

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

**PRETORIA**

**CASE NO. FOC 02069/09-10/GP7**

**CASE NO. FOC 00376/10-11/GP1**

**In the matter between:**

**Frans Johannes Jamneck**

**First Complainant**

**Aubrey Jamneck**

**Second Complainant**

**and**

**H. J. Van der Walt**

**First Respondent**

**Prestigeplan Brokers CC**

**Second Respondent**

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

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**A. INTRODUCTION**

[1] The complainants are father and son who made investments through the respondents in certain companies. All of these companies were either stopped from conducting business or placed under liquidation. The complainants lost their money and lodged their complaint with this Office. The

respondents presented this office with a comprehensive response denying liability for any loss suffered by the complainants.

## B. THE PARTIES

[2] The first complainant is Frans Johannes Jamneck, an adult male pensioner of 2 Rina Street Bergbron extension 8 Roodepoort.

[3] The second complainant is Aubrey Jamneck, an adult male business person of 4 Rina Street Bergbron extension 8 Roodepoort.

[4] The first respondent is Henk van der Walt an adult male financial services provider of 7 Skyhawk Close Helderkruin Roodepoort. First respondent is a member of and key individual in second respondent. At all times material hereto, 1<sup>st</sup> respondent interacted with the complainant.

[5] The second respondent is Prestigeplan Brokers CC, a duly incorporated close corporation having its principle place of business at 7 Skyhawk Close Helderkruin Roodepoort.

The second respondent is a licensed financial services provider whose FSB licence number is 9323.

## C. THE COMPLAINT

[6] During December 2005 first complainant was introduced to the first respondent by his daughter. First Respondent was introduced as a registered financial services provider. The daughter had used the services of the respondent in the past.

According to the first complainant, the first respondent came to his house and introduced an investment in "bridging finance". First Respondent explained that the funds would be invested "with the Law Society" which would in turn advance funds to approved buyers of property to be used for transfer duty and costs.

[7] First respondent described this as a "safe investment" with very good returns. First respondent offered a return of 2% per month payable every three months. First respondent further stated that the investment may be terminated at any time on three months written notice.

[8] Pursuant to the meeting first complainant made five separate investments over a period of one year. The investments were as follows :

Date of investment	Amount invested
14/12/2004	R200 000 – 00
30/12/2005	R200 000 – 00
23/03/2006	R200 000 – 00
17/06/2006	R200 000 – 00

10/08/2006	R200 000 – 00
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[9] Second complainant invested funds as follows:

23/03/2006	R 50 000 – 00
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13/07/2006	R100 000 – 00
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[10] First complainant received “interest” from his investments in an amount of R240 000 – 00 until 20<sup>th</sup> March 2007, after which no further payments were made.

[11] Initially, the money was invested by the first respondent in an entity called Jean Multi Management and a company called Silver Falcon Trading 199 (Pty) Ltd (Silver Falcon). Thereafter the money was alleged to have been invested in a “new structure” called City Square Trading 381 Ltd (City Square 381). City Square 381 in turn lent the funds to another company called Bitflow Investments 300 (Pty) Ltd (Bitflow).

[12] Both City Square 381 and Bitflow were liquidated.

[13] The complainants then found out that their funds were not invested in the law society as was represented by the respondent.

[14] Both complainants state that they invested with the first respondent upon the latter’s advice. At all material times the first respondent was an authorised financial services provider. Their complaint is that their money was lost as a result of the respondent’s conduct and accordingly wish to be repaid their investment.

[15] It is not in dispute that the complainant's funds were eventually invested in City Square 381. The first respondent does not dispute that he sold shares in City Square 381 to the complainants. It is equally undisputed that City Square 381 was placed into liquidation and the complainants did not receive any part of their investments. The shares are worthless.

#### D. THE RESPONDENTS' RESPONSE

[16] There was no prospect that the parties could settle the matter and accordingly the matter was dealt with in terms of section 27 of the act. The second respondent is known as Prestigeplan Brokers cc (Prestige). The first respondent provides financial services to members of the public through Prestige in which he is the sole member and key individual. The respondent is a licensed financial services provider, FSB licence number 9323. This office received a written response from the respondent in which he gives reasons why he should not be held liable for the complainants' loss.

Respondent's submissions may be summarised as follows:

[17] The first respondent's first line of defence is that when the complainants invested their funds, he was not acting as a financial services provider and

that the money was not invested through Prestige. Respondent emphasises the fact that Prestige had nothing to do with this investment. First respondent therefore states that when the complainants engaged him to invest their money he was not acting in his capacity as a financial services provider as contemplated in the FAIS act.

[18] According to the respondent the funds were invested through City Square 381. Respondent admits that he facilitated the whole transaction but states that he did so as “a director and direct marketer” of City Square 381. As a direct marketer respondent was not bound by the FAIS code of conduct for FSPs.

[19] The respondent also states that at all times the complainants were aware of the fact that he was acting as a director of City Square 381 and that the funds were being invested in City Square 381.

[20] It is significant that the respondent does not deny that he initially informed complainants that the funds were to be invested in a company called Jean Multi-management serv. Pty (LTD) (Multi-management) which provided bridging finance through attorneys. The owner of this company, according to respondent, was Adam Johannes du Plooy, also known as Attie du Plooy. This description of the company in the respondents' response is incorrect. The correct reference is given elsewhere in this determination.

[21] The first respondent explained that after he had invested some of the money in Multi-management, the registrar of banks investigated the company and

stopped further investments and ordered Multi-management to refund investors' funds. In response to this Attie du Plooy then suggested to the first respondent that the latter's clients should now invest their money in a new company to be incorporated called City Square 381. The funds in City Square 381 will in turn be lent to a company called Bitflow in respect of working capital for property development. According to respondent he made this option available to his clients, including the complainants. Clients agreed to invest in what respondent calls "die nuwe struktuur". New agreements and documents were also produced and respondents furnished copies of such documents to this Office. I deal with these documents later in this determination.

#### E. THE ISSUES

[22] The following are the issues for determination:

- 22.1 Did the first respondent give advice as contemplated in the act;
- 22.2 Did the first respondent act as an independent direct marketer and not as a licensed financial services provider;
- 22.3 Whether the respondents rendered the financial service herein negligently and/or in a manner which is not compliant with the FAIS Act;

22.4 If it is found that the respondents did render the financial service negligently and/or failed to comply with the FAIS Act, whether such failure caused the complainant's loss.

## F. THE INVESTMENTS

[23] An understanding of the investment is important for purposes of this determination.

[24] Initially complainants were told that the funds would be invested in "bridging finance through attorneys". This is not disputed by the respondent who readily admits that this form of investment was made through Multi-management. I could find no evidence that any funds were ever placed in bridging finance through attorneys or the law society. Nor is it in dispute that after Multi-management stopped trading, funds were invested, according to the respondent, in loans to a company involved in property development. The only reasonable conclusion to be drawn is that there was never any investment in the law society or with attorneys. First respondent misled the complainants into believing that this was a safe investment.

[25] Eventually, after the initial investment was made complainants learned that the money was not going to attorneys. However by this time they were persuaded by the first respondent to continue to invest in his schemes.

[26] On the first respondents own version du Plooy and his company, Multi-management, were stopped from operating and ordered to repay or settle with investors. In fact Multi-management was found to be involved in a fraudulent



scheme. There is no evidence that respondent was concerned about du Plooy and the failed business of Multi-management. Instead the opposite is true. Respondent was only too pleased to become involved in du Plooy's new "structure" and even recommended investments into du Plooy's new company.

[27] This new company was City Square 381. Of significance is the identity of the directors of City Square, namely A J du Plooy, B Geer and **H J van der Walt**, the respondent himself. The A J du Plooy is Attie du Plooy. It is also worth mentioning that B Geer was also a director of Multi-management.

[28] According to first respondent, complainants' funds were invested in City Square 381 which in turn invested the money in Bitflow. Complainants were told that the money was lent to Bitflow by City Square 381 in terms of written agreements and that Bitflow was to use the money in property development. I have no evidence that Bitflow actually developed property. According to CIPRO records, Bitflow's principal business is described as a manufacturer of wooden furniture. The sole director of Bitflow is Dewan du Plooy who happens to be Attie du Plooy's son.

[29] After complainants' money was invested, two significant events took place, du Plooy resigned as a director of City Square 381 and Bitflow was liquidated. The third thing that happened is that the complainants no longer received any payments and lost their investments.

Of further significance is the fact that first respondent had invested an amount of R200 000 – 00 of first complainants money in Silver Falcon. How this

investment was made is not explained by the first respondent. What is noteworthy is that Silver Falcon was also involved in du Plooy's schemes.

[30] Du Plooy, himself, was sequestered on the 25<sup>th</sup> October 2007.

30.1 Of significance is the relationship between these companies and their respective directors. The money was first invested in Multi-management which was owned by du Plooy. When du Plooy was stopped from doing business, he started a new "structure" called City Square 381. Du Plooy and first Respondent were co directors in City Square. Du Plooy's son was a director of Bitflow.

30.2 The first respondent is a licensed financial services provider and as such should have been alarmed at the fact that the regulator deemed it necessary to close down du Plooy's activities. One would expect him to steer clear of du Plooy and the latter's activities. In particular he must be expected to keep his client's money away from du Plooy.

30.3 On the contrary, respondent became a co director with du Plooy and Geer and invested his client's money in City Square 381 and Bitflow, both du Plooy's companies.

30.4 Respondent failed to disclose these facts to his clients. In particular he failed to disclose the activities and involvement of du Plooy. At all material times first respondent was under a clear duty to disclose this to the complainants. In particular he had to disclose that he was not at arms length with City Square 381 and

- Bitflow. He had to disclose the truth about his relationship with du Plooy viz. that the latter was a business associate.
- 30.5 To put it plainly, respondent failed to disclose a clear conflict of interest. The complainants would not have invested if they knew that they were investing in du Plooy.
- 30.6 A further conflict of interest relates to first respondent being a director of the very company in which the complainants invested. Although, eventually, complainants found out that respondent was a director of City Square 381, this does not condone his conduct and certainly does not address the conflict of interest.
- 30.7 Certain agreements that were signed by the complainants in respect of the investments require scrutiny. After Multi-management was closed down an arrangement was hatched by first respondent and du Plooy whereby the investments in Multi-management and Silver Falcon would be transferred to City Square 381 in terms of written agreements of substitution and loan. Copies of these agreements were provided to this Office.
- 30.8 In a typical "agreement of substitution" City Square 381 assumed Bitflow's indebtedness to complainants. The substitution itself makes no commercial sense as all City Square 381 did was to attract a liability for which no benefit was derived for the company and its investors. It is also worth mentioning that in this agreement of substitution the first respondent himself signed on behalf of both City Square 381 and Bitflow. He gives no explanation as to how he came to sign on behalf of Bitflow as

well. By what authority he signed on behalf of Bitflow, was not revealed. The only conclusion to be drawn is that the first respondent was involved with du Plooy and the latter's schemes. By now the first respondent's judgement was entirely clouded by a conflict of interest. The agreements themselves were sham agreements made to mask the fact that investor's money in Multi-management and Bitflow was lost. Some of these agreements also involved Silver Falcon. It should come as no surprise that this was also one of du Plooy's companies.

[31] According to complainants, first respondent made them sign these agreements "to meet with reserve bank requirements". This makes no sense, as first respondent was merely misleading the complainants. Closer to the truth is that these agreements were produced in terms of the section 311 compromise, mentioned later in this determination.

Equally, complainants were requested to sign, what appear to be, loan agreements between complainants and City Square 381. These agreements make interesting reading. The agreements record that the complainant as "lender" in his capacity as "a shareholder of the borrower" lends money to the latter. The borrower being City Square 381.

The agreement then records that the borrower "is willing to pay a market related return to the lender". What is meant by a "market related" return is not defined. Then the agreement states that "interest on the loan is calculated at 24% per annum". Surely this extravagant rate is well beyond any market standard.

What is of further interest is that the complainants were told that they were purchasing shares in City Square 381, and indeed the agreements record the complainants as shareholders of City Square 381. Yet I saw no share certificates and no agreements for the purchase of shares.

[32] The respondents, as licensed financial services providers, sold shares in a company to the complainants and this amounted to financial advice as contemplated in the FAIS Act. The respondents were, at that time, not licensed to market shares.

#### G. DU PLOOY

[33] For purposes of this determination, it is important to say something about du Plooy. In his response respondent referred to the fact that Multi-management was prevented from conducting business by the Reserve Bank.

33.1 In fact the company in question is Jean Multi Management and Administration Services Gauteng (Pty) Ltd, registration no. 2003/0222834/07. This was one of du Plooy's many companies. This company was found to be conducting an illegal scheme in contravention of the Banks Act. A court order was obtained in November 2004 against du Plooy and his companies to stop conducting the business of a bank. This order was granted in the form of a rule that was returnable on the 16<sup>th</sup> August 2005. Du Plooy gave an undertaking to court that the company's loan creditors would be paid.

33.2 Before the return date, du Plooy caused an application to be launched in the High Court in terms of section 311 of the Companies Act. The application was in respect of a scheme of arrangement regarding the creditors of the company. Part of the scheme was that City Square 372 (Pty) Ltd (City Square 372) was to put up a guarantee of R211 million in order to pay the loan creditors in full. The creditors would then have a claim against City Square 372 and not Multi Management. Needless to say, this scheme did not work and City Square 372 was liquidated.

33.3 The significance of this is that the first respondent was a director of City Square 381 and must have known about the section 311 scheme. The first respondent's co-directors in City Square 381 were none other than du Plooy and Geer, both directors of Multi-management. Notwithstanding this, the respondent was quite happy, between December 2005 and August 2006, to invest complainants' funds in Multi-management and City Square 381. Even more startling is that the agreements of cession signed by the complainants at the instance of the first respondent are, in their terms, exactly the same documents that were used between Multi-management and City Square 372 in the Sec 311 compromise.

33.4 City Square 372, City Square 381, Silver Falcon, Jean Multi-management and Bitflow are sister companies. The directors in Silver Falcon are also directors in City Square 372. All these

companies, with the exception of City Square 381, use the same address. All of these companies fell under the control of du Plooy. The first respondent was aware of this. All of these companies went into liquidation.

33.5 The section 311 compromise involving Multi-management, City Square 372 and Silver Falcon was described in the High Court as a “fraudulent scheme” brought about by material misrepresentations made by du Plooy. Full details of this scheme appears in a curators report filed in the High Court, Cape of Good Hope Provincial Division under case no. 2197/07.

33.6 In effect, first respondent invested complainants’ money in a scheme that had just attracted debt in an amount of R211 million. What is alarming is that first respondent as a director of City Square 381 knew this and failed to inform his clients, the complainants. There can be no doubt that if complainants were aware of the facts they would not have invested in City Square 381, Multi-management, Silver Falcon or any of du Plooy’s other enterprises. The agreements of loan and cession that the complainants signed had nothing to do with the Reserve Bank’s requirements. They were actually part of du Plooy’s fraudulent scheme that he hatched in response to the Reserve Bank closing down Multi-management. On the facts before me, first respondent was very much part of the whole scheme. At best, first respondent knew about the scheme.

33.7 There is no doubt that first respondent and du Plooy enjoyed a business relationship. It is not disputed that the pair were co directors in City Square 381 and that first respondent knew about the business of Multi-management and that this company had run into trouble with the regulators. Of significance is the fact that respondent failed to disclose to the complainants, his own involvement with du Plooy and du Plooy's involvement in Multi-management, City Square 381, City Square 372 and Bitflow. Ironically when the whole scheme was exposed and after City Square 381 was also liquidated, the first respondent conveniently blamed du Plooy for the whole debacle.

33.8 Du Plooy is in fact notorious for having been involved in a number of failed investment schemes and for having attracted the attention of regulators. The respondent was clearly a business associate of du Plooy and must have been familiar with the latter's activities.

#### H. THE DUTY TO DISCLOSE

[34] Between the complainants, first respondent and City Square 381 there was a legal duty on first respondent as a director of City Square and as a licensed financial services provider to make a full disclosure to the complainants, and indeed other investors, of the following:



- 34.1 that du Plooy and Geer, who were directors in the failed Multi-management scheme, were directors of City Square 381;
- 34.2 that first respondent was a co director in City Square 381 with du Plooy and Geer;
- 34.3 the truth about why Multi-management was closed by the regulator;
- 34.4 that City Square 372, a sister company of City Square 381 took on a debt and provided guarantees in an amount of R211 million in one of du Plooy's schemes;
- 34.5 that Bitflow was also one of du Plooy's companies, and
- 34.6 the truth behind the signing of the cession and loan agreements.

All of the above information was available to the first respondent and he failed to make the disclosure.

There can be no doubt that the complainants would not have invested if they had this information. The inference is inescapable that first respondent deliberately withheld this information as a result of a conflict of interest.

By all accounts, at the time when complainants invested, City Square 381, like its sister companies under the du Plooy banner, was in serious financial trouble and even possibly insolvent.

[35] Of greater significance is that the first respondent approached the complainants as a licensed financial advisor of many years of experience. It is doubtful that complainants would have entertained any suggestions from the respondents if the latter were not licensed financial services providers.

#### I. CONFLICT OF INTEREST

[36] On the first respondents own version, he found himself in a conflict of interest. He was a licensed FSP and a director in the provider company. The General Code of Conduct for Authorised Financial Services Providers and Representatives, (the Code) defines conflict of interest as:

“**conflict of interest**” means any situation in which a provider or a representative has an actual or potential interest that may, in rendering a financial service to a client, -

(a) influence the objective performance of his, her or its obligations to that client; or

(b) prevent a provider or representative from rendering an unbiased and fair financial service to that client, or from acting in the interests of that client,

including, but not limited to -

(i) a financial interest;

- (ii) an ownership interest;
- (iii) any relationship with a third party;”

[37] The first respondent readily admits that he had a direct interest in City Square 381. It is also clear to me that he enjoyed a relationship with Du Plooy and Geer. On first respondents own version he was simply not capable of dealing with the complainants independently and he was unable to render an unbiased and fair financial service. This explains why first respondent invested the money in his own company which, at that time, was factually insolvent.

#### J. DIRECT MARKETER

[38] First Respondents submission that he was not acting as a member of the second respondent but as an independent director and direct marketer of City Square, must be rejected.

“Direct marketer” is defined in the Code as :

“**Direct marketing**”, means the rendering of financial services by way of telephone, internet, media insert, direct mail, or electronic mail, excluding any such means which are advertisements not containing transaction requirements.

**“Direct marketer”** means a provider who, in the normal course of business, provides all or the predominant part of the financial services concerned in the form of direct marketing”.

[39] First respondents conduct falls outside of this definition. On the first respondent’s own version he was not engaged in any direct marketing for City Square 381. He approached the complainants and personally persuaded them, as a licensed FSP, to invest in Multi-management, Silver Falcon and City Square 381.

[40] First respondent’s attempt to rely on being a direct marketer is nothing more than a feeble excuse to avoid the Code.

Even on this aspect the respondent failed to comply with any provision of sections 14 and 15 of the Code.

## K. SECTION 3 OF THE CODE

41.1 Section 3 of the act provides that material representations made by the FSP must be factually correct. In this regard the first respondent told the complainants that the funds were to be invested in bridging finance through the Law Society. This was a blatant untruth. Equally the complainants were informed that City Square 381 was investing in Bitflow which was engaged in property development. The truth was that City Square 381 and

Bitflow were part of du Plooy's scheme and more importantly City Square 372 had just acquired debt to the tune of R211 million. The representation to invest in City Square 381 equally falls foul of the Code.

41.2 Section 7(1)(a) of the Code provides that the first respondent must ,

“ provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision;”

41.3 There can be no doubt that complainants would not have invested if the first respondent told them the truth about City Square 381 and Bitflow and the involvement of du Plooy. Contrary to this provision First respondent deliberately withheld material information from complainants and certainly failed to make full and frank disclosure of the relevant information.

41.4 First respondent failed to comply with the provisions of section 8 of the Code. Absolutely no needs analysis was carried out and there is no evidence of any kind of assessment that the investment was appropriate for the complainants. On the

respondents version he was a direct marketer for City Square 381. This I rejected. In fact on the first respondents own version he merely advised the complainants to invest in Multi-management and City Square 381. No alternatives were discussed.

#### L. LICENSE

41.5 The respondents are not licensed to sell securities and instruments. First respondent readily admits that he sold shares in City Square 381 to the complainants. The respondents contravened section 7 of the Act. The first respondent certainly did not, on his own version, sell shares as a direct marketer.

41.6 On the evidence before me, the first respondent, by his conduct in this case, falls far short of the fit and proper requirements of section 8 of the Act. The complainants were deliberately misled into investing into du Plooy's scheme by the first respondent. He did not act with honesty and integrity. He knew that the complainants' money was going into a scheme that was already in trouble with the regulator and financially compromised. I have no doubt in my mind that the first respondents conduct amounted to fraud. He has brought the financial services industry into disrepute. The first respondent clearly used his status as a licensed FSP to take money from the complainants and put it into a failed company of which he was a director.

41.7 The first respondents conduct fell far short of the desired conduct as contemplated in section 16(1) and (2) of the act.

#### M. FINDINGS

[42] For reasons set out in this determination, I make the following findings:

42.1 The respondents rendered financial advice, as contemplated in the Act.

42.2 The first respondent did not render any service as a direct marketer but acted as a licensed financial services provider and as a member of the second respondent.

42.3 The respondents in rendering the service to the complainants were negligent and acted in a manner not compliant with the Act.

42.4 The aforesaid failure caused the complainants loss.

#### N. THE QUANTUM

[43] It is not in dispute that the companies in which the investments were made have been liquidated. There is no prospect that the complainants will recover their investment. Their shares in these companies are worthless.

#### O. THE ORDER

I make the following order:

In respect of both complainants the complaint is upheld.

## A) In respect of the first complainant:

Respondents are ordered to pay jointly and severally, the one paying the other to be absolved,

1. The 1<sup>st</sup> complainant lost an amount of R1000 000. As this Office's jurisdictional limit is R800 000, I can only order that he be paid an amount of R800 000. The complainant agreed to abandon an amount of R200 000.
2. Interest on the amount of R800 000 at 15.5 per cent per annum calculated from seven days after date of this order to date of payment.

## B) In respect of the second complainant :

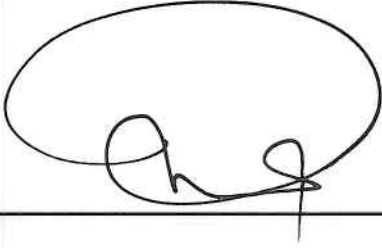
Respondents are ordered to pay jointly and severally, the one paying the other to be absolved,

1. The amount of R150 000 – 00
2. 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) The respondents are ordered to pay the total case fee of R2000-00 to this office in respect of both cases, within 30 days of date hereof.



**DATED AT PRETORIA ON THIS 30<sup>th</sup> DAY OF NOVEMBER 2010**

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a cursive 'BAM'. The signature is positioned above a horizontal line.

**NOLUNTU N. BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**

