

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 06822/13-14/ GP 1

In the matter between:-

MAYNARD MOTSHOANE MABATLE

Complainant

and

LUCKY MOTSOTO

First Respondent

ZANELE ELSIE MOTSOTO

Second Respondent

MOTSOTO'S TRADING AND INVESTMENT (Pty) Ltd

Third Respondent

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

A. INTRODUCTION

[1] The financial services sector is at the heart of the South African economy and touches the life of each and every citizen. Financial services allow people to make daily economic transactions, save and preserve wealth to meet future aspirations and retirement needs, and insure against personal disaster.¹

[2] Indeed, as has been witnessed in several jurisdictions around the world, the financial services sector may from time to time have dubious suppliers of financial services, although their stay is always brief.

¹ A safer financial sector to serve South Africa better, 2011 National Treasury Policy Document Republic of South Africa, 23 February 2011

- [3] Compounding the problem is what David Llewellyn² calls, under investment in information by consumers and the 'free rider' argument, where all consumers assume that others have investigated the safety and integrity of suppliers of financial services. The consequence being that consumers relieve themselves of establishing the most basic information required before parting with their hard earned money.
- [4] Indeed, the complaint in this case could be said to be the epitome of a consumer being on a free rider.
- [5] The complaint arises out of an agreement to invest in shares, following advice from an employee of the respondents, one Magalane Phoshoko, (Phoshoko). Phoshoko advised complainant that the Motsotos were in the business of 'buying and selling JSE shares under high gearing securities (CFDs and Currencies) to make profit in a short period'. Phoshoko further advised complainant that he too could make a lot of money out of this investment.
- [6] Moved by the stories of success he heard from Phoshoko and his own prospects of accumulating wealth in such a short space of time, complainant sought and obtained a bank loan, the proceeds of which were invested with the respondents. Funds were paid from the complainant's bank account into a Standard Bank account ostensibly controlled by the first and second respondents jointly as CEO and Executive manager, respectively.

² Professor David T Llewellyn, Money and Banking, Loughborough University, Regulation of Retail Investment Services, Spring, 1995

[7] Indeed complainant received a copy of the 'Investment Club Agreement Application Form' he completed with the relevant terms. The form however, is only signed by complainant.

[8] It is now an established fact that notwithstanding the respondents' claim that they were licensed financial services providers, with license number 44542 printed on their firm's stationery, none of the three were ever licensed according to the regulator's records.

B. THE PARTIES

[9] The complainant is Maynard, Motshoane Mabatle, an adult male of Chiawelo, Gauteng Province.

[10] The First respondent is Lucky Matsoto, an adult male, whose full and further details are at this stage unknown to this Office. First respondent's address is 62 Duncan Street, Brenthurst, Brakpan, Gauteng Province.

[11] Second respondent is Zanele Elsie Motsoto, whose full and further details are also unknown to this Office. Second respondent's address is 62 Duncan Street, Brenthurst, Brakpan, Gauteng Province.

[12] Third respondent is Motsoto's Trading and Investment (Pty) Ltd, a private company duly incorporated in terms of the laws of South Africa, with its registered address being 62 Duncan Street, Brenthurst, Brakpan, Gauteng Province.

[13] At all times material hereto, first and second respondents were in control of the third respondent.

C. COMPLAINT

[14] According to the complainant, he concluded an investment agreement with the respondents on 31 March 2013³. In terms of the application form completed by complainant, an amount of R60 000 would to be paid to the respondents on the basis that same would be invested in the JSE and a return of 30% would be payable to complainant within 25 working days. The term selected by complainant was 75 working days, out of which complainant aimed to receive at least three payments of 30% interest.

[15] Complainant has presented proof to this Office that he indeed paid the funds into an account known as Motsoto's Trading and Investment Pty (Ltd) on 31 March 2013 following the concerned advice. Complainant says that he expected to be paid a return of 30 % at the end of April, May and June, after which, his capital would be paid in full. The application form presented by complainant to this Office supports that this is what the respondents were offering but there is no written agreement.

[16] At the time of lodging the complaint, complainant had not received anything from the investment. He claims that prior to lodging his complaint he had made several enquiries in vain. Calls to first respondent went unanswered while second respondent answered her phone and made several promises to revert, all of which came to nought. To date, complainant's capital and interest have still not been paid.

³ A copy of what complainant refers to as an agreement has been furnished to this Office with only the complainant's signature.

D. RELIEF SOUGHT

[17] Complainant seeks the return of his capital together with interest of 30% from April 2013.

E. DETERMINATION AND REASONS

[18] The issues for determination are:

- i) Did the respondents render financial services at all? If they did, was the rendering in compliance with the FAIS Act?
- ii) Did the financial services rendered cause complainant the loss complained of?
- iii) The quantum of such loss.

[19] During the course of this Office's investigation, several notices were sent to respondents inviting them to resolve the complaint with the complainant in terms of the Rules on Proceedings (the Rules). Following failure on the part of the respondents to respond, a notice in terms of section 27 (4) of the FAIS Act was sent to respondents advising them that the Office had accepted the matter for investigation and further informing respondents to provide all documents and or recordings that would support their case. The notice further indicated to respondents that in the event the complaint was upheld, they could face liability. To date, there is still no response from respondents. The complaint will be decided on the basis of the facts at hand.

[20] The regulator's records indicate that the Motsoto's had never been granted license in terms of the FAIS Act. The representation that the respondents had an FSB license number 44542 must have been calculated to mislead investors

to believe they are dealing with an authorised provider. It is reasonable to conclude that respondents knew that members of the public would have been induced by their false representation to invest their money with them.

[21] In his complaint, complainant says he was advised to invest by an employee and an old family friend, one Magalane Phoshoko, (Phoshoko). Phoshoko apparently informed complainant that the first respondent lost a lot of money whilst dabbling in investments a number of years ago. Having had his fingers burnt, Motsoto took it upon himself to learn how investments work. With his new found knowledge, Motsoto went back to invest, only this time to make large sums of money in returns. This is when the idea of running his own investment company was born.

[22] Having concluded he could make money himself, complainant decided to enter the fray with the proceeds of a bank loan he had recently obtained. He first arranged for the transfer to be made by his bank into the bank account of the respondents on 30 March 2013 and then completed an application form and on 31 March 2013.

[23] The application form briefly introduces the nature of the alleged investment activity. It reads:

'Our service: We are buying and selling JSE shares under high gearing securities (CFDs and Currencies) to make profit in a short period of time mainly up to three months....Our contract shall continue for 15 weeks which is 75 working days unless earlier termination is required and one week (5 working

days) notice should be given and 25 % early termination would be charged from deposited money. Our bank details

[24] Out of what is set out in the application form, one can at least conclude that respondents represented that they were in the business of trading in high risk securities, such as, contracts for difference, (CFDs) and currencies. Based on what is in the complainant's papers, it is not difficult to conclude that complainant in all probability did not understand what is meant and what risks are inherent in the activity claimed by respondents. A CFD is *'as an arrangement made in a futures contract whereby differences in settlement are made through cash payments, rather than the delivery of physical goods or securities. This is generally an easier method of settlement because losses and gains are paid in cash. CFDs provide investors with all the benefits and risks of owning a security without actually owning it'*⁴.

[25] Futures are more eloquently described in the unreported judgment of Absa Bank Ltd v Ukwanda Leisure Holdings (Pty)⁵ where it is stated:

'Futures and commodity options trading is among humanity's more impenetrable concepts. It involves selling what one does not own, and as a rule buying what one does not want. It is deeply shrouded in terminology that conceals its meaning. It operates in an arena where opinion is everything, where supply and demand are hard to distinguish from supposition and doctrine, and where inherent uncertainty has spawned an endless holy war between two religious—sounding antagonists, the fundamentalists and the

⁴ Definition from Investopedia

⁵ Ltd case number 2009/354146 56 HC at para 1

chartists, not to mention the new breed of computer dependent faithful. Into this world comes the general public, eager to enjoy its riches and often unprepared to become its poor.'

- [26] The one page application form presented by complainant is only signed by complainant. Respondents have not denied that the funds were transferred into their bank account. In addition, this Office has received confirmation that the amount was indeed transferred into the respondents' account.
- [27] Now it is one thing for an investor to lose money in an investment through normal market movement and quite another when money is lost in a dubious transaction. The circumstances of this case lead one to conclude that complainant's money was stolen while he held on to the prospects of becoming rich. It is fair to say complainant has lost his R60 000 and has no chance of ever recovering it.
- [28] Complainant made the investment following the advice offered by respondents, which advice was in violation of the FAIS Act. Phoshoko had no business advising the public to invest in Motsoto's scheme, which had all the hallmarks of pyramid scheme.
- [29] Complainant is now saddled with repayments of a bank loan solely as a result of riding on the basis that someone else had investigated the authenticity of the investment he put his money in. Complainant must be criticised for failing to obtain further details about Motsoto's scheme. For a start, he could have verified the license claims with the regulator. Had he done so, he would have realised that Motsoto's claims were false.

F. QUANTUM

[30] Complainant invested R60 000 and never received anything thereafter. There is no evidence that any economic activity was taking place to justify the ridiculously high returns.

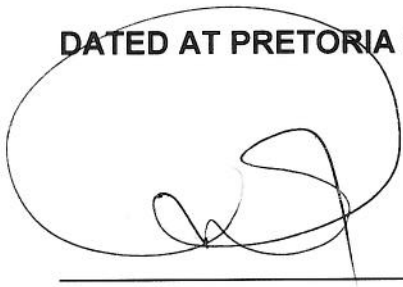
[31] It is clear that having been misled by respondents, complainant lost his capital and any interest which he might have earned had his funds been placed in a legitimate entity.

G. ORDER

[32] In the premises, the following order is made

1. The complaint is upheld;
2. The respondents are hereby ordered to pay complainant, jointly and severally, the one paying the other to be absolved, the sum of R 60 000;
3. Interest at the rate of 15.5% per annum, seven (7) days from date of this order to the date of final payment.

DATED AT PRETORIA ON THIS THE 12th DAY OF MAY 2014.


A handwritten signature in black ink, consisting of a large loop followed by a series of smaller, fluid strokes, is written over a horizontal line.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS

