

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO. FOC 01023/09-10/ WC 7

In the matter between:

FURNELL RICARDO ARENDS

COMPLAINANT

(In his capacity as Representative of estate of the late V E Arends

by virtue of letters of authority issued in terms of section 18(3)

of the Administration of Estate's Act 66 of 1955 as amended)

and

ANTHONY N MOSES

RESPONDENT

**DETERMINATION IN TERMS OF SECTION 28(1) (a) OF THE FINANCIAL
ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002
("FAIS Act")**

A. INTRODUCTION

[1] This case revolves around a property syndication investment made by the late V E Arends, in what is generally referred to as the Blue Pointer group of companies.

[2] An inspection of the affairs of the Blue Pointer was carried out by the Financial Services Board, who pursuant to this inspection issued a warning to consumers to be cautious when dealing with Blue Pointer.

[3] I have made reference to the FSB report in prior determinations issued by the Office, in particular the Bernard Frederick Dudley v Lifesure Financial Services FOC 04114/08/09 WC 1¹ determination which contains a brief synopsis of the report. The reader is directed thereto.

[4] Amongst the companies referred to within the FSB report is Turquoise Moon Trading 46 Limited trading as PROPDOTCOM NO.1, the entity in which Ms V E Arends purchased R60 000 rand's worth of shares in March 2005.

[5] Now not only are prior Blue Pointer determinations relevant from the perspective of the FSB report, but in addition the lack of licensing of the financial services providers, failure to perform any proper due diligence on the Blue Pointer companies and general contraventions of the FAIS Act are in most instances replicated within this group of determinations. The determination of Lorraine West v Tridev Brokers CC and Egbert Henry Oswald De Villiers, FOC 3967/07-08 WC(1) is equally illustrative thereof.

[6] Accordingly in light of the preceding paragraph I shall confine myself in this determination to some of the more pertinent breaches.

B. THE PARTIES

¹ See Dudley Pages 9 – 14 Para 18 - 23

[7] The Complainant is Furnell Ricardo Arends, acting in his capacity as a representative of the deceased estate of his late mother Mrs Valerie Evon Arends, residing at No. 58 Bothma Street Paarl, 7646.

[8] The Respondent is Anthony Moses an authorised Financial Service Provider, with licence number (FSP No.11041) of 45 Lady Grey Street Paarl.

C. THE COMPLAINT

[9] Complainant alleges that respondent acted irregularly in placing complainant's mother's retirement money in a private company which is now bankrupt.

[10] This relates to both the initial purchase of shares in Turquoise Moon and the subsequent exchange of said shares, a little over a year later into a related entity SAF Growth Limited. Ms Arends was induced to make the exchange by the offer of additional shares within SAF Growth Limited.

[11] Whilst Ms Arends received a monthly income on these shares up till her passing in May 2007, subsequently thereto income on the shares ceased and all attempts by complainant to liquidate the shares and or recover the monies have been to no avail.

[12] The amount of R60, 000.00 invested in this unlisted entity represented the substantial portion of Ms Arends life savings.

[13] At all relevant times Ms Arends acted under the advice and guidance of respondent.

[14] In effect complainant suggests that the Respondent failed to properly advise the deceased. As a result of the Respondent's failure to exercise due skill and care of a professional he held himself out to be, so the complaint goes, the Respondent lost the deceased's investment which was worth R60, 000.00.

[15] The Complainant is seeking an order from this Office compelling Respondent to refund to the deceased estate the capital together with interest. Complainant has been struggling to get the money for two years without success.

D. THE RESPONSE

[16] In terms of the rules on proceedings of the FAIS Ombud, the complaint was referred to respondent, who raised the following points in his reply.

[17] The deceased made contact with the Respondent pursuant to a referral from a minister of religion. Her initial request was for assistance on a Sanlam disability claim. She further requested assistance in claiming retrenchment benefits from her previous employer and advice on investing an amount of R100 000.00.

[18] On the 23rd of March 2005 the deceased's needs analysis was prepared and completed. The risk profile completed by respondent confirmed that the deceased was a moderate investor.

[19] The deceased decided to invest R40, 000.00 into a growth plan with Liberty Life in a fixed bond for 5 years and the remaining R60, 000.00

in an income bearing investment plan. This amount was invested in Blue Pointer/Turquoise Moon which she later transferred to SAF Growth in terms of a share exchange opportunity.

[20] Respondent contends the deceased was fully aware of the risk of investing but having no other means of income she opted for the higher income offered by Blue Pointer/Turquoise Moon as opposed to more traditional quotations from Liberty and Old Mutual, which options respondent also presented to the deceased.

[21] The Respondent submits that deceased knew from the outset that her funds were invested in shares as the signed quotation clearly states the number of shares, the signed application form for linked units makes reference to the number of shares. The signed Record of Advice and Compliance Checklist document stipulates the investment as Property Syndication, unlisted shares in Turquoise Moon Trading 46 limited.

[22] The Respondent was later informed by the Complainant that Ms Arends had deceased. Complainant gave the Respondent the original will as well as all relevant information pertaining to the above investments which he had on file and referred the Complainant to SAF Growth for transfer of the shares to the heirs.

[23] At all material times respondent alleges that he was a representative of Chris Johan Van Tonder, FSP 7895, and was licensed under Section 13 to provide advice with regard to shares, under Van Tonder's supervision.

[24] Due diligence of SA Growth/Turquoise Moon Trading 46 Limited was

also done by Mr Chris Van Tonder.

[25] Respondent denied that SAF Growth was insolvent as initially alleged by complainant and offered to assist him to sell the shares.

E. THE ISSUES

[26] The question is whether the respondent's conduct violated the provision of the FAIS Act, specifically, the duty on providers of financial services to act with due skill, care and diligence and in the interests of clients and the integrity of the financial services industry.

[27] For convenience, the question is dealt with under the following headings:

27.1. Was respondent licensed to sell shares?

27.2. Did respondent act with the necessary due skill care and diligence, more specifically, did he properly appreciate the nature of the investment and advise the deceased accordingly?

27.3. Did respondent make the required disclosures?

[28] I shall confine myself in this determination to some of the more pertinent breaches.

F. THE LICENSE

[29] Respondent contends that he acted as a representative of Chris Van Tonder who was licensed to provide shares.

[30] However an investigation revealed that no representatives were registered under Chris Van Tonder's license.

[31] I note that in addition whilst Respondent was licensed as a financial

services provider in his own right he was not so authorised to sell shares.

[32] Quite simply Respondent contravened Section 7 of the FAIS Act when he provided the financial service without being licensed to sell shares. Of particular concern is that I would expect Respondent to be familiar with the licensing requirements, being an authorised adviser and as such having gone through the licensing process himself.

[33] Once the FSP holds himself or herself out to the public as a qualified adviser, it then follows that members of the public may safely rely on the provider's services. When an FSP is licensed, it conveys to members of the public that the regulating authority has satisfied itself that the FSP is qualified to render the necessary service.

DID RESPONDENT ACT WITH THE NECESSARY DUE SKILL CARE AND DILIGENCE?

[34] Part ii Section 2 of the General Code of Conduct (the code), places a general duty on providers to render financial services, honestly, fairly and with due skill, care and diligence and in the interests of the client and the integrity of the Financial Service Industry.

[35] In the Dudley determination I stated that 'any financial services provider who intends to recommend an investment in a property syndication to a client must first obtain all the available information about the promoters as well as the financial viability of the underlying investment before the product can be presented to a client'².

² See Dudley Pages 20 – 24 Para 32

[36] Accordingly there was a duty on the Respondent to conduct a check on the SAF Growth/Turquoise Moon Trading 46 Limited Investment scheme and its related entities. This he could have done by going through the relevant documents which would have shed light on the liquidity and general financial standing of the Companies.

[37] There is no indication that the Respondent sought to establish whether any off Blue Pointer companies including Turquoise Moon Trading 46 Limited had issued any financial statements. Had the Respondent checked, he would have established that SAF Growth/Turquoise Moon Trading 46 Limited did not own any assets of value. He merely relied on Mr Van Tonder whom he claims conducted a due diligence of the respective company and its entities. This was not enough.

[38] It is also important to highlight that the Respondent did not bother to conduct even the most basic investigation on SA Growth/Turquoise Moon Trading 46 limited and its entities. He appeared blissfully ignorant as to his duties in terms of the FAIS Act, as a representative. The Respondent's conduct borders on gross dereliction of his duties as a representative, and shows negligence on his part.

[39] The respondent had a duty to specifically point out to the deceased, the downside of investing in unlisted shares. Strangely, there is no record of any written documentation reflecting the Respondent's advice on the risks involved in Blue Pointer. On the contrary, the objective evidence as before me indicates that had all the material facts been disclosed to the deceased, she would not have purchased

the investment.

DID RESPONDENT MAKE THE NECESSARY DISCLOSURES?

[40] In the Dudley determination³ I dealt in detail with the minimum mandatory disclosure requirements expected of Respondent. These are contained in Government Gazette No. 459 of 2006 issued by the Department of Trade and Industry. The disclosures are to be made by promoters of property syndications. By extension, any provider who carries in his portfolio of investment choices, property syndications as a form of investment and recommends the investment to clients must be aware of the disclosures.

[41] In terms of the FAIS Code of Conduct the provider has an obligation to disclose material information to his or her client to enable the client to make an informed decision.

[42] In that my comments as set out in the Dudley determination are mostly applicable in the present instance I do not deem it necessary to repeat them verbatim and as such refer the reader hereof to the respective paragraphs⁴.

[43] However in summation of the aforesaid, I refer to the final applicable paragraph wherein I stated that 'Upon a proper reading of the general notice it amounts to a set of guidelines which FSP's may use in order to serve members of the public more responsibly. FSPs who ignore these guidelines do so at their peril. In this particular case, the respondent appears to have conducted this transaction in complete disregard of the recommended guidelines'.

3 Dudley Pages 25- 33 Para's 33-45

4 Dudley Pages 25- 33 Para's 33-45

[44] The deceased was an elderly lay person who had no in-depth understanding of commercial transactions, including investments. She relied entirely on the information she obtained from the Respondent.

G. CONCLUSIONS

[45] On the undisputed facts before this Office the following conclusions are made:

[46] The Respondent failed to make an independent and objective assessment of the SA Growth/Turquoise Moon Trading 46 Limited product.

[47] The deceased wanted an investment and wanted a good short term option.

[48] The Respondent's Record of Advice is inadequate as it does not conform to the requirements of Section 9 of the General Code of Conduct, in particular the requirement that the provider, provide an explanation of why the product selected is likely to satisfy the clients identified needs. Respondent merely noted that it gave her 10% income, an explanation neither justifiable nor adequate in the circumstances.

[49] The Respondent did not conduct any due diligence on the Blue Pointer companies, i.e PDC/SA Growth/Turquoise Moon Limited to ensure that the deceased's funds were invested in a safe investment.

[50] The deceased was dependent on the Respondent for professional and sound advice on the appropriate investment that she needed to make.

[51] The Respondent invested the deceased's money into the SA Growth/Turquoise Moon Trading 46 Limited project, which was a high risk investment.

[52] The respondent was not qualified to deal in unlisted shares and debentures, nor was he licensed to do so.

[53] The respondent breached various provisions of the FAIS Act and General Code, and is therefore liable to the Complainant.

[54] In the premises, the complaint is upheld and the Respondent is ordered to pay the Complainant's claim.

H. QUANTUM

[55] The Respondent invested an amount of R60,000.00 of deceased's money in the SAF Growth/Turquoise Moon Trading 46 limited Project. There is no prospect of recovering any amount from these companies.

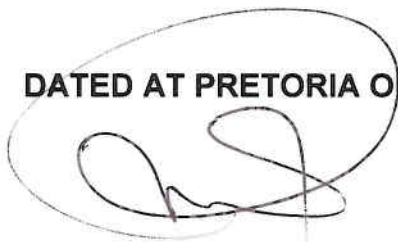
[56] Accordingly an order will be made that Respondent pay to complainant an amount of R60, 000.00. Interest will be awarded on this amount from the date of the death of the deceased to date of payment.

ORDER

The complaint is upheld and;

1. The Respondent is ordered to pay to the estate of the late Valerie Evon Arends the amount R 60, 000.00;
2. Interest on the aforesaid amount shall accrue at the rate of 15.5 per cent per annum, from the 22nd May 2007 to date of payment.
3. Respondent is ordered to pay the case fee of R1 000, 00, to this Office within thirty (30) days of date of this determination.

DATED AT PRETORIA ON THIS THE 6th DAY OF April 2011



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS