

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS  
HELD IN PRETORIA

**CASE NO.: FOC 900/05/KZN/01**

In the matter between:

**RITA ABRAHAM**

**First Complainant**

**MATHEW GABRIEL ABRAHAM**

**Second Complainant**

and

**CHRISTOPHER PILLAY**

**Respondent**

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

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**Parties**

1. The First Complainant is Mrs. Rita Abraham, an adult female person, currently residing at House Number 730, Road 104, Montford, Chatsworth, KwaZulu Natal. The Second Complainant is Mr. Mathew Gabriel Abraham, an adult male person, also residing at House Number 730, Road 104, Montford, Chatsworth, KwaZulu Natal. The complainants are married to each other in community of property.
2. The Respondent is Mr. Christopher Pillay an adult male person who is an authorised financial service provider ('FSP') in terms of the FAIS Act, and carrying on business as such at Suite 13A, 13<sup>th</sup> Floor, Mercury House, 320 Smith Street, Durban, KwaZulu Natal.

### **The Background**

3. The Complainants and Respondent have known each other since 1996 through attending the same church.
4. During August 2003, the Complainants purchased dread disease cover from Old Mutual through the intermediation of the Respondent.
5. In October 2004, Second Complainant was diagnosed with a dread disease. Fortunately the condition was treatable as it was discovered at an early stage. It did not affect the Second Complainant's employment.
6. In December 2004, Old Mutual duly honoured the claim and paid out the dread disease in the sum of R250 000.00.
7. In January 2005, Respondent contacted the Second Complainant by telephone and offered to assist him with investing the proceeds from his dread disease policy.
8. The Second Complainant agreed to meet with the Respondent on 14 January 2005. On the day of the appointment, to Complainants' surprise, a certain Mr. M.R. Dennis ('Dennis') accompanied the Respondent to the meeting.

9. During the meeting, Dennis made presentations on Global Investments to the Complainants. At the end of the meeting, the Complainants sought time to think about the investment.
  
10. Two days after the meeting with the Respondent and Dennis and after having considered the advice given, Complainants telephoned Respondent informing him that they were ready to purchase the investment. Both the Respondent and Dennis went to the Complainants' house to attend to the necessary arrangements to conclude the investment agreement.
  
11. The Complainants further allege that during the meeting, the Respondent advised them that they should invest the payout with Global Investments since the return on that investment portfolio was very good, essentially recommending the investment to them. In addition, the Respondent allegedly advised them that there was a 2% guaranteed return per month on the investment and that they could draw such return in the form of monthly income should they wish to do so.
  
12. The Complainants further allege that during the second meeting, the Second Complainant enquired about the rumours that they heard about Global Investments being investigated by the South African Revenue Services ('SARS'). The Respondent and Dennis both assured them that the problem was not with Global Investments but with the investors

who were receiving income from their investments with Global Investment, which they were not declaring to SARS.

13. The Complainants invested R230 000.00 with Global Investments on 17 January 2005. They selected an option of preserving their capital for a period of a year whilst receiving a 2% guaranteed return as monthly income.
14. At the beginning of March 2005, the Complainants' received income from their investment with Global Investments in the amount of R4 600.00. This income was due and payable at the end of February 2005.
15. At the beginning of April 2005, the Complainants also received a further amount of R4 600.00. This income was due and payable at the end of March 2005. The Complainants received the two payments only after having enquired from the Respondent as to when they would be receiving their income.
16. At the end of April 2005, the Complainants did not query the income, anticipating that they would receive it late as in the previous instances. However, on the 08<sup>th</sup> of May 2005, whilst the Complainants were having lunch, one of the family members mentioned that Dennis was in financial trouble.

17. The Complainants allege that they were shocked and immediately called the Respondent to confirm whether the rumour was true. The Respondent confirmed that it was true. He promised to furnish them with more information about Dennis's problem.
  
18. Subsequent to the Respondent's advice that they should get their money from Dennis, the Complainants made an appointment to see Dennis on 9<sup>th</sup> May 2005. Dennis assured them that their investment was safe but that he could not put it in writing as he had been prohibited by SARS and the Financial Services Board ('FSB') from doing so. He asked them to be patient as the matter would sort itself.
  
19. After the aforementioned two payments, the Complainants received no further income from Global Investments. They lodged a complaint with this Office on 23 May 2005.

#### **The relief sought by the Complainants**

20. The Complaints are seeking full payment of their capital amount of R230 000 from the Respondent.

#### **Investigation by this Office**

21. Upon receipt of the Complaint, this Office dispatched a letter dated 6 June 2005 to the Respondent. A copy of the complaint was also

annexed to the aforementioned letter. In essence this letter afforded the Respondent a period of six weeks within which he should try to resolve the complaint with the Complainants. This is a normal practice followed by this Office in order to facilitate compliance with Rule 6(b) of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers ('the Rules').

22. On 20 June 2005, this Office received a letter from Respondent dated 15 June 2005 in response to the complaint. The following are pertinent points in the response:

22.1 That he could not recommend any suitable investment for the Complainants as the Second Complainant was looking for the best possible return with no term and was also intending to venture into business;

22.2 That 'the appointment in January 2005 with the Second Complainant was confirmed to discuss not only the investment but also the possibilities of getting disease cover'.

22.3 That the he had informed the Second Complainant that he would be bringing another advisor to their meeting. This is denied by the Complainants.

- 22.4 That he was not concerned about bringing another advisor to the meeting as the other advisor was registered by the Financial Services Board ('FSB') as a financial service provider;
- 22.5 That during that meeting, Dennis discussed an alternative investment with Global Investments;
- 22.6 That he (the Respondent) did not advise nor pressure the Complainants to invest with Global Investments; and
- 22.6 That he was only aware of the SARS audits. He had no knowledge of the investigations by the FSB.
23. In a letter dated 2 August 2005 in terms of section 27 (4) of the FAIS Act, this Office informed the Respondent that this matter was proceeding to investigation, as it had not been resolved and requested a response from him.
24. The Respondent replied to the aforementioned letter per letter dated 8 August 2005. In the letter the Respondent indicated that he had communicated with the Complainants. They had indicated that they intended to recoup their capital from Dennis. It turns that this is not the position by virtue of Complainants pursuing their complaint against Respondent through this Office.

## Issues

25. The issues for determination are:

25.1 Whether the Respondent rendered a financial service to Complainants in respect of their investment in Global Investments;

25.2 If so, whether the Respondent acted willfully or negligently in rendering that financial service;

25.3 If it is found that he did render the financial service negligently to the Complainants, whether his conduct caused the Complainants to suffer financial loss; and

25.4 The quantum of Complainants' damages.

## Determination and the reasons thereof

**Whether the Respondent rendered a financial service to the Complainants in respect of their investment in Global Investments?**

26. Section 1 of the FAIS Act defines rendering of a financial service as:

- a. giving advice, or
- b. giving advice and rendering intermediary service; or



c. rendering an intermediary service.

27. Taking Respondent's relationship with Complainants down the historical path, in August 2003 the Respondent clearly rendered a financial service to the Complainants when the second Complainant purchased dread disease cover from Old Mutual through his intermediation.
28. Further, when the Second Complainant lodged a claim for dread disease in November 2004, he did so through the intermediation of the Respondent. Old Mutual honoured the claim and paid the proceeds to the Second Complainant.
29. In January 2005 the Respondent sought to assist the Complainants by advising them on the investment of the money received by the second Complainant for his dread disease policy.
30. He met with the Complainants on the 14th January 2005 to discuss the investment options.
31. On the evidence of the Complainants, the Respondent clearly rendered a financial service to the Complainants. He contacted the Complainants by telephone and offered to help them with investing the proceeds of the pay out from the dread disease policy. Instead, on the day of the meeting, he brought Dennis along without consulting the

Complainants. During the meeting, he did not make it clear to the Complainants who Dennis was and who would be taking responsibility for the actions of Dennis. He however, allowed Dennis to address the Complainants on an alternative investment with Global Investments. When Complainants reached a decision to purchase the investment, they telephoned the Respondent, not Dennis, to inform him of their decision. Once again Respondent goes to the Complainant's home with Dennis to have the documents completed in order to effect the investment. At no stage did Respondent ever dissuade the Complainants from investing with Dennis. What is evident is that at all material times Respondent was aware of the nature of Dennis's business. Dennis was Respondent's former employer from January 2003 until June 2004, when Respondent left to set up his own brokerage business.

32. Section 5 (b) of Part IV of the General Code of Conduct for Authorized Financial Services Providers and Representatives ('the Code') provides:

'Where a provider ..... renders a financial service to a client, the provider must at the earliest reasonable opportunity furnish the client with full particulars of the following information and, where such information is provided orally, must confirm such information within 30 days in writing:

- (a) .....

(b) 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 regard 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.'

33. On his own version the Respondent failed to comply with the Code in this material respect, as he did not at any stage explain to Complainants who Dennis was. His status was not disclosed. Dennis himself failed to comply with Section 5(b). However, because of the broker–client relationship between the Complainants and the Respondent they accepted what Dennis was saying as he had been brought to them by the Respondent. They trusted the Respondent. It was the Respondent with whom they had a long-standing relationship.
34. When Respondent's suggestion to assist with the investment was accepted he brought Dennis to the meeting with the Complainants. He sat in on the meeting. He did nothing to disabuse the Complainants about the wisdom of investing in Global Investments. It was he who the Complainant's contacted to confirm their investment in Global Investments. It was he who arranged for Dennis to conclude the

investment at a subsequent meeting. He sat in on that meeting. It was the Respondent whom the Complainants contacted when they were concerned about Global Investments, not Dennis. The logical conclusion therefore is that it was Respondent who recommended the product and merely used Dennis to conclude the transaction.

35. There is however a dispute of fact between the evidence of the Complainants and that of the Respondent as to whether the Respondent played any more than a purely passive role in the meeting between the Complainants and Dennis on the 14<sup>th</sup> January 2005. In my view it is not necessary to resolve that dispute. Even if the role of the Respondent in the actual discussions with Dennis was passive, the Respondent can rightly be held to have rendered a financial service to the Complainants over the investment in Global Investments for all the reasons aforementioned.
  
36. The whole pattern of the Respondents conduct over the investment in Global Investments was of one approval in that investment and apparent support to the Complainants both in their meeting with Dennis and their decision to invest in Global Investments.
  
37. Pursuant to the above, it is evident that the Respondent did indeed render the financial service to Complainants which resulted in their investment in Global Investments.

**Whether the Respondent has acted willfully or negligently in rendering the financial service**

38. This aspect of the complaint revolves around the financial service rendered, and in particular, the advice given by the Respondent to the Complainants, which influenced the Complainants to invest with Global Investments.
  
39. As indicated above, Global Investments was a business that was operated by Dennis as a sole proprietor. It was an investment club that collected monies from members of the public and in turn invested such monies in other business ventures. It is evident that Dennis had no authority as required by law to act as a deposit taking institution.
  
40. Respondent's educational background and professional experience shows that he must have known or reasonably ought to have known that Global Investments was neither registered nor licensed as a deposit taking institution or registered as a Collective Investment Scheme ('CIS') as defined in Section 1 of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002) ('the CISC'). In my view, if the Respondent did not know about such important issues, he, at the very least, should have taken reasonable steps to enquire as the true state of affairs of Global Investments with regard to the aforementioned issues and to have advised the Complainant's of them.

41. The criterion used by the FSB to issue a license is the satisfaction of compliance with the fit and proper requirements as prescribed by the FAIS Act. The fit and proper requirement amongst other requirements makes provision for competency. The competency requirement is the criterion that focuses on the qualifications and experience the applicant possesses with regard to the financial products on which he is authorised to advise or provide intermediary services on to prospective clients. In terms of Respondent's licence he is authorised to advise and render intermediary services on, amongst other things, participatory interests in Collective Investments Schemes.
  
42. The Respondent completed his matriculation in 1986 and obtained his B. Com degree through Unisa in 1997. The Respondent joined Old Mutual after obtaining his B. Com degree and was employed as a senior financial advisor for 5 years, that is, from 01 October 1997 until 18 December 2002. His main areas of responsibilities were to market and sell Old Mutual's product range. Old Mutual's product range during that time included, amongst others, the CIS.
  
43. After leaving Old Mutual, the Respondent joined M R Dennis and Associates as a sales manager where he served from 02 January 2003 until June 2004. Thereafter the Respondent opened and operated his own brokerage, which he continues to operate to date hereof.

44. Based on the above, it is evident that the Respondent would have satisfied the competency element of the fit and proper requirements.

45. In order to determine whether or not the Respondent was negligent in rendering financial services to the Complainants, it is important that one should look at the common law as developed by our courts. In the case of *Durr v ABSA Ltd and Another 1997 (3) SA 448 the Appellate Division (now the SCA) per Schutz J*, at 460F-I held that lack of skill is regarded as culpable. It is important to note that the SCA was considering the following two important questions in the case:

(a) In general what is the level of skill and knowledge required from a broker?

(b) Is the standard required in judging that level that of the ordinary or average broker at large?

46. In answering the first question the SCA made reference to the principle contained in the judgment of Innes CJ in the case of *Van Wyk v Lewis 1924 AD 438 at 444* in which case the court was dealing with the negligence of medical practitioners. The relevant portion of his judgment read as follows:

‘It was pointed out by this Court, in *Mitchell v Dixon (1914 AD at 525)*, that “a medical practitioner is not expected to bring to bear

upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care". And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by *the members of the branch of the profession* to which the practitioner belongs. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that level'.

But the decision of what is reasonable under the circumstances is for the Court; it will pay high regard to the views of the profession, but it is not bound to adopt them'.

47. Given the background, education and level of experience that the Respondent has, it is expected of him to have at the very least, a basic knowledge of the requirements of the operation of the CIS and that of a deposit taking institution.
  
48. The Respondent should have established and satisfied himself that Global Investments complied with the laws applicable to the aforementioned institutions. The Respondent was negligent in that he failed to exercise even the basic level of skill and diligence required to be exercised by an average or typical broker.



**Did the Respondent's conduct cause the Complainants to suffer financial loss?**

49. The Complainants invested R230 000.00 as the original investment amount. It is clear from the evidence that the Complainants looked up to the Respondent for advice as to how the funds would be invested. But for the conduct of the Respondent, the Complainants would not have invested their funds in a scheme of this nature. The Respondent's conduct not only accounts for the factual cause of the Complainant's loss but also is the proximate cause. Out of the amount invested, the Complainants received two payments of R4 600.00 each for the months of February and March 2005. They did not receive any further payments since then. Global Investments has since been liquidated and the available funds will only be paid out in terms of the Insolvency Act, No. 24 of 1936, as amended. The conclusion is clear that the Respondent's conduct occasioned the Complainant's losses.

**Quantum of damages**

50. It is the Complainants submission that they invested the sum R230 000.00 with Global Investments. This is supported by an acknowledgement from Global Investments of receipts of such amount. I am prepared to deduct the amounts already paid as a reduction on the capital amount of the investment.

## Conclusion

51. It is clear from the evidence presented to me that the Respondent rendered a financial service to the Complainants, that he was negligent in that he failed to render the financial service with due skill, care and diligence, in the interest of the complainants and the integrity of the financial services industry.

## Order

The complaint is upheld and the respondent is ordered as follows:

- a. to pay the complainants an amount of R210 800.00 (being the amount invested less the sum of R9 200.00 already paid);
- b. to pay interest to the complainants on the aforesaid amount of R210 800.00 at the rate of 15.5% per annum from the date of the investment, being 17 January 2005 to date of final payment;  
and
- c. to pay the case fees to this Office in the sum of R1000.00 plus Value Added Tax thereon.

**Dated at Pretoria on this the 19<sup>th</sup> day of June 2006.**



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**CHARLES PILLAI**  
**OMBUD FOR FINANCIAL SERVICES PROVIDERS**

