

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

Case Number: FAIS 08320/11-12/LP 3

In the matter between:-

DAVID JOHANNES LE ROUX

1st COMPLAINANT

BLUE TYRE INVESTMENTS

2nd COMPLAINANT

and

SUZETTE BRICKHILL

1st RESPONDENT

MATHYS JOHANNES MARAIS t/a

PROTEA MAKELAARS

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 1st complainant is David Johannes Le Roux ('Le Roux'), an adult male and sole proprietor conducting a transport business in Tzaneen, Limpopo. Le Roux is also the sole member and authorised representative of 2nd complainant, a closed corporation (registration 2002/047453/23) with its principal place of

business at 32 Lex Numeri Peace Street, Tzaneen, 0850, Limpopo. For convenience, I refer to both complainants as Le Roux. Where necessary, I specify.

- [2] First respondent is Suzette Brickhill ("Brickhill"), an adult female who rendered financial services to the public on behalf of Marais from her residence at 14 Mopanie Street, White River.
- [3] Second respondent is Matthys Johannes Marais ("Marais"), a sole proprietor and authorised financial services provider (License no. 3820) who trades as Protea Makelaars ('Protea') at 6A Northern Street, Piet Retief.

B. BACKGROUND

- [4] On or about 1998, Le Roux mentioned to a family friend that he was seeking services of a short term insurance broker. Upon his friend's suggestion, Le Roux contacted Brickhill who was at that stage working as a broker for a well-known bank. Brickhill was no stranger to Le Roux as they attended the same high school. During the years that followed Brickhill assisted Le Roux with all his business insurance needs. Le Roux and Brickhill had a cordial business relationship until September 2011 when Le Roux learnt of allegations that Brickhill misappropriated her clients' insurance premiums. Le Roux was said to be one of the clients who were affected. It would appear that Brickhill's explanations in response to the allegations were not acceptable to Le Roux. This

led to the latter demanding payment of his money.¹ Brickhill's and her employer Marais' refusal to reimburse Le Roux led to the filing of the present complaint with this Office.

C. COMPLAINANT'S COMPLAINT

[5] The complainant's complaint may be summarised as follows:

5.1 According to Le Roux, Brickhill had on a number of occasions proposed that he change the premium frequency of his Santam policies from monthly to annually. In November 2010, Le Roux finally accepted Brickhill's proposal. After the latter's provision of the necessary invoices, Le Roux paid the following annual premiums to her:

In respect of a Volvo FM 9 Truck, ('Volvo'), an amount of

R14 437.50 was paid on 08 November 2010; and a further

R14 437.50, on 22 December 2010²

In respect of Blue Tyre Investments ('Blue Tyre') an amount of

R7 680 on 1 November 2010.³

5.2 On 12 September 2011, Le Roux received an e-mail from Nelize, a colleague of Brickhill. According to the e-mail, Brickhill requested that Le Roux sign a new broker's appointment with Platorand Makelaars

¹ Respondents placed *in mora* during September 2011.

² The total amount is R28 875.

³ Annual premium to cover the business.

(‘Platorand’) as there were ‘problems’ with his business insurances with Santam.⁴ During a subsequent telephone conversation with Platorand, Le Roux was informed that Santam conducted an investigation into the affairs of Brickhill following a complaint from an unnamed client of theft of his premiums. Platorand told Le Roux that Santam confirmed that the policy purportedly covering his Volvo did not exist. When Le Roux questioned Brickhill about the monies he paid to her, she responded via e-mail that she had switched the Volvo policy back to a month-to-month policy after being requested to do so by one Eldore⁵ in December 2010. Eldore had provided the banking details of the account into which Brickhill refunded the annual premium in cash. She further told Le Roux that documentation evidencing the payment vanished when a storm hit Richardsbay during December 2010.

5.3 Subsequent to lodging a complaint with this Office, Le Roux found out that the business policy too did not exist. Le Roux states he is aggrieved by Brickhill’s conduct. Le Roux quantifies the financial damage caused by Brickhill’s unlawful conduct to be R36 555.

D. RELIEF SOUGHT

[6] The complainant seeks a full repayment of the amount of R36 555, which he alleges was misappropriated by 1st respondent.

⁴ When Santam instituted an investigation into Brickhill’s affairs, she approached Platorand to take over some of her Santam clients.

⁵ Eldore is an employee of Le Roux.

E. FIRST RESPONDENT'S RESPONSE

[7] Having failed to resolve the complainant's complaint, Brickhill provided the Office with her response to the complaint as requested in terms of section 27(4) of the FAIS Act. As opposed to dealing with the complaint levelled against her, Brickhill resorted to attacking Marais (her employer) as well as the complainant (Le Roux). This appears to be an attempt to divert attention away from the allegations of theft and fraud made against her. Nevertheless, what follows is a summary of Brickhill's response:

7.1 According to Brickhill, Marais appointed her as a representative of Protea on 01 May 2001. As her income was commission-based, she had to source her own clients and do her own administration.

7.2 Brickhill avers that in the ten years that she was employed by Marais, she never worked under supervision. She worked from her residence and only received two half hour visits from Marais in 2010 and 2011, during which he inspected two of her files. She further states that she neither received any formal training during her employment nor was she qualified to render financial services. In order to up-skill herself Brickhill enrolled for a commercial course and a Santam personal lines course in 2001 and 2006, respectively. Although she managed to acquire 61 credits, she later learnt that she did not meet the competency requirements of the FAIS Act to render financial services. This ultimately led to her being dismissed by Marais in 2011.

- 7.3 Marais failed to provide her with an employment agreement, a mandate, as well as a copy of his licence. Furthermore, Marais failed to list her as a representative of Protea with the Registrar of Financial Services Providers. Brickhill contends that as a result of Marais' said failures she was ignorant of her legislative obligations. She states that Marais as an FSP is responsible for her conduct.
- 7.4 Brickhill asserts that Santam issued separate agent codes to her and her colleague (Nelize) on request of Marais. However, Santam failed to ensure that they were in fact registered as representatives under Marais' FSP license and simply issued policies as and when requested.
- 7.5 Brickhill states that there were a number of instances where she was pressured by Le Roux to ensure that claims lodged under his personal policy were honoured although he did not enjoy cover. Brickhill is of the view, that Le Roux should declare his false claims to Santam before he accuses her of theft.
- 7.6 According to Brickhill she has no documentation to assist the Office with its investigation. Everything in her possession was handed to Santam following their investigation into her affairs. Brickhill asserts that she is unemployed since July 2011. She blames Marais who sent letters to clients informing them that she was charged with fraud for her inability to find employment.

F. SECOND RESPONDENT'S RESPONSE

[8] Marais' response to the complaint may be summarised as follows:

8.1 According to Marais, he employed Brickhill as a representative of Protea on 1 May 2001. Before her appointment, Brickhill had eight years' experience of working as broker at a well-known bank. Marais asserts that he provided Brickhill with in-service training during 2001 and visited her office on a monthly basis from 2002 to 2004. Marais conducted quarterly audits on Brickhill's client files until 2005 when he switched to annual audits. Marais further states that on his visits to Brickhill's office every six to eight weeks, they would discuss pending and finalised claims. All insurance claims were sent directly to him per e-mail by Santam.

8.2 Marais states that it appears from a forensic investigation report of Santam, that Brickhill started committing fraud during January 2010. Her *modus operandi* was to recruit new clients and then persuade them to pay annual premiums on their policies. Brickhill would provide clients with false invoices created on Protea letterheads using Santam's VAT number and her own banking details. Unbeknown to the clients they paid monies into Brickhill's personal bank account. Marais asserts that the files of those clients who were defrauded by Brickhill were not kept in her office; as such he was unaware of their existence.

8.3 Marais asserts that he had measures in place to prevent fraud, but according to him Brickhill was so cunning and dishonest that she still managed to commit fraud. After Brickhill's dishonesty was discovered, she

was immediately dismissed. Marais contends that he should not be liable for Le Roux's loss as Protea never had any intention to deceive clients and did not benefit from Brickhills actions.

Investigation by the Office

Enquires made with Santam

- [9] Upon request, Santam provided the Office with a report of their investigation. According to the report, in July 2011 Santam received information from a client who alleged that Brickhill stole his money after requesting him to pay an annual premium on his policy into her bank account.
- [10] Santam instituted an investigation and discovered that there were a number of clients who paid money to Brickhill after she requested them to pay annual premiums on their Santam policies. It is alleged that Brickhill made use of fabricated tax invoices and policy schedules to deceive clients into thinking that they were insured. According to the report neither Brickhill nor Marais had a mandate to collect premiums on behalf of Santam. Further evidence uncovered raised suspicion that various other acts of dishonesty might have been committed by Brickhill. Santam opened a fraud case against her and reported the matter to the Registrar.

Enquiries made with the Registrar

[11] The Registrar confirmed that following receipt of Santam's report it entered into a settlement agreement⁶ with Marais. In terms of the agreement, Marais was ordered to pay an administrative penalty of R150 000 for the following contraventions:-

- i. Section 13(3) of the FAIS Act – Failure to maintain a register of representatives and key individuals, which must be regularly updated and made available to the registrar for reference or inspection purposes;
- ii. Section 17(1)(a) of the FAIS Act – Failure to appoint a compliance officer to monitor compliance with the Act by the provider or its representatives, particularly in accordance with the procedures contemplated in subsection (3)⁷, and to take responsibility for liaising with the Registrar.
- iii. Section 2 of the Code⁸ - Failure to act with due skill, care and diligence, and in the interest of clients and the integrity of the financial services industry.
- iv. Section 11 of the Code - Failure to efficiently employ resources, procedures and appropriate technological systems that can reasonably be expected to eliminate, as far as reasonably possible, the risks that clients, product suppliers and other providers or representatives will

⁶ As contemplated in Section 6B (7)(A) of the Financial Institutions (Protection of Funds) Act, No 28, of 2001.

⁷ In terms of Section 17 (3) of the FAIS Act 'An authorised financial services provider must establish and maintain procedures to be followed by the provider and any representative concerned in order to ensure compliance with the Act.

⁸ General Code of Conduct for Authorised Financial Services Providers and Representatives.

suffer financial loss through **fraud, theft**, other dishonest acts, poor administration, negligence, professional misconduct or culpable omissions. (own emphasis).

G. DETERMINATION AND REASONS

[12] The essential questions are:

- i. Whether there is sufficient evidence for finding on a balance of probabilities that Brickhill misappropriated monies paid to her by Le Roux, which caused him to suffer financial loss;
- ii. If it is indeed found that Brickhill caused Le Roux to suffer financial loss, whether both respondents should be held liable for the loss.

Documentary evidence

[13] Le Roux's provided the Office with two tax invoices in support of his complaint. The invoices were sent to him by Brickhill when he agreed to pay annual premiums on his Santam policies. The invoices contain *inter alia* the following information⁹:

PROTEA INSURANCE BROKERS

TAX INVOICE

SANTAM VAT NUMBER - 4440102095

DJ LE ROUX

POLICY NUMBERS - 63120058792 & 20058792

INSURER - SANTAM

⁹ Translated from Afrikaans.

ANNUAL PREMIUM - R28 875-00

R7 975-00

In his response to the complaint, Marais made it clear that the invoices issued to Le Roux are fictitious. Santam confirmed that they have never issued policies with numbers 63120058792 & 20058792. Furthermore, Brickhill and/or Protea:

- Did not have a mandate to collect cash premiums;
- Is/are not empowered to give any cover of risk;
- Is/are not mandated to bind Santam to any agreements;
- Is/are neither mandated to enter into short-term policies nor amend such policies.

[14] Bank statements provided to the Office by Le Roux show that that the following amounts were transferred to Brickhills' personal bank account held at FNB¹⁰.

08 November 2010 - R14 437.50

22 December 2010 - R14 437.50

01 November 2010 - R7 680

Cause of Loss

[15] When confronted by Le Roux about the alleged theft of his premiums, Brickhill counteracted that the annual premiums paid to her were refunded by means of

¹⁰ FNB confirmed that the bank account to which the monies were transferred is Brickhill's personal bank account.

a cash deposit into Le Roux's bank account. Brickhill told Le Roux that documentation evidencing payment was lost during a storm which struck Richards Bay in December 2010. How exactly the storm caused the documentation to mysteriously vanish is unclear. Nevertheless, if the refund was indeed made by Brickhill, the transaction could have been easily traced by the bank accepting the deposit. To date, Brickhill failed to provide proof that the payments were made to Le Roux.

[16] In her response to the complaint, Brickhill failed to address any of the allegations made against her by Le Roux as well as Santam. She evaded all the Office's questions relating to alleged theft and fraud. Instead, in attempt to shift focus she levelled accusations against Marais of non-compliance with the FAIS Act and accused Le Roux of instituting false insurance claims. The reason for Brickhill's failure to deal with the allegations can only be the overwhelming evidence against her. By issuing fabricated invoices to Le Roux, Brickhill deceived him into parting with his money. I am persuaded that no refund ever took place as alleged by her. There's also no question that she indeed misappropriated the annual premiums paid to her by Le Roux resulting in him suffering financial damage. She also had no authority to collect premiums from clients and she was fully aware of this but deliberately provided falsified information to unsuspecting clients in order to carry out her scheme.

Liability

[17] Having found that Brickhill caused Le Roux to suffer financial loss, liability must be dealt with. It is not in dispute that Marais allowed Brickhill to render financial

services to the public whilst not being registered with the Registrar as his representative in terms of Section 13 of the FAIS Act. In simple terms Brickhill had no business rendering financial services to the public and both Marais and Brickhill were fully aware that they were violating the law in this regard. She also did not have the requisite qualifications to render financial services without supervision.¹¹ On Marais' own admission, since 2005, he conducted audits on Brickhill's clients' files only once a year and visited her every six to eight weeks to discuss pending and finalised claims. Marais was obliged to have entered into a supervisory agreement with Brickhill that detailed the procedures regarding the rendering of services under supervision.¹² Marais was also required to ensure that Brickhill was supervised at all times when executing her duties, which included the observation of selected meetings of Brickhill and her clients as well as the assessment of advice given by her.¹³

[18] Apart from his obligation to have properly supervised Brickhill¹⁴, Marais was also required to have taken reasonable steps to ensure that she complied with the Code¹⁵ and to have efficiently employed resources, procedures and technological systems to eliminate as far as reasonably possible, the risk that clients might suffer financial loss.¹⁶ Marais failed to discharge these obligations. Marais basically left Brickhill to her own devices to do what she pleased to the

¹¹ See Board Notice 104, Government Gazette 15 October 2008.

¹² Section 9 (b) of Board Notice 104, Government Gazette 15 October 2008.

¹³ Section 9 (c) of Board Notice 104, Government Gazette 15 October 2008.

¹⁴ Ibid.

¹⁵ As required by Section 13(2)(b) of the FAIS Act.

¹⁶ As required by of Section 11 of the Code.

detriment of the public. Marais did not even bother to register her with the Registrar. For these reasons, I am compelled to not only hold 1st respondent, but also the 2nd respondent liable for the losses suffered by the complainants. Section 13(1)(b)(i)(bb) of the FAIS Act stipulates that '.....the provider accepts responsibility for those activities of the representative¹⁷ performed within the course and scope of, or in the course of implementing, any such contract or mandate....' .

[19] I therefore intend to make an order against both respondents based on their flagrant disregard of the law as evidenced in this determination. Both respondents' conduct can only serve to undermine the integrity of the financial services industry. Even at a point when complainant made a case against the two, they still refused to pay him his premiums, notwithstanding the obvious flouting of the law on their part. Brickhill knew all along that she had defrauded the complainants and had no basis in law for holding on to complainants' funds. Marais actions were the underlying reason that exposed clients to theft by unleashing the untrained, unsupervised and unregistered Brickhill to the public.

H. ORDER

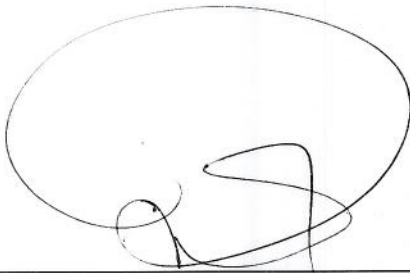
[20] In the premises the following order is made:

1. The complaint is upheld;

¹⁷ Brickhill was employed by Marais and rendered financial services to Le Roux. In terms of Section 13(6) of the FAIS Act: 'A person who on the date contemplated in Section 7(1) complies with the requirements of this Act for a representative and on such date acts as employee of mandatory for any person who on or after such date becomes an authorised financial services provider, is for the purposes of this Act.....regarded as a representative'

2. Respondents are hereby ordered to pay, jointly and severally, the one paying the other to be absolved, to 1st complainant the amount of R28 875 and to 2nd complainant the amount of R7 680;
3. Interest at a rate of 15, 5% per annum, from 30 September 2011 to date of final payment;

DATED AT PRETORIA ON THIS THE 7th DAY OF OCTOBER 2013.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS

