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Legal update 7 of 2020: Case law on financial adviser-related matters

Introduction

There have been recent cases that affect financial advisers. Below is a summary of these cases and insight into how we handle such matters. We have also included more detail on the cases in the document.

Summary

Case 1: Flowa vs Cousins (Constellation Financial Services) (case number: FSP34/2019)
The Financial Services Tribunal (FST) set aside the decision to debar a financial services representative.

- The finding: The FST found that there was no factual basis to debar the financial services representative and the correct debarment process was not followed.
- How we deal with this: Should we have to follow a debarment process for an appointed representative, we will ensure that there is factual basis for the debarment and the correct process is always followed.

Case 2: DFF Property and Investments CC t/a Bergsma and Van Heerden Brokers and H Erwee vs Kies and Ombud for Financial Services Providers (FSPs) (case number FAB59/2019)
The FSP must give appropriate advice and not sell products off the shelf.

- The finding: The FSP found that the FSP did not give appropriate advice to the client and did not comply with the General Code of Conduct. The complaint was referred to the Office of the Ombud for Financial Services (The Ombud) as it is not clear if Mrs Kies had been compensated twice.
- How we deal with this: We ensure that our appointed representatives always provide appropriate advice to our clients. If there is a complaint, we will take the necessary steps to try and resolve the complaint with the client.

Case 3: JC Mostert vs Leoni Landman and the Ombudsman for Financial Services (case number: FAB127/2018)
The adviser breached the General Code of Conduct as he did not give advice with the appropriate degree of skill and care

- The finding: The FST found that the adviser had breached the General Code of Conduct (the Code) as he did not give advice with the appropriate degree of skill and care. The FST could not find a link between the breach of the Code and the loss the client suffered and referred the matter to the Ombud for reconsideration.
- How we deal with this: We ensure that our appointed advisers always act with the appropriate degree of skill and care when giving a client financial advice.

More detail on the cases

Case 1: Flowa vs Cousins (Constellation Financial Services) (Case number: FSP34/2019)
The FST set aside the decision to debar a financial services representative.

Mr Flowa was employed by Constellation Financial Services (CFS). His employment had a restraint of trade agreement in which he had agreed not to share CFS's confidential information and not try to solicit any clients he had met through his employment with CFS.

Mr Flowa resigned from CFS in January 2019. In May 2019, while working for Intersure, Mr Flowa received an email from CFS telling him that he had breached the restraint of trade and he should stop trying to "poach" CFS clients.
Mr Flowa denied the allegation, saying he had not and did not have any intention of poaching CFS clients.

Despite Mr Flowa's denial, CFS went ahead and debarred him. CFS did not communicate with Mr Flowa about this beforehand or give him an opportunity to be a part of the debarment process. Instead, Mr Flow found out from his colleagues in the industry that he had been debarred.

On application for reconsideration of the debarment, the FST found that CFS did not follow the correct procedures for debarment. Furthermore, there was no evidence presented that could justify Mr Flowa's debarment.
According to CFS, one of its clients withdrew its mandate and CFS found this out when it was notified by the client's insurer. CFS argued that because the client had joined CFS through Mr Flowa and the referral had come through one of Mr Flowa's contacts while he was employed, the conclusion was that he must have solicited the client to join another brokerage.

Not only did CFS not give notice of the debarment proceedings, but it also refused to give Mr Flowa any documentation that supported the debarment. Instead, CFS contacted Flowa's employers for what appears to be an attempt to get support for Mr Flowa's debarment.
The FST set aside the decision to debar Mr Flowa as there was no factual basis to debar him and the correct process to debar him had not been followed.

Case 2: DFF Property and Investments CC t/a Bergsma and Van Heerden Brokers and H Erwee vs Kies and Ombud for Financial Services Providers (case number FAB59/2019)
FSPs should give appropriate advice and not sell products off the shelf.

In 2008, Mr Erwee made two investments of R500 000 and R200 000 each on behalf of Mrs Kies. The amounts were invested in two Sharemax property syndication schemes. The first was on the basis that she would get good returns and she would be able to access her money plus interest in five years. The second was to provide her with a monthly income of R2 000.

In August 2010, the property syndication ran into problems and Mrs Kies stopped receiving the income. Mrs Kies lodged a complaint with the Ombud . The Ombud referred the matter back to the parties to try and resolve it before officially accepting the complaint.

In March 2012, the Ombud received a fax from Mrs Kies saying the R500 000 property syndication problem had been resolved as she would receive an income of R2 881 per month for five years and then the capital plus interest (R576 216) would be paid out in December 2016.
The second R200 000 property syndication problem remained unresolved and on that basis the Ombud decided to proceed with the complaint. In March 2018, the Ombud ruled that the R700 000 loss Mrs Kies suffered must be paid back to her.

On application for reconsideration to the FST, it was argued that Mrs Kies had already received her money and the Ombud's ruling was actually double compensation.
This was allegedly supported by the fax that Mrs Kies sent in 2012. There was no evidence presented showing that Mrs Kies received her money and Mrs Kies denied ever receiving her money. Although the company appeared to still be active, the status of Mrs Kies' investment remained unclear despite several attempts to contact the company.
For that reason, the FST referred the case back to the Ombud for further investigation.

The FST found that the Ombud was correct in finding that Mr Erwee was negligent in investing the funds in a property syndicate. While previous Sharemax investments were successful, it did not mean that all Sharemax investments were successful. It could not be shown what type of advice was given and what considerations were taken into account. The FST stated that the General Code of Conduct for Authorised Financial Services Providers and their Representatives (the Code) makes it clear that a product must be adequate and appropriate in the circumstances of the particular financial service. The FSP should give appropriate advice and not sell products off the shelf. No proof was ever provided to show that the advice given was appropriate so the FST upheld the Ombud's ruling of negligence.

The matter was referred back to the Ombud for further investigation of the double compensation.

Case 3: JC Mostert vs L Landman and the Ombudsman for Financial Services (case number: FAB127/2018)
Dismissal of an application for reconsideration of decision to debar a financial services representative on the grounds of fraud.

In 2008 Mrs Landman, on advice from Mr Mostert, invested R650 000 in a Sharemax property syndicate. She received approximately R5 000 a month income from May 2008 to July 2010. During July 2010, Mr Mostert told Mrs Landman that Sharemax was having difficulties and would not be able to pay her income. He offered to pay her an income until the misunderstanding was resolved. He paid her several amounts until March 2012 after which the payments stopped. Mrs Landman had to sell her house to raise funds to support herself and her grandson.

Mrs Landman lodged a complaint with the Ombud. The Ombud agreed with Mrs Landman and found that Mr Mostert had advised her to invest in a financial product that was not suitable for her, bearing in mind her financial needs and risk tolerance. He was ordered to pay Mrs Landman R650 000 plus 10% interest.

Mr Mostert applied to the FST for reconsideration of the matter. The FST found that he had breached the Code by not providing Mrs Landman with a summary of the information and material the advice was based on, which financial products were considered, the financial products that were recommended with an explanation why that product was chosen and why it is likely to satisfy the client's needs or objectives.

The FST also took into account that there was no summary of record of advice given. The FST could not determine what factors, if any, were taken into account when the advice was given. It therefore found that Mr Mostert breached the Code as he did not give advice with the appropriate degree of skill and care.

Although Mr Mostert had breached the Code, there was not enough evidence that the breach caused Mrs Landman to suffer the loss. There was no evidence that Mr Mostert's breach had anything to do with the Sharemax payments being stopped. For Mr Mostert to be held responsible for the loss Mrs Landman suffered, it had to be shown that there was a link between Mr Mostert's conduct and the payments being stopped. The FST could not find such a link. There was no evidence to show that in 2008 Mr Mostert could have reasonably foreseen the loss.

The FST recommended that the Ombud consider whether it is necessary, in a matter like this one, to investigate the link between the loss and the cause of the loss and whether it is possible to get expert evidence on property syndications like this one.

The FST referred the matter back to the Ombud for further consideration.

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