IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 04525/11-12/ GP 1

In the matter between:

AMANDA KARVELAS **COMPLAINANT**

and

HENDRIK VAN ZYL FINANSIËLE DIENSTE (PTY) LTD **FIRST RESPONDENT**

JOHANNES HENDRIK CONRADIE VAN ZYL **SECOND RESPONDENT**

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

A. INTRODUCTION

[1] This determination follows a recommendation made in terms of section 27 (5) (c) of the Act on 22 December 2017.

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

[3] The recommendation should be read together with the determination.

B. THE PARTIES

[4] The complainant is Mrs Amanda Karvelas, an adult female whose particulars are on file with this Office.

[5] The first respondent is Hendrik van Zyl Finansiële Dienste (Pty) Ltd, a company duly incorporated and registered in terms of South African law, with registration number 1999/024582/07. The regulator's records confirm the first respondent's principal place of business as 424 State Way, Doorn, Welkom, 9459. The first respondent is an authorised financial services provider with licence number 14579. The licence has been active since 29 September 2004.

[6] The second respondent is Johannes Hendrik Conradie van Zyl, an adult male, key individual and representative of the first respondent. The second respondent's address is the same as that of the first respondent.

[7] I refer to the first and second respondents as "the respondent". Where appropriate, I specify.

C. THE RESPONDENT'S REPLY TO THE RECOMMENDATION

[8] The respondent's reply is summarized below:

8.1 The second respondent provided a breakdown of his career in the financial services industry. Of relevance is that in respect of the license of the first respondent (14579), the second respondent was only authorized to sell short term insurance, and not to sell category 1.8 (shares) or 1.10 (debentures) products.

8.2 At the time of rendering the advice however, the second respondent stated that he was an independent broker of SEESA Commercial (Pty) Ltd (13488). The second respondent further claimed that "all investment and life business", including the advice rendered in respect of Sharemax was submitted under the SEESA license in his capacity as their representative. To this extent, the respondent submitted various supporting documentation, which included the independent broker agreement he concluded with SEESA.

8.3 The respondent further claimed that in accordance with FAIS legislation, it is the responsibility of the key individuals of SEESA to manage and oversee activities. It is not the responsibility of a representative to conduct any due diligence on a product provider. Information in respect of due diligence should therefore be sought from SEESA, their key individuals and other directors.

8.4 The respondent concluded that the recommendation was incorrect, did not include all the facts and cited the incorrect parties / respondents. The Office allegedly ignored the applicable key individuals, and should therefore withdraw the recommendation against the first respondent.

D. FINDINGS

[9] It is worth noting that the respondent, in his reply to the recommendation, did not deal with the findings that the advice rendered to the complainant was inappropriate. Instead, the respondent claimed that he was not liable for the losses suffered, and tried to shift this responsibility to the key individuals of SEESA.

[10] I will explain below why the respondent's arguments are not sustainable.

Mandatory documentation

[11] Section 5 of the General Code of Conduct deals with disclosure of information to a client concerning the financial services provider, in other words, the provider on whose behalf a person is acting. Amongst others, the following information must be disclosed:

11.1 Full business and trade names, registration number (if any), postal and physical addresses, telephone and, where applicable, cellular phone number, and internet and e-mail addresses, in respect of the relevant business carried on, as well as the names and contact details of appropriate contact persons or offices.

11.2 Concise details of the legal and contractual status of the provider, including details as regards the relevant product supplier (or, in the case of a representative, as regards the relevant provider and product supplier), to be provided in a manner which can reasonably be expected to make it clear to the client which entity accepts responsibility for the actions of the provider or representative in the rendering of the financial service involved and the extent to which the client will have to accept such responsibility.

11.3 Details of the financial services which the provider is authorized to provide in terms of the relevant licence and of any conditions or restrictions applicable thereto.

11.4 Whether a representative of a provider is rendering services under supervision as defined in the Determination of Fit and Proper Requirements.

[12] No disclosure documentation as required by section 5 was provided to the complainant or to this Office, despite requests for the respondent's full file of papers. What was provided to the Office, was communication from the respondent on the letterhead of the first respondent wherein the investment was explained. Even the investment application form reflects the broker as "H van Zyl", and not SEESA.

[13] The complainant has also confirmed that she was not informed that the second respondent was acting in his capacity as an independent broker or representative of SEESA.

Independent broker agreement

[14] The preamble of the memorandum of agreement as alluded to above, states the following:

"Whereas the SEESA Independent Broker is desirous to utilize the SEESA Group name, client information, leads and support services to procure business for the mutual benefit of both parties hereto".

[15] "SEESA Independent Broker" is defined for purposes of the agreement to mean *"the individual person, appointed by SEESA Commercial in terms of this broker agreement. The SEESA Independent Broker remains an independent contractor for the purposes of any labour legislation or practice and at no stage is an employee of SEESA Commercial".*

[16] The section of the agreement that deals with compliance provides that SEESA will provide the independent broker with support to enable the broker to comply with all the relevant legislation in respect of compliance requirements. To this extent, two courses per annum would be funded to keep up with new legislation and to be fit and proper as per FAIS requirements.

[17] Most importantly; nowhere in the agreement is it stated that SEESA takes responsibility for the action / advices rendered by the independent broker. In fact, the agreement explicitly states that SEESA will not be liable for any loss or damage that may be suffered as a result of deliberate, negligent or incomplete advice provided on any business.

Status as representative

[18] A representative is defined in the FAIS Act to mean: *"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…."*

[19] The regulator has confirmed that the second respondent was a representative of SEESA from 11 November 2005 to 22 September 2009 when he resigned.

[20] There is a clear distinction between a representative in terms of the above definition and an "independent broker" as per the agreement the second respondent concluded with SEESA. It is common cause that the second respondent did not have a license to market category 1.8 and 1.10 products. As provided for in section 13 of the FAIS Act, representatives would be allowed to market products subject to a supervisor's guidance, because he does not have a license in his own capacity to market a specific product. However, such a representative would still have to comply with the provisions of the Code of Conduct. See in this regard the decision of *Black v Moore*[1] where the former Appeals Board dealt with this question.

[21] No documentation has been provided confirming that the second respondent was acting under the supervision of SEESA, and was therefore entitled to market category 1.8 and 1.10 products. What the second respondent had with SEESA was more of a commercial agreement which allowed him access to a pool of clients in order to procure business for the mutual benefit of both entities, subject to certain conditions. This agreement explicitly excludes any liability on the part of SEESA, should it be found that the advice rendered by the "independent broker" was negligent, deliberate or incomplete.

[22] If the respondent was therefore a true representative as was intended by the Act, the agreement would have been one of supervision, where the key individual accepts responsibility for the advice rendered by its representative. In this instance, it would appear that SEESA contracted out of this responsibility. Why the second respondent was therefore registered as representative by SEESA is not clear.

[23] The only conclusion that can be made, is that the second respondent was at no time authorized, either in his own right or as a true juristic representative of a financial

[1] Decision handed down on 14 November 2014, paragraphs 18 to 23

services provider, to render any services in respect of product categories: shares and debentures.

[24] I conclude that the respondent did not act with the necessary due skill, care and diligence, and could not recommend the Sharemax product as suitable for his client's needs. This is so in light of the fact that the respondent could not lawfully market or render advice in respect of Sharemax products.

[25] Even if an argument could be made that a representative agreement existed and the second respondent was in fact appropriately licensed and acting under supervision, the advice he rendered was still negligent and not in the best interest of his client:

25.1 The respondent committed in writing to the complainant that her capital is 100% guaranteed for a period of 3-5 years. This despite the prospectus (which the respondent claimed he explained to his client) stating that the shares are unlisted and the investment is considered as a risk capital investment.

25.2 The respondent stated that the complainant was investing in a shopping mall. This is not true, since no mall existed at the time. Had the respondent understood the prospectus, he would have explained to the complainant that she would be lending her money to a company that did not own a property yet, and that the money would be lent to developers (who offered no security for the loans) to build the property. In return for this investment, she would have a "claim", which is defined in the Sharemax prospectuses as an "*unsecured subordinated floating interest rate acknowledgement of debt made by the company in favour of the shareholder".* In other words, what the complainant acquired, is nothing other than debentures[2].

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

25.3 I add that the prospectuses made it clear that the investment was far too risky, guaranteeing neither the capital nor the income. Furthermore, the complainant was never informed that the investment is in unlisted shares and debentures, products that the respondent had not demonstrated any competency in, and was a risk capital investment where the complainant could lose her entire investment.

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

E. CAUSATION

[27] I conclude that the respondent could not lawfully render advice on Sharemax products. As a result, his negligent and inappropriate advice caused the complainant's loss.

[28] As far as causation arguments are concerned, I refer to my determination *in ACS Financial Management vs Coetzee*[3], as well as the Tribunal's decision in *J G Financial Service Assurance Brokers (Pty) Ltd and another vs Robert Prigge*[4].

F. THE ORDER

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

1. The complaint is upheld.
2. The respondents are ordered to pay the complainant, jointly and severally, the one paying the other to be absolved the amount of R400 000.
3. Interest on this amount at a rate of 10% per annum from the date of determination to date of final payment.
4. The complainant is to cede her rights in respect of any further claims to this investment to the respondent.

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5. The matter will be referred to the Financial Sector Conduct Authority (FSCA) Enforcement Department for consideration in respect of the breaches of the FAIS Act and the Code.

DATED AT PRETORIA ON THIS 12th DAY OF MARCH 2019.

NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS