus the loss of income in respect of those amounts.

[12] For reasons that are not immediately relevant, complainant abandoned his claim in respect of 11(d) and requires restitution in respect of the other amounts from respondent in a total amount of R200 300 – 00. He also claims interest on that amount at the rate of 6% per annum.

[13] Exactly how these amounts are arrived at is explained in an annexure to the complaint. I will deal with this later.

D. SETTLEMENT

[14] In keeping with section 27 (5) (b) of the Act, the parties were encouraged to settle the dispute. To this end there were meetings between the parties and correspondence was exchanged. There was no agreement and the matter was referred for a determination.

E. MATERIAL DISPUTE OF FACT

[15] In broad terms, the parties were very far apart in respect of all the material issues. Respondent denied the whole of complainant's case whilst complainant rejected respondent's version of the facts. This meant that this Office was confronted with having to resolve material disputes of fact over the following:

a) The terms of the agreement between the parties; in particular with regard to the rate at which fees and other charges could be levied;

b) How each party interpreted the fees applicable to each class of investment; and

c) The method of calculation of fees; including how complainant calculated what he alleges to be an overcharge and how he arrived at his figures.

F. RESPONDENT'S RESPONSE

[16] Respondent provided comprehensive written responses to complainant's allegations. Their defense can be summarized as follows:

a) A point *in limine* is made that complainant cited the wrong party in this complaint. The agreement relied on by complainant was with NNB then represented by Brink. That contract was on the 7th July 2008. Respondent

was not a party to that agreement and cannot be liable in contract for any advice given by NNB. Further, when respondent acquired NNB, it was a term of the contract that respondent will not be liable for any claims that pre-dated the effective date of the acquisition. Respondent submits that the complaint can be dismissed on this point alone.

b) A second point *in limine* is raised that complainant's claim has prescribed in terms of the Prescription Act 68 of 1979. The respondent points out that on complainant's own version he was aware of the rates charged since 7th July 2008 and was receiving statements regularly but made no objection to the fees charged until after 6th July 2011. There was no incident of interruption of prescription and therefore complainant is precluded from making this claim. On this basis alone the complaint falls to be dismissed.

Thereafter respondents, on the basis that the above points are unsuccessful, set out their defense on the merits of the complaint. They are as follows:

c) Respondent points out that complainant's case is based on subjective interpretation and his own calculation of how much he was allegedly overcharged. This makes it difficult to objectively pin point exactly what his issues are; making it difficult to respond.

d) Regarding the first complaint that there was a unilateral change in agreed fee base and/or non communication of substantial changes; respondent denies this and points out that the agreed rates were applied and that there was no credible evidence that this was exceeded. They further dispute the accuracy

of complainant's calculations. In this regard, there is also a response from Momentum that does not support complainant's allegations.

e) The second complaint is that there were unsubstantiated charges to his investment accounts. Respondent disputes this and points out two things:

- Firstly that complainant neglects to take the contractually agreed to platform and advisor fees into consideration when formulating his calculations; and
- Secondly, his claims are not supported by documentation signed by complainant in which he acknowledges that the charges were explained and he accepts them (the documents were annexed).
- Respondent refers to the following extract from a document signed by complainant:

  "11. I declare that I fully understand all of the fees that are applicable to my investment choice as contained in the Fee and Benefit Proposal and Fee Schedule. I acknowledge that it is my responsibility to request a copy of the Fee and Benefit Proposal from my financial advisor to fully understand the fees association with investment choices.

  12. I agree and accept the fees, charges and time periods for administrative processes as detailed in this application form, in the Terms and Conditions, New Business Statement, Fee schedule and general business practice of the Administrator."

Complainant accordingly accepted that he understands all the fees charged and agreed to be so charged and further accepted the onus of requesting copies of fee and benefit schedules and accounts.

f) As for the allegation of unsubstantiated fees charged against the money market portfolio, respondent gave the following explanation:

"All the admin and advice fees are charged against the money market portfolio. This practice is to the benefit of the client as it does not make sense to sell units to cover the fees. Due to this a portion of the investment is always in cash to cover fees. The cost of the money market is: platform admin fee (0.55%), Brinks advice fee (0.3%) and 0.58% asset manager fee."

g) The next complaint is that complainant lost money in the process of switching investments in his offshore money market fund. Whilst respondent concedes there was a delay, this was due to the manner in which complainant gave instructions and such instructions were not possible to carry out as system protocols did not allow it. Any loss could not be attributed to failure on the side of respondent to give complainant appropriate information.

h) Respondent disputes all of complainant's calculations on the basis that his input figures are not supported by credible evidence.

G. COMPLAINANT'S COMMENTS

[17] Complainant was invited to consider respondent's response and send his comments to this Office. There was no agreement and the disputes were merely escalated as no common ground emerged.

H. THE ISSUES

[18] The issues are as follows:

a) Bearing in mind the contractual relationship between the parties, did respondent levy charges contrary to any agreement;

b) If so how much and how is that amount calculated; and

c) Did respondent fail to provide appropriate information timeously to complainant regarding his offshore investments;

d) If so how much was complainant's loss and how is this calculated.

e) Did respondent breach section 2 of the Act and section 7 of the General Code of Conduct for Authorised Financial Services Providers and Representatives (the Code).

[19] In order to make a final determination in this matter, I have to resolve the factual disputes over the following. I note that most of these are material disputes of fact:

a) The terms and conditions of the contractual relationship between the parties; and

b) The calculations relied on by the complainant.

I. DISCUSSION

[20] I begin with the two points *in limine* relied on by respondent. On the record before me, it will not be difficult for me to adjudicate these issues. However in the light of how I intend to deal with the merits in this case, it will be inappropriate for me to

make a decision in this respect. Accordingly I make no finding in respect of the two points *in limine.*

[21] The contractual relationship between the parties is not clear cut. The parties rely on a combination of oral agreements, correspondence, application forms, declarations, and contracts involving various classes of investment. How these contracts were meant to be interpreted and applied is very much in dispute. It is not possible for me to resolve these disputes, particularly disputes over what was intended and interpretation, based on the record before me. The only way to resolve these disputes is to have the parties present oral evidence in an adversarial hearing.

[22] I now turn to one of my main difficulties in this dispute. Complainant presented this Office with various schedules setting out how he calculated the amounts he claims as an overcharge and losses. Respondent rejects the calculations principally on the basis that they are based on a false premise in the first place. They reject complainant's interpretation of how charges are made on the various investment products in his portfolio.

[23] Having studied the calculations presented by complainant, I was not in a position to properly understand them to make an assessment of the accuracy thereof. The problem begins with the fact that there is no agreement over the source figures used by complainant. There is also disagreement as to the method of interpretation and application of fee charges across the various investment

options. In this regard respondent is equally unhelpful by not being able to find any common ground regarding these calculations.

[24] For this Office make a calculation on its own, it will need comprehensive documentation involving statements over the time period concerned, fee schedules, calculation and interpretation of fee and benefit schedules, records of payments made by each party, all correspondence and agreement on the interpretation of how charges were meant to be levied. This is not possible on the record before me.

[25] The issue over complainants calculations requires the following:

a) Full discovery of all documentation; and
b) A statement of each party's accounts and debatement of such accounts to establish what, if anything, is owed to complainant.
c) Full disclosure in a court will encourage the process of debatement and possible settlement.

In order to meet these requirements an adversarial hearing is necessary. This Office does not have the resources to hold such a hearing nor do I deem it appropriate, in the circumstances of this case, to hold a hearing in this Office. As far as possible this Office tries to resolve matters informally, expeditiously and economically, using records. This is in keeping with section 20(3) of the Act which provides as follows:

"*The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to -*

(a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and

(b) the provisions of this Act."

[26] On the record before me it is not possible to reject any of the disputed versions as improbable. In particular I can neither accept nor reject complainant's calculations.

[27] In the premises I am compelled to deal with this matter in terms of section 27 (3) (c) of the Act which provides as follows:
"The Ombud may on reasonable grounds determine that it is more appropriate that the complaint be dealt with by a Court or through any other available dispute resolution process, and decline to entertain the complaint."

[28] This dispute cannot be reasonably dealt with in this Office as, for reasons set out above, the parties require an adversarial hearing to resolve material disputes of fact. Such a hearing is available in our courts of law. I am therefore compelled to decline to determine this dispute and complainant must institute action in an appropriate court.

J. CONCLUSION

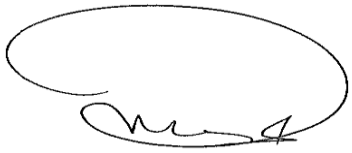
[29] For reasons set out above, I have come to the conclusion that this dispute be dealt with in terms of section 27 (3) (c) of the Act.

K. THE ORDER

[30] I make the following order:

1. The complaint is not finally determined;
2. In terms of section 27(3) (c) of the Act, it is appropriate that this complaint be dealt with by a court.

DATED AT PRETORIA ON THIS THE 14th DAY OF MARCH 2016.



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