

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 00943/10-11/GP 1

In the matter between:-

PAULINA SUSANNA COETZEE

Complainant

and

ACS FINANCIAL MANAGEMENT SERVICES CC

1st Respondent

CORNELIA S.J. SNYMAN

2nd Respondent

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

A. THE PARTIES

[1] The Complainant is Paulina Susanna Coetzee, a female pensioner of Wierda Park, in Pretoria.

[2] The Respondent is Cornelia Snyman, an authorised financial services provider, and a sole member of Multi-Professional Services CC (t/a ACS

Financial Management CC, an authorised financial services provider, of Wapadrand, in Pretoria.

B. THE COMPLAINT

- [3] The complainant and respondent had a professional relationship dating back to 1999 when complainant's husband passed on. In her complaint, complainant states that she has relied on respondent for financial advice since the death of her husband. The respondent had been managing her financial affairs since then.
- [4] In 2005 the respondent advised complainant to withdraw funds from her Sanlam Investment account and invest R 530 000 in the Blue Zone Investment scheme.
- [5] According to the complainant, the respondent presented her with an income plan in which respondent indicated she would receive a monthly income of R 4 257 for a year with projected increases indicated up to the tenth year. Respondent advised complainant that payments would be made into her account by the 7th of every month.
- [6] Complainant states that she expressed concern as to whether she should not be investing in an established investment entity, however the respondent assured her that Blue Zone "was a fixed-return investment".

[7] The investment was concluded on the 3rd of November 2005. Complainant says she received monthly income until about December 2008 when payment ceased. From then onwards, she either received a reduced income or no income at all. Even in those instances where income was reduced, complainant states that it often came in late. For instance on 09 November 2009 she received a reduced income of R3 313. When complainant enquired about the reason for the discrepancy, she was told by respondent that the payments made for September and October 2009 needed some adjustment.

[8] The complainant received the last reduced payment in November 2009. Since then complainant has never received any further income from the investment. When she enquired from respondent as to the cause of the non payment, respondent informed her that Blue Zone was under judicial management. Complainant states that was the first time she heard that Blue Zone investment was experiencing financial difficulties. However, despite the difficulties, respondent assured complainant that she should not be concerned because a new investment group called Bonatla would be purchasing Blue Zone.

[9] When no further payments were made to the complainant in terms of her investment, she turned to this Office for assistance and lodged the present complainant against her broker (the respondent) for having failed to properly advise her in accordance with the FAIS Act.

[10] In her complaint, Complainant expressed concern that she stood to lose her remaining savings as a result of respondent's advice.

C. THE RESPONSE

[11] This Office then issued a statutory letter requesting the respondent to resolve the complaint with the complainant informally. However, when the complaint was not resolved, this Office then issued the notice in terms of section 27(4) of the FAIS Act requesting the respondent to submit her response together with all relevant documents in terms of the Act.

[12] In the response filed on her behalf, the respondent set out the circumstances surrounding the investment of complainant's funds. In the response she stated that complainant had capital which derived from a Guaranteed Income Plan that matured in 2005. Complainant therefore requested respondent to reinvest in a similar type of investment with Sanlam. Respondent further stated that due to the low prime interest rate throughout 2005, a guaranteed product that would have locked Complainant into a low interest investment for a further five year period was not advisable.

[13] Respondent further stated that as the complainant felt at ease with Sanlam, the alternative was to transfer the capital into Sanlam Stable Bonus fund or utilise the continuation option as a source of income. However the respondent

thought this option too was not feasible because of the complainant's specific needs.

[14] The respondent also submitted that she also recommended the Allan Gray Balanced Fund as it offered potential for both income and capital growth. However, when she pointed out to complainant that Fund Managers are allowed to have up to 75% equity exposure, complainant was averse to any kind of equity exposure.

[15] Furthermore, according to the respondent, the complainant was also not keen on the Money Market as an option because of the low level interest rate which at that time stood at 10,5%, and the Money Market rate was between 7-7,5%.

[16] The respondent stated that as none of the afore-stated considerations met with complainant's needs, the only other alternative was a property syndication investment. The respondent then decided to invest an amount of R530 000 of Complainant's money into the property syndication scheme, Blue Zone. Complainant was asked to sign a document referred to by respondent as "Investment Agreement".

[17] When asked to furnish this Office with documentation which indicated compliance with the provisions of the FAIS Act, respondent failed to do so. In addition, respondent was asked to provide copies of the following:

- (a) *Record of advice;*
- (b) *Proof that risk analysis was conducted;*
- (c) *Any further documentation which showed compliance with the Act.*

[18] However, in her response, respondent stated that she had not kept any such documentation. It is apposite to quote directly from the response furnished to this Office on behalf of the respondent:

“The signed documentation you are referring to was in Mrs. Coetzee’s instance somewhat not utilised. It is therefore not possible to furnish you with the signed versions to points 1-3 as requested. As a result, we therefore sustain with the response given and documentation provided.”

In effect, the Respondent was saying she did not keep any record of advice.

Property Syndications

[19] In the previous Determination of *Bernard Frederick Dudley v Lifesure Financial Services CC CASE NO: FOC 04114/08/09 WC 1*, I discussed at some considerable lengths the minimum statutory requirements for disclosure that must be met by a diligent financial services provider when conducting due diligence on property syndications. In *Dudley* Determination I also discussed statutory requirements that must be complied with when marketing property syndications. I went on to mention that a reasonable provider acting diligently has to ensure that these legislative requirements are met before committing a

client's funds into the particular scheme. It is worth reproducing here the discussion of the principles of disclosure as published in the *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 Practice) Act, 1988, (the Gazette):

“[33] Property syndication fraud is rife in this country, costing investors millions of rand. The legislature took positive steps by publishing legislation to prevent property syndication fraud. All financial services providers have a duty to be familiar with the legislation and apply it. The following are the minimum mandatory disclosures that respondent should have made. They are contained 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). Attached to the Gazette is Annexure A which contains the disclosures. The disclosures are to be made by promoters of property syndicates. 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. 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.

[34] The principle underlying the disclosures contained in Annexure A is set out in Clause 1 of the Gazette, thus:-

'Statements, presentations and descriptions shall not convey false or misleading information about public property syndication schemes and /or omit material information during the public offer of shares. Material information is information which an investor needs in order to make an informed decision.'

[35] Clause 2 further provides that promoters shall make available the prescribed information to investors who invest in or intend investing in public property syndication schemes. The prescribed information shall be made available to investors and or potential investors in a disclosure document. The details to be disclosed are set out in Annexure A.

Clause 3 provides that anyone who does not comply with the requirements commits a criminal offence and shall be liable on conviction, to a fine not exceeding R200 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

ANNEXURE A to the gazetted general notice sets out the minimum information to be contained in a property syndication disclosure document. It is the duty of an FSP to be familiar with these requirements before embarking on the promotion of any investment in property syndication.

[36] Clause 1 contains a specific caveat that the investor shall be informed in writing that property syndication is a long term investment, usually not less than five years. The investor shall also be informed of the substantial risk he or she carries in that the investor may not be able to sell his share should he wish to do so in future. Sub clause (b) (iii) provides that it is not the function of

the promoter to find a buyer should the investor wish to sell his shares and that it is the investor's responsibility to find his own buyer. Clearly, access to funds in this type of investment is a material issue which ought to have been disclose to a complainant. On respondents own version, this was never disclosed to complainant.

*[37] **Clause 2** deals with investor protection:*

*It provides: In addition to informing investors in writing that all funds received from them prior to the transfer/ finalisation shall be deposited into the trust account of a registered estate agent, a legal practitioner or a certified chartered accountant, it shall be clearly stated **who** controls the withdrawal of funds from the trust account.*

In addition, it is provided in clause 2 that funds shall only be withdrawn from the trust account in the event of registration of transfer of the property into the syndication vehicle, or underwriting by a disclosed underwriter with details of the underwriter; or repayment to an investor in the event of the syndication not proceeding. Apart from being aware that funds were to be deposited into Du Toit Benidell attorneys' trust account, it didn't bother respondent that it did not know who controlled the withdrawals from the trust account. This, coupled with the fact that no clear track record was known of any of the persons behind the scheme in terms of how they deal with investor funds is critical in analysing risk to the investor. As it is in this case, the promoter controlled the withdrawals from the trust account. The latter, combined with the unlicensed status of the financial services provider, had the potential to produce disaster.

[38] **Clause 2 (e)** also deals with disclosure of how any capital shortfall would be dealt with. On respondent's own version this aspect never formed part of the advice complainant received. It only learnt when making enquiries about the unpaid income that in fact only one of the intended properties was purchased which was also sold without the investors being informed. The reason furnished at the time is that the full syndicate value could not be met.

[39] **Clause 3** provides that the disclosure document must also contain a statement by the promoter regarding amongst other things, the disclosure of proper due diligence (commercially and legally) with regard to the property and its tenants that the promoter has carried out, prior to the unconditional purchase of the property. The disclosure document is to be signed and dated by the promoter. Critical to the conduct of respondent is that it never called for the disclosure document mentioned in this clause, nor was any presented to it.

[40] **Clause 4** deals with management. In addition to the full details of the syndication vehicle, the board of directors, the auditors, the attorneys and the valuer, a separate disclosure in relation to the fee structure of the management company or manager and any appointments or contracts relating to the syndication had to be made. Of the rentals collected and apart from any other reasonable expenses, there was a 5.75 % charge in respect of management fees that had to be deducted by the managing agents, Hermas and Roman. Of the 5.75%, 2.5% would go to Blue Pointer and 3.25 % was retained by the agents. What is important here, is taking into account this expenditure together with any other foreseeable expenditure, the FSP is forced to do a reality check to see whether the projected returns are realistic.

It is only with advice from a provider acting with due skill and diligence that a client would appreciate whether the attractive projected returns were not too good to be true.

*[41] **Clause 5** deals with amongst others, the structure of the company, a disclosure as to whether a shareholders' agreement exists or not and that if the latter exists, it shall be attached as annexure to the disclosure document.*

Other details to be furnished are:

- The financial year end;*
- The shares to be issues; the shares to be issued in future; control over the unissued shares; borrowing powers, shareholders' loans and or debentures; a pro-forma balance sheet on acquisition (in the case of new developments, on completion); the income distribution plan; minimum and maximum shareholder/ participation quota; any special voting rights; gearing; existing and or planned; borrowing powers and how they are to be exercised; external borrowing facilities available to investors to finance the acquisition of shares in the investment company; the amount provided in the syndication structure for working capital and reserves.*

[42] On respondent's own version, these disclosures were not dealt with. The details are critical. As it is, several amounts were being paid by shareholders to the promoter without being aware of it. I am aware that compounding the problems at Blue Pointer was the fact that no proper books were maintained and no financial statements were made available.

*[43] **Clause 6** deals with amongst other things, :-*

- *The cost of the property to the promoter or the syndication company including acquisition price;*
- *Cost of renovations, conversion or enhancement including details of any leases or lease renegotiations which enhance the value;*
- *marketing and promotional cost fees and the promoter's entrepreneurial mark up, giving rise to the shareholder offer price in the company as at the offer date **and***
- *the valuation of the property as at a date, which shall not be more than three calendar months before date of the offer, undertaken by a valuer, in accordance with paragraph 10 of the Notice.*
- *These details are necessary to enable any FSP to seriously consider whether there is any value for the investor. In addition, the FSP has the chance to consider the prudence with which the scheme is to be conducted by examining the add-ons to the acquisition price.*

*[44] **Clause 9** deals with projections. Full details for the basis used to calculate projections with regard to net income growth. These shall be based upon rental income derived from leases and or market rental growth, less specified and disclosed as well as reasonably expected expenses projections. The basis used to calculate projections on capital value. These may be stated in rand as estimates, provided they are accompanied by stated, specific assumptions showing how those values are determined. Specific projections as to capital growth are not permissible, bearing in mind the many variables influencing property values including a statement whether the validity of the assumptions used in determining projections is based on fact or opinion. The*

Notice specifically states, should a specific return be projected, it should be calculated with reference to the syndication value.

*[45] **The syndication value** is the aggregate sum of the shareholders' total interest in the syndication vehicle in terms of the disclosure document, recognising that this sum includes an appropriate premium over and above the open market value of the property asset. The quantum of the premium is to be stated. In this case it was not disclosed. Evidenced by the blatant infractions of the Code, respondent violated the general duty as set out in Part II section 2."*

[21] In the present matter, the respondent did not examine the prospectus of Blue Zone Investments to see whether they comply with the above-mentioned legislative requirements for disclosures. Had she done so, the respondent would have noticed that the prospectus of Blue Zone Investment did not comply with requirements of disclosure set out in the *Government Gazette No. 28690, Notice No. 459 of 2006*. The respondent ought to have been hesitant to commit the complainant's funds into a scheme whose promoters appeared to have failed to comply with the principles of public disclosure as set out in the regulations.

[22] The respondent should have discussed the above-mentioned disclosures with the complainant during the course of rendering financial advice. Needless to say, the respondent herself appears to have been blissfully ignorant of the existence of the regulations on public disclosures. As a result, the

complainant's attention was never drawn to the minimum disclosures as set out in the Gazette.

D. DETERMINATION AND ITS REASONS

[23] In the present matter, the respondent conceded that she did not keep any record of advice. Her failure to keep a proper record of advice constitutes a breach of the FAIS Act and the Code.

[24] The Complainant is a pensioner who had previously invested with Sanlam. Her Guaranteed Income Plan had matured in 2005. In her response, the Respondent informed this office that she had specifically been instructed by the Complainant to invest her funds in a similar type of investment.

[25] The decision to invest the Complainant's funds into a property syndication scheme appears to be at odds with the personal needs and circumstances of the Complainant. When asked by this office to furnish details of a risk analysis conducted for the Complainant which also showed that the Complainant's risk profile corresponded with the proposed product, the Respondent submitted the following answer:

“Due to her risk aversion towards equity exposure, she clearly stated that only a fixed interest type of investment will suffice. All possible alternatives were explored, but at the time, none, bar the property investment, proved to meet with her need for income as well as Capital Growth.”

[26] This Office requested the Respondent to provide information relating to any due diligence she might have conducted to determine the viability of the Blue Zone product. This was particularly significant as the Respondent on her own version was of the view that interests and needs of the complainant would be better served by the choice of product.

[27] In her response, the Respondent acted that Blue Zone Investments did not issue a prospectus when selling its investments. The reason no prospectus was issued was because these were private offerings with a minimum investment amount of R100 000, and for that reason, the products were not registered with the registrar of companies. This response is untenable. It is common cause that the Respondent decided to invest an amount of R530 000 into Blue Zone. At the time the Respondent made the decision to invest, Blue Zone was an unknown entity with no trading track record. To compound matters further, Blue Zone had not issued any prospectus. It is therefore difficult to understand on what basis Respondent decided on Blue Zone as the appropriate financial product.

[28] When advice was rendered, Respondent could not have had any objective criteria by which to judge the financial viability of Blue Zone. A respondent acting in compliance with the general duty set out in section 2 of the Code

would not have invested a client's funds to a scheme solely on the basis of projected return to the exclusion of , amongst other things, risk, liquidity, taxation and many other factors that deserve answering before such a decision is made.

[29] As part of her response, Respondent submitted that one of the tenants of the property was a "JSE listed" company. However, what the respondent fails to appreciate is that her decision to invest into a property syndication scheme was at variance with Complainant's risk profile. Moreover, the Respondent conceded that the Complainant had expressly instructed that money be invested with Sanlam. The Respondent could not give any plausible reason for ignoring complainant's request.

[30] There is no indication that the Respondent ever explained to Complainant what the risks attendants to the property syndication scheme are. As such the respondent invested complainant's funds into an entity she did not understand. That amounted to throwing complainant's funds into a dark hole.

[31] The Respondent could not explain why despite her knowledge of Complainant's circumstances, she decided to invest her money into Blue Zone. She could not say how investing Complainant's funds into property syndication suited the needs of the Complainant. On the contrary, Respondent failed to furnish any documentation which indicated how the

property syndication scheme was appropriate to the Complainant's needs and how it suited her risk profile.

Section 8(1) of the Code provides as follows:

“8. Suitability

- (1) *A provider other than a direct marketer, must, prior to providing a client with advice-*
- (a) *take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;*
 - (b) *conduct an analysis, for purposes of the advice, based on the information obtained;*
 - (c) *identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangement.”*

No proof has been provided to show that respondent complied with this section of the Code.

Section 9 of the Code sets out the following:

“9. Record of advice

- (1) A provider must, subject to and in addition to the duties imposed by [section 18](#) of the Act and section 3(2) of this Code, maintain a record of the advice furnished to a client as contemplated in section 8, which record must reflect the basis on which the advice was given, and in particular-
- (a) a brief summary of the information and material on which the advice was based;
- (b) the financial products which were considered;
- (c) the financial product or products recommended with an explanation of why the product or products were selected, is or are likely to satisfy the client’s identified needs and objectives.”

(EMPHASIS ADDED)

[32] There is no information to see the basis on which the Blue Zone product was considered appropriate to satisfy complainant’s needs. It is fair to conclude

that respondent merely sold complainant what is simply her favourite of the month.

[33] The breaches of the Act committed by the respondent directly resulted in the complainant's loss. The respondent is therefore liable to compensate the complainant for her loss. The statutory basis for such compensation is found in section 28 of the Act. In particular, in the present matter, the provisions of section 28 (1) (b) are apposite, and they provide as follows:

“28. Determinations by Ombud

(1) The Ombud must in any case where a matter has not been settled or a recommendation referred to in [section 27\(5\)\(c\)](#) has not been accepted by all parties concerned, make a final determination, which may include-

(a).....

(b) the upholding of the complaint, wholly or partially, in which case-

(i) the complainant may be awarded an amount as fair compensation for any financial prejudice or damage suffered.”

In the premises, I find as follows:

- [34] The Respondent failed to conduct any due diligence of Blue Zone Investments, the property syndication into which she invested complainant's funds.
- [35] The Respondent did not conduct any risk profile to determine the Complainant's risk tolerance or the suitability of the financial product she had chosen to invest Complainant's money into.
- [36] The Respondent failed to maintain and keep proper records of advice in terms of the Act and the Code.
- [37] The Respondent failed to comply with various provisions of the Code when she rendered advice to the Complainant.
- [38] As a result of the various breaches of the Code, the Respondent invested Complainant's money into a property syndication scheme.
- [39] Regular monthly payments that were promised to the Complainant failed to materialise when payments stopped after only few months.
- [40] The Complainant is of the view that she has lost her investment.

E. QUANTUM

[41] The First Respondent invested an amount of R530 000.00 of Complainant's money into Blue Zone Investments. Blue Zone ran into financial difficulties and the Complainant was not paid the promised regular monthly payments.

[42] Accordingly an order will be made that Respondent pay to complainant an amount of R530, 000.00, and interest will be awarded on this amount.

THE ORDER

In the premises, I make the following order:

1. The complaint is upheld.
2. The respondent is ordered to pay the complainant:
 - 2.1 The amount of R530, 000.00
 - 2.2 Interest on the amount of R530, 000.00 at the rate of 15, 5% per annum from the 01st November 2009 to date of payment.
3. Respondent is ordered to pay the case fee of R1000, 00 to this office within thirty (30) days of date of this determination.

DATED AT PRETORIA ON THIS THE 30th DAY OF MARCH 2012.

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by the name 'Noluntu N Bam' in a cursive script.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS