THE FINANCIAL SERVICES TRIBUNAL

Case №: **FAB52/2019**

In the matter between:

SOPHIA ELIZABETH COETZER t/a DOWNSTREAM TRADING	Applicant
and	
TASHA CHRISTELLE DE BEER	First Respondent
THE FAIS OMBUD	Second Respondent

Tribunal: H Kooverjie (chair), J Pema, L Makhubela

Hearing: 25 November 2019

Decision: 14 January 2020

Summary: What constitutes fair compensation in terms of Section 28(1)(b)(i) of the FAIS Act.

DECISION

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1. This matter is before the Tribunal by virtue of the Chair's directive indicating that there was merit in the application for reconsideration. The directive recorded the following:

> "***Leave was granted. There are material factual disputes on the papers, and the conclusion of the Ombud is subject to doubt. It is not understood on what basis the Ombud rejected or ignored the applicant's allegations****.*"

2. For the purposes of this decision the parties will be referred to as set out in this application.

3. The applicant challenged the determination of the FAIS Ombud dated 26 March 2019, which ordered the applicant to pay the first respondent an amount of R750,000.00 together with interest ("***the determination***").

4. According to Ms De Beer, the applicant failed to render financial services in accordance with the FAIS Act and the General Code of Conduct ("***the Code of Conduct***"), resulting in her suffering financial loss.

5. The applicant based her application on three main grounds namely that:

   5.1 the determination of the FAIS Ombud was premature;

   5.2 the first respondent had alternative remedies by approaching court; and

   5.3 the compensation awarded is not fair if one has to take into consideration how it should be calculated.

6. The application therefore is limited to the determination on the quantum aspect. In particular, if and to what extent the first respondent suffered damages?

7. The complaint related to two "investments" one of them being the investment in Unimin African Resources (Pty) Ltd (Unimin shares). According to the applicant

the matter was already determined in court, under case number 80188/2014 (in the Pretoria High Court). The first respondent, a party in those proceedings, was cited as the eighteenth respondent therein, claiming repayment of her investment in the company, Unimin African Resources (Pty) Ltd.

8. The applicant's case is that De Beer should have sought recourse by virtue of the relief granted as per the court order. It was therefore argued the Ombud should have also taken cognisance of the aforesaid and not made a fresh determination again.

9. The first so called "investment" related to "Platfields" shares. It was argued that the amount in respect of the "Platfields" shares of 150,000 should not form part of the award as she did not suffer such actual loss. The circumstances around the Platfields shares were set out and explained in detail by the applicant.

10. In considering the matter we note from the "determination", the Ombud was aware of the aforesaid facts and recorded *inter alia* the following in the said determination:

    10.1 During 2012 Ms De Beer requested the applicant to assist her with selling her Unimin and Platfields shares. It was only then that Ms De Beer became aware that the Unimin shares were changed to ordinary shares which could not be sold and at the time, the Platfields shares were worth only R3,000.00, a fraction of the R150,000.00 invested. Furthermore, the complainant was unable to access her funds.

    10.2 In the determination it was recorded that the first respondent had unclaimed securities. She was contacted by the applicant. The applicant offered to assist the first respondent. There was an agreed upon percentage of the value of the unclaimed shares which the applicant would benefit from. It was alleged that the applicant charged a fee of 20% of the value of the transaction, being R178,000.00. The applicant alleged that the first respondent was given a discount in respect of services rendered by the applicant, thus claiming only R150,000.00 (paid in the form of the Platfields shares). The applicant further claimed that she never provided financial advice to Ms De Beer. She merely directed the first respondent to the Unimin's website. It was the first respondent who conducted her own research into Unimin.

11. The Ombud found that the applicant indeed rendered financial advice in respect of selling the Netcare shares and purchasing the Unimin shares. In discharging these obligations towards the first respondent, the applicant had a duty to comply with the FAIS Act and the General Code of Conduct.

12. Consequently the Ombud found that there was a contravention of Section 7(1) of the FAIS Act where it is required that reasonable and appropriate general explanation and the nature of the transaction must be explained to the client and that full and frank disclosure of the investment should have been made. Furthermore in terms of Section 8(1)(d) of the Code, it is required that where a financial product is to replace an existing financial product wholly or partially, the financial services provider must fully disclose to the client the actual and potential financial implications, costs and consequences to such replacement.

13. In respect of the quantum aspect, the Ombud determined that the complainant invested R600,000.00 into Unimin. The Ombud further found that with regard to the R150,000.00 that was invested in Platfields, the Platfields listing on the JSE had been terminated and there was currently no reported share price.

14. The Ombud's reasoning as to why the first respondent should be awarded compensation in the total amount of R750,000.00 was that it was unlikely that the first respondent's capital of R600,000.00 could be recovered in respect of her investment in Unimin as well as the R150,000.00 in respect of her Platfields investment.

15. Argument was proffered on behalf of the applicant, that the Ombud failed to determine the actual losses suffered by the first respondent. By virtue of the court order the first respondent was entitled to claim repayment of her investment from Unimin. There is no evidence before us as to whether Ms De Beer pursued her claim by virtue of the court order. It appears not. However it was incumbent upon the office of the Ombud to make such enquiry. If such enquiries were made, it was not recorded in the "determination".

16. Of relevance is Section 28(1)(b)(i) of the FAIS Act which provides that a complainant is entitled to <u>fair compensation as a result of financial prejudice or damages suffered</u>.

17. The FAIS Act makes it clear that the Ombud has jurisdiction where a complainant "has suffered or is likely to suffer financial prejudice or damage" or where the provider or representative has acted in a way "which is likely to result

in such prejudice or damage".[1]

18. "Financial prejudice" is however not defined in the FAIS Act. It however refers to "pure economic loss". Loss incurred essentially refers to the amount of money which had been lost.[2]

19. It was argued that the Ombud should have made enquiries to determine the current value of the shares issued to the first respondent. Such value should have been set off against the actual investment made by the first respondent.

20. We particularly note that the relevant facts were placed before the Ombud namely that:

    20.1 The Ombud appears to have considered the court order which ordered Unimin to repay the subscription of the shares to shareholders. The first respondent's explanation was recorded in the said determination. The explanation tendered by the applicant was that the company, Unimin, was ordered to repay all subscriptions, including the first respondent.

    20.2 The Ombud further took cognisance of the explanation proffered by the applicant that the complainant would be refunded for her loss and further that the applicant would appreciate the opportunity to engage with the complainant or to explore a settlement.

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1 Section 1(1) (a) and (b) of the FAIS Act – definition of "complaint"

2 Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992(1) SA 783 A 797; Ries v Boland Bank (Pty) Ltd 2000 (4) SA 955

21. We note however that the Ombud failed to address on what basis the explanations furnished by the applicant pertaining to the "investments" were not upheld.

22. We find that the Ombud's reasoning appears inconclusive in that the explanations proffered by the applicant regarding the quantum aspect were not addressed. In respect of the Unimin shares the Ombud merely found that it was unlikely that she would be able to recover her capital and in respect of the Platfields shares, there appeared no reported share price and therefore little likelihood or none that the capital can be recovered.

23. Having considered the determination and contentions raised, it is our view that the matter be remitted to the Ombud for reconsideration, particularly to consider the quantum in terms of Section 28(1)(b)(i) of the FAIS Act. In particular, to determine to what extent the first respondent suffered losses in respect of the two "investments".

24. The following order is therefore made:

    (1) The matter is remitted to the FAIS Ombud for reconsideration.

SIGNED at **PRETORIA** on this **14th** day of **JANUARY 2020** on behalf of the Panel.

ADV H KOOVERJIE SC

With the Panel consisting also of:

J Pema

L Makhubela