

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

Case Number: FOC 3477/07-08 WC (1)

In the matter between:-

DIANE CAROL BOTHA

Complainant

and

MAREE & ROGERS BELEGGINGS (EDMS) BPK

1st Respondent

COENRAAD FREDERICK MAREE

2nd 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] This is a complaint about an investment made into the Blue Pointer Group of companies, Turquoise Moon 48 Ltd, t/a PropDotCom 1, a property syndication company. All pertinent details about the Blue Pointer group of companies were comprehensively dealt with in the determination of BERNARD FREDERICK DUDLEY v LIFESURE FINANCIAL SERVICES C C, FAIS Reference No: 04114/08/09 WC 1, ("Dudley"). Reference will from time to time be made to that determination. As such, it follows that this determination must be read with that of Dudley.

B. THE PARTIES

- [2] Complainant is Diane Carol Botha, an adult female, residing at No.10 16th Avenue, Boston, Bellville, 7530.
- [3] First respondent is Maree and Rogers Beleggings (Edms) Bpk (Registration No. CM 98/17070/07) (1st respondent) a company duly incorporated and registered in terms of the laws of South Africa, with its principal place of business situate at Unit 19, Marshall Chambers, 130 Marshall Street, Polokwane. Whilst letters issued to complainant by the 2nd respondent were in the letterhead of 1st respondent, this Office could not find any trace of the 1st respondent's license at the time of rendering financial services.
- [4] Second respondent is Coenraad Frederick Maree, ("2nd respondent") an authorised financial services provider (license number 17202) at the time of rendering financial services who resides at 189 Blaauberg Road, Table View, 7441. 2nd respondent's license has since been suspended by the FSB as at 26 March 2010. At all times material hereto, 2nd respondent represented 1st respondent.

C. THE COMPLAINT

- [5] During March and September 2005, complainant invested amounts of R600 000 and R300 000 respectively in Turquoise Moon 48 Limited t/a PropDotCom 1 ('PropDotCom'), a property syndication, based on the advice of the 2nd respondent.
- [6] Second respondent recommended that the money be invested in a property syndication as the *'returns would be higher than those achieved by Old Mutual and Sanlam'*.
- [7] Subsequent to concluding the investments, complainant received monthly income payments during the years 2005 and 2006 and for some in time in 2007. However, in August 2007 the monthly payments stopped. The complainant was unsuccessful in re-instating her income payments and in recovering her capital.

D. THE RELIEF SOUGHT

[8] The complainant requires the return of her capital in the amount of R900 000 together with interest thereon.

E. JURISDICTION

[9] As the amount of damage sought to be recovered by complainant is more than this Office's jurisdictional limit of R800 000, the complainant agreed to forgo the amount in excess of R800 000.

F. COMPLAINANT'S VERSION

[10] During 2003, complainant and her late husband were introduced to the 2nd respondent who they appointed as their financial advisor. When complainant's husband passed away on 11 February 2005, she contacted 2nd respondent who undertook to assist her with insurance claims payable as a result of insurance policies over the life of her husband.

[11] On the 15th of February 2005, the complainant signed a letter of appointment with 1st respondent, appointing the 1st respondent as her financial advisor. A copy of the appointment letter is annexed hereto marked 'A'.

[12] During March 2005 complainant received an amount of about R600 000. At that stage she was approached by the 2nd respondent who advised her that he would assist her with investing the funds so as to provide her with a monthly income equivalent to 10% of the amount invested.

[13] Second respondent recommended an investment in a property syndication company called PropDotCom. Second respondent informed the complainant that he would send his father Mr. L.M Maree ('Moff Maree'), a director of 1st respondent to collect

the cheque and arrange to place the funds with PropDotCom. The investment was duly done.

- [14] In early May 2005, complainant contacted 2nd respondent complaining that her income was late every month. In response to the complaint, 2nd respondent informed complainant that the rentals of the properties were being paid late but that should not worry her as her investment was secure. Complainant was further informed she would not lose her money.
- [15] On the 20th of September 2005, complainant received a further R300 000 from another insurance claim. A cheque in the amount of R300 000 was collected from complainant by one Antwanette van Tonder, ('van Tonder') of PropDotCom. The amount was once again invested with PropDotCom. Thereafter, van Tonder presented complainant with two share certificates dated 4 April and 3 November 2005 respectively in respect of the two investments in PropDotCom. Copies of the share certificates are annexed hereto marked 'B1' and 'B2').
- [16] During December 2006, complainant instructed 2nd respondent to withdraw all her funds from PropDotcom because her income was continuously being paid late. However, this was not done. She continued to call 2nd respondent on numerous occasions. Second respondent however never returned her calls.
- [17] In August 2007, complainant's income payments stopped and she never received any income payments again. She called PropDotCom and was told that they had financial problems and that an entity known as Uniprop Investments was taking them over.

G. THE RESPONSE

- [18] In terms of the Rules on Proceedings of the Office, the complaint was referred to respondent to resolve. As the complaint could not be resolved, it was accepted for

investigation. The pertinent aspects of the respondents' response as presented by 2nd respondent are set out below:

[18.1] Complainant appointed 2nd respondent as her investment advisor on 15 February 2005. Second respondent furnished the complainant with all legal compliance documents on that date. His letter of introduction clearly states all the companies he is authorized to do business with and Blue Pointer or PropDotCom are not one of these.

[18.2] The risk profile worksheet in conjunction with the amount of income required by the complainant indicated that the complainant would need a medium to low risk investment with a steady monthly income. As annuities and investments with guaranteed income rates provided only for about half of the income complainant required, they decided to consider property investment as an alternative.

[18.3] He advised the complainant to diversify her portfolio as follows:

- *'Settle all liabilities R120 000*
- *Settle Bond R575 000*

Invest the remaining R700 000 as follows:

- *R80 000 in the money market*
- *R20 000 in her bank account as an emergency fund*
- *R50 000 in an Old Mutual endowment policy with low risk to ensure future funds in order to compensate for inflation*
- *R500 per month to be added to the endowment policy*
- *R500 000 to be invested in order to provide monthly income'*

[18.4] He put the complainant in contact with a sales person employed by PropDotCom and requested a presentation of its products. He sought and established information about the risk profile and FSB status of PropDotCom and established that *'Prop.Com marketing were at that stage licensed at FSB under one Chris van Tonder.'*

[18.5] According to 2nd respondent, the risk profile of PropDotCom's product was medium with guaranteed income from lease agreements with terms of five years. Although he did not personally attend the PropDotCom presentation, he was nevertheless told that all compliance procedures were followed.

[18.6] The complainant contacted 2nd respondent on several occasions about late payments and requested him to investigate. He spoke with several people at PropDotCom and conveyed the information to the complainant as it was given to him.

[18.7] The complainant asked 2nd respondent to try and sell her PropDotCom shares, but he advised her that he still does not market the mentioned company's products.

H. DETERMINATION AND REASONS

[19] The issues to be decided are:

[19.1] Whether 2nd respondent advised complainant to invest in PropDotCom;

[19.2] Whether 2nd respondent acted in a manner which is not in compliance with the FAIS Act and General Code of Conduct and/or negligently ;

[19.3] If it is found that 2nd respondent's conduct violated the provisions of the FAIS Act and or that he acted negligently, whether his conduct caused the complainants to suffer damage or financial prejudice; and

[19.4] The amount of such damage or financial prejudice.

I. FINDINGS

Whether 2nd respondent advised the complainant to invest in PropDotCom

[20] Section 1 of the FAIS Act defines advice as:

- (1) ‘... any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to a client or group of clients –
 - (a) in respect of the purchase of any financial product; or
 - (b) in respect of the investment in any financial product; or
 - (c) on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or
 - (d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase or investment in any such product,and irrespective of whether or not such advice-
 - (i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or
 - (ii) results in any such purchase, investment, transaction variation, replacement or termination, as the case may be....’

[21] It is not in dispute that after the death of the complainant’s husband on the 11th of February 2005, she appointed the 1st and 2nd respondents as financial advisors whereby 2nd respondent was representing the 1st respondent. Note that in the letter of appointment the 2nd respondent describes himself as ‘Coenie Maree of Maree and Rogers Investments’. The letter of appointment is on a letterhead of the 1st respondent. After the death of her husband the 2nd respondent assisted her with her insurance claims and to arrange for payments to be made to her as beneficiary. Second respondent, at all material times knew that the complainant was due to receive payments as beneficiary from insurance policies.

- [22] On the 2nd respondent's own version he knew that the complainant was to receive payments as a beneficiary and he was appointed to advise her on how to invest the money.
- [23] It is not in dispute that 2nd respondent assisted the complainant with financial planning and that he considered different financial products (i.e. annuities and guaranteed investments). According to the 2nd respondent these products did not satisfy the complainant's income needs and he recommended property as an alternative investment. Second respondent admits that he put the complainant in contact with an employee of PropDotCom and requested a presentation of their products. Notwithstanding this admission and notwithstanding repeated requests for an explanation from this Office, the 2nd respondent failed to explain why he introduced the complainant to PropDotCom; he also failed to explain the basis upon which he advised complainant to consider the PropDotCom product.
- [24] At all material times 2nd respondent knew that complainant was entirely incapable of making an assessment as to the appropriateness of any financial product. It cannot be disputed that she was going to rely on the advice of her financial advisor, namely the 2nd respondent. Complainant at that time was fifty years of age and had spent the last twenty four years as a housewife. Her highest level of education is standard eight. The complainant would have relied entirely on 2nd respondent's advice.
- [25] It appears from documentation received from the 2nd respondent that he had comprehensive knowledge of the complainant's financial status. He knew that she had no other source of income and was going to rely on income from her modest investment. Second respondent states that a risk profile done by him indicated that the complainant *'would need a medium to low risk capital growth with a steady monthly income'*. It was abundantly clear to the 2nd respondent that the complainant simply could not risk any amount of her capital.
- [26] According to the complainant she had never heard of PropDotCom and she knew nothing about property syndication and the nature of such investments. She stated that it was on the 2nd respondent's advice that she agreed to invest in PropDotCom.

According to the complainant 2nd respondent failed to explain the nature of the investment to her and merely told her that 'it is property, you cannot lose your money'.

[27] On 2nd respondent's version, he realised that the recommended investments would not provide an adequate income for the complainant. He then considered property investment as an alternative. On 2nd respondent's own version he knew of PropDotCom and enquired about its risk profile and FSB status. According to the 2nd respondent: 'Prop.Com marketing were at that stage licensed at FSP under Chris van Tonder. The risk profile of their product was Medium with guaranteed income from 5 year lease agreements.' On the 2nd respondent's own version he enquired about PropDotCom before he advised the complainant. In his correspondence to this Office 2nd respondent was extremely vague and failed to state how he arrived at the conclusion that the risk profile of the PropDotCom product was medium and what information he considered before concluding that the income from such investment was guaranteed. On 2nd respondent's own version, he knew very little about the risks of investing in PropDotCom. On his own version, 2nd respondent failed to make the necessary disclosures as set out in Government Gazette No. 28690, Notice No. 459 of 2006 issued by the Department of Trade and Industry, in terms of the Consumer Affairs (Unfair Business Practices) Act, 1988, (the Gazette) (**See in this regard the Dudley determination**). As a licensed provider engaged in marketing property syndication investments, 2nd respondent ought to have made those disclosures.

[28] According to the 2nd respondent his letter of introduction gives details of all the companies he is authorised to do business with. See Annexure 'A'. Second respondent points out that Blue Pointer/PropDotCom is not one of those companies. Yet, on his own version, he made enquires about PropDotCom. Second respondent also claims that he did not say that he markets PropDotCom's products. On the 2nd respondent's version he merely put the complainant in contact with a sales person employed by PropDotCom. The 2nd respondent was extremely vague about this. He failed to state who this person is and how it came about that he put the complainant in contact with this person. He claims that a meeting took place between this person and the complainant where a presentation of product was made. Second respondent

does not state when and where this meeting took place nor does he state who attended it. The 2nd respondent however denies that he attended the meeting.

[29] Complainant denies that she ever came into contact with a sales person from PropDotCom. She also denies attending any meeting where a presentation of product was made. The complainant states that the entire transaction was concluded with the 2nd respondent. The 2nd respondent filled out the application forms and even arranged for cheques to be collected from the complainant. According to the complainant, the second cheque was collected by someone whom the 2nd respondent described as a representative of PropDotCom. The first cheque was collected by the 2nd respondent's father who is also a director of the 1st respondent.

The vagueness of the 2nd respondent's response and his reluctance to provide facts to support his version leads to the conclusion that complainant's version is the more probable one.

[30] Even on the 2nd respondent's own version there can be no doubt that he advised complainant to make the investments in PropDotCom. As such it must be concluded that respondents rendered financial services to the complainant as defined in the definition section of the FAIS Act.

Whether respondent acted in a manner which is not in compliance with the FAIS Act and General Code of Conduct and/or negligently and if so, whether his conduct caused the complainants to suffer damage or financial prejudice

[31] At the outset one must look at the license status of the respondents and PropDotCom. The 1st respondent describes itself as an investment company and in its papers filed with CIPRO it described its main business as an investments and estate agency. For all purposes, the 1st respondent publicly held itself out to be a company that conducts the business of investments and financial advice. I am therefore astonished to find that the 1st respondent was not licensed by the FSB in

terms of the FAIS Act. This company was conducting business without a license. The 2nd respondent knew this and was under a duty to disclose this to the complainant. He failed to do so.

[32] At the time when the 2nd respondent advised the complainant to invest in PropDotCom, he was licensed by the FSB under license number 17202. However, the 2nd respondent's license did not authorise him to deal in unlisted shares. Accordingly when the 2nd respondent advised complainant to invest in PropDotCom he was not licensed to do so. He knew this and was under a duty to disclose this to the complainant. He failed to do so.

[33] Apart from the lack of a license, the 2nd respondent can provide no information that suggests that he had the necessary training and capacity to market the type of product offered by PropDotCom. I must accept that the 2nd respondent did not have the capacity to market these products. Another fact which was withheld from the complainant.

[34] The FSB confirmed that neither Blue Pointer nor PropDotCom are licensed financial services providers. Had the 2nd respondent made the most basic of enquires by doing an internet search on the FSB's web site or by contacting the FSB, he would have realised that neither Blue Pointer nor PropDotCom were licensed and that no representatives were listed under Chris van Tonder's license. This is what one would expect a reasonably diligent financial services provider to do. If indeed the 2nd respondent made this enquiry and found out about the license status of PropDotCom then he was under a duty to disclose this to the complainant. He did not do so.

[35] Second respondent merely chose to rely on the advices of a sales person at PropDotCom who informed him that PropDotCom operated under the license of Chris van Tonder. Having been an authorised financial services provider himself, the 2nd respondent ought reasonably to have been aware that it was not possible for a juristic person to operate under the license of a natural person.

- [36] The shares issued by PropDotCom are unlisted shares and are therefore regarded as high risk investments. The capital can only be redeemed if a willing buyer for the shares can be found. This adds to the risk. At all material times 2nd respondent must have known this and was under a duty to disclose this to the complainant. His failure to do so is negligent and in contravention of the General Code of Conduct. If he did not understand the risks associated with this investment then he was reckless in recommending the product to the complainant. This too is a contravention of the General Code of Conduct.
- [37] Not only were 1st and 2nd respondents not licensed to give advice on shares, the 2nd respondent also failed to act with due skill, care and diligence when he failed to ensure that the complainant's capital was invested in safe investments and invested in line with her risk profile. In this regard, the 2nd respondent contravened section 7 of the FAIS Act and Sections 2 and 3 of the General Code of Conduct.
- [38] I am persuaded to find in favour of the complainant in respect of both of the above-mentioned issues.
- [39] On the undisputed facts of this case it was 2nd respondent's conduct that resulted in the complainant losing her capital and income. At all material times 2nd respondent was also a representative of the 1st respondent and the 1st respondent is equally liable for the loss suffered by the complainant.

QUANTUM

- [40] The complainant lost an amount of R900 000 and received no income since July 2007. As this Office's jurisdiction is limited to R800 000, the Complainant agreed to abandon the amount of R100 000 plus the lost income to bring the amount of damage within the jurisdiction of this Office.

ORDER

The respondents are ordered to pay, jointly and severally, the one paying the other to be absolved.

- a) The amount of R800 000;
- b) Interest on the amount at 15.5 per cent per annum calculated from seven days after date of this order to date of payment;
- c) A case fee of R1 000.00 to this Office.

Dated at PRETORIA on this the 25th day of October 2010.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS