IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA **CASE NO: FOC 3345/06-07 FS (1)**

In the matter between:

JF MARITZ	**1ST COMPLAINANT**
MS MARITZ	**2nd COMPLAINANT**
and	
MARIUS JACOBS	**1st RESPONDENT**
RAYMOND DANIEL DE VILLIERS CC	**2ND RESPONDENT**
JAR FINANCIAL SERVICES (Pty) Ltd	**3rd RESPONDENT**
RAYMOND DANIEL DE VILLIERS	**4TH RESPONDENT**

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

A. THE PARTIES

[1] The 1st complainant is Johan Frederik Maritz, a pensioner residing at 26 Jacob Street, Universitas, Bloemfontein.

[2] The 2nd complainant is Maria Susanna Maritz, a pensioner, married in community of property to the 1st Complainant, residing at 26 Jacob Street, Universitas, Bloemfontein.

[3] The 1st respondent is Marius Jacobs an authorised financial services provider in terms of the FAIS Act of 23 Kaapse Nooi Street, Pellissier, Bloemfontein.

[4] The 2nd respondent is Raymond Daniel De Villiers CC, a close corporation duly incorporated in terms of the laws of South Africa, with its principal place of business situated at The Suites, Pretty Gardens Centre, corner of Du Plessis and Faan Ferreira Avenues Bloemfontein. 2nd Respondent is an authorised financial services provider in terms of the FAIS Act with license number 10803 and is duly represented by its key individual, the 4th respondent.

[5] The 3rd respondent is JAR Financial Services (Pty) Ltd a company registered in terms of the company laws of the Republic of South Africa and having its registered address at 23 Donald Murray Avenue, Park West, Bloemfontein. 3rd Respondent is duly represented by its director the 4th respondent.

[6] The 4rd respondent is Raymond Daniel De Villiers, adult male, a director of JAR Financial Services (Pty) Ltd ('JAR'), and key individual

of 2nd respondent herein.

B. THE COMPLAINT

[7] Complainants are claiming an amount of R283 000.00 together with interest from respondents. The sum constitutes funds invested on the advice of 1st respondent in the 3rd respondent, JAR Financial Services (Pty) Ltd company. The complaint was initially directed against 1st respondent but during the course of investigation it became necessary to add the 2nd, 3rd and 4th respondents and, for reasons that will become clear later, join them as parties in this matter.

[8] Pursuant to a meeting with 1st respondent on 7th October 2004, and acting on his advice, complainants invested R77 000 and R206 000 respectively in participation bonds. This investment was made in 3rd respondent company.

[9] Complainants had previously invested in an entity known as Taakmeesters Trust ('TMT')[1] on 1st respondent's advice. At the meeting mentioned in paragraph 8 they were informed that this was no longer available, but that 4th respondent had informed 1st respondent that investments in participation bonds were now available with 3rd respondent.

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1. 4th Respondent along with a Mrs Hermien Prinsloo, was a trustee of TMT in addition to his role as a director of 3rd respondent. These prior investments in TMT preceded the implementation of the FAIS Act and fall outside my mandate.

[10] At the meeting and in accordance with his practice 1st respondent phoned 4th respondent to confirm the availability of the investment as well as the applicable interest rate.

[11] The purpose of the investment was to derive interest income. Complainants are pensioners of limited means and other than a residence which they own outright and some small investments, subsist on a combined monthly pension of approximately R3 300 per month.

[12] Complainants were repeatedly advised by 1st respondent that TMT and 3rd respondent are low risk investments with a capital guarantee. In support thereof complainants attached a list, apparently provided by 1st respondent detailing the number of clients that he had invested with 2nd, 3rd and 4th respondent.

[13] However in a letter dated 22 July 2005, the subject matter whereof is headed 'TAAKMEESTERSTRUST/JAR BELEGGINGS' 1st respondent addressed urgent correspondence to complainants advising them to withdraw all investments made in 'TMT Trust/JAR'. This letter refers to the fact that the preceding month's rental had not been paid out on time.

[14] Complainants called up their investment, but only received an amount of R150 000 out of a total of R614 000 invested between TMT and 3rd

respondent.

[15] Around March 2006 complainants approached their attorneys, who in turn contacted the directors of 3rd respondent. Arising out of this JAMES ANDREW CALLIS, previously a director of 3rd respondent, and an attorney practicing as CALLIS ATTORNEYS in Bloemfontein provided an affidavit the gist whereof states as follows:

15.1 3rd Respondent was set up by Raymond Daniël De Villiers, his brother Leon De Villiers and James Callis as a structure for an anticipated property syndication company. This, however never came to fruition,

15.2 After being informed by complainants' attorneys of their investment Callis discussed the matter with Raymond Daniël De Villiers and Mrs Hermien Prinsloo[2]. This revealed that on the 8th October 2004 amounts of R77 000 and R206 00 were paid into 3rd respondent.

15.3 Documentation completed in the name of 3rd respondent confirmed that the funds were received from complainants. Callis states that he reacted with shock in that it was not the intention of 3rd respondent to take in any investments of this type.

15.4 Mr de Villiers and Mrs Prinsloo explained that there had been a mistake on their part and that the monies should have been invested in TMT.

15.5 Callis then asked Mrs Prinsloo for an explanation of what happened to the funds and was informed that the total amount received on 8th October 2004 had been paid out on the same day in the amounts of

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2 A trustee of the TMT trust

R130 000 and R153 000. The amounts were paid out to the Beanstreet Trust and the Taakmeesters Trust respectively.

15.6 Callis is of the opinion that these monies were deposited dishonestly in the bank account of 3rd respondent and then dishonestly paid across to the TMT Trust or the Beanstraat Trust.

[16] In a letter from Callis Attorneys to complainants' attorneys dated 14 August 2007 Mr J A Callis stated that he had resigned as a director of 3rd respondent, and that to the best of his knowledge the company possessed no assets.

[17] Complainants contend[3] that in order for the investment to be made in participation bonds as advised by 1st respondent, 3rd respondent, should have been registered in terms of the Collective Investment Schemes Act 45 of 2002.

[18] Additionally complainants contend that there are no assets, investments, mortgage bonds or participation bond collective schemes registered in the name of 3rd respondent, and hence 1st respondent should have realised that 3rd respondent was in no position to receive complainants investments.

C. 1st RESPONDENT'S VERSION

[19] In early October 2004 1st complainant contacted 1st respondent

3 As advised by their attorney

regarding a maturing retirement annuity. 1st Respondent was only available to meet on 7th October but in the interim provided quotations from Old Mutual, Sanlam and Liberty as he preferred complainants to invest with these entities.

[20] These quotations were rejected by complainants on the basis of their returns and as such at the meeting on 7th October 2004 they instructed 1st respondent to make the investment in 3rd respondent. In effect complainants were already familiar with 'De Villiers/ Taakmeesters Trust' the risks previously having been explained to them. As such what was required of 1st respondent was not advice but merely an administrative act.

[21] As such he contacted 4th respondent, who informed him that future investments will be made through 3rd respondent in the form of a property syndications, because TMT was no longer being available due to current financial services legislation.

[22] After being informed about 3rd respondent he requested additional information and was provided with a brochure on Emirates Property Syndication Pty Limited (a separate entity[4]). 4th Respondent explained that the money would be secured by way of participation bonds and that the company would target a specific commercial property which would be bought by the company with the shareholders money. The

4 No monies were invested in Emirates, a totally separate structure and the brochure appears to have been provided as an example of a similar structure.

company would only buy one property at a time.

[23] Complainants then elected to proceed with the investment in 3rd respondent on the same day. The application was initially completed on a TMT form as no 'JAR forms' were available at that point.

[24] At that stage complainants were aware of the fact that up to that point 1st respondent had been unaware of 4th respondents intention to close down TMT and accept all further investments into JAR/Emirate. As such complainants knew that 1st respondent possessed limited knowledge of JAR/Emirates but nonetheless they still wanted their money invested therein.

[25] In essence the basis of 1st respondent's defence is that complainants were in fact not the usual investors and as such capable of making their own decisions about where to invest.

[26] In so far as complainants' allegations that 3rd respondent was investing in participation bonds and hence subject to the Collective Investment Schemes Act, 1st respondent replied as follows:

26.1 'If regard is had to the definitions contained in Section 1 of the Act and one compares it with the information in the brochure (referring to the Emirates Brochure) ....one will notice that JAR and/or Emirates does not fall within the definition of a collective investment scheme. The company was an "open ended" investment company as it was a

privately owned company with certain limitations imposed on it by the Companies Act,..... the shareholders did not hold a participatory investment portfolio of the scheme as the shareholders invest in individual and separate property transaction whereby a piece of property is bought and owned by a particular company.

26.2 'According to the brochure, different companies would each own a commercial property and it is therefore quite possible for JAR to issue shares on the one hand and JAR on the other hand partaking in a participatory bond on a property owned by a third entity, who then repays the loan for the property to JAR'.

D. DETERMINATION

WHETHER THE LEADING OF EVIDENCE IS REQUIRED

[27] One of the issues raised by 1st respondent was whether any disputes of fact were of such a material nature so as to require a hearing. Accordingly it is necessary that I dispense with this prior to commencing with the main issues.

[28] The very nature of an investment creates a paper trail, be it a deposit slip, acknowledgement of receipt, investment certificate or even promotional literature.

[29] Combined with the stringent disclosure and record keeping requirements of the FAIS Act, this documentation or even the lack thereof is of such an evidentiary nature as to either support of refute

either parties version.

[30] However as will become evident herein, analysis of this very documentation lends the lie to 1st respondent's assertion that there are material disputes of fact that require a hearing. In reality the disputes such as they are can be disposed of, when tested against the documentary evidence, none of which is in dispute, as well and the very nature of this investment.

WHETHER 2ND AND 3RD RESPONDENT RENDERED A FINANCIAL SERVICE IN A WILFUL OR NEGLIGENT MANNER AND WHETHER 4TH RESPONDENT SHOULD BE HELD JOINTLY LIABLE IN HIS PERSONAL CAPACITY

[31] Save for what follows 2nd, 3rd and 4th respondents essentially failed in any meaningful way to contest the issues and statements contained in the complaint. This being the case I deem it appropriate to firstly dispense with the role played by these respondents.

[32] The complaint containing the damning allegations of Mr Callis[5] was addressed to 2nd, 3rd and 4th respondent. Other than to falsely claim that the matter had already been settled, the response was essentially that the advice had been rendered by 1st respondent with 4th respondent having had no contact with complainants in so far as the advice or

5 See para 15

placing of the funds was concerned.

[33] Notably 4th respondent remains silent on any contact with 1st respondent or the allegation that the recommendation to invest in participation bonds emanated from him. Accordingly this is deemed to be an admission on his part.

[34] He does however claim that the payments made into 3rd respondent and the subsequent letters from 2nd respondent dated 7th October 2004 confirming the investment in 3rd respondent had been an error.

[35] According to his version the investment should have been in TMT and when he became aware of this he immediately ordered that the correct forms be completed.

[36] This version is overwhelmingly contradicted by the evidence in front of me. On both complainants' and 1st respondent's version the advice to invest in 3rd respondent came from 4th respondent. I have no doubt that complainants could only have come to know about 3rd respondent in consequence of information supplied by 4th respondent.

[37] The claim that the payment was in error is not substantiated by the facts. Had the money been paid in error then surely the transaction would have been reversed. Instead on the undisputed evidence part of these funds were paid out of 3rd respondent and into the Beanstreet

Trust.

[38] On the most essential point as to what has subsequently happened to the funds invested 2nd, 3rd and 4th respondents remain silent.

[39] 4th Respondent's recommendation that the investment be placed with 3rd respondent and a confirmatory letters issued by 2nd respondent to both complainants on 7th October 2004 advising of the investment in 3rd respondents participation bonds are a complete and utter disregard for the provisions of Sections 7. (1) and 13. (1) (a) of the FAIS Act. Section 7. (1) states 'a person may not act or offer to act as a financial services provider unless such person has been issued with a licence under section 8.' Section 13 requires that 'a person may not carry on business by rendering financial services to clients for or on behalf of any person who is not authorised as a financial services provider'

[40] As will become evident, no participation bonds were registered in term of the Collective Investment Schemes Act. Therefore the confirmatory letter referred to above as issued by 2nd respondent is nothing short of a blatant misrepresentation. 3rd Respondent was not authorised as a financial services provider and 4th respondent's actions on behalf of 3rd respondent were a contravention of the FAIS Act.

[41] Whilst 4th respondent did not deal directly with complainants they were known to him. Complainants assisted by 1st respondent had effectively

invested with 4th respondent in the past when they placed funds with TMT a trustee of which was the 4th Respondent[6].

[42] Hence when 4th respondent made his recommendations to 1st respondent he knew that it would lead directly to complainants making the investment in 3rd respondent.

[43] Additionally the confirmatory letter issued by 2nd respondent and the very acceptance of the investment by 3rd respondent are an integral part of this transaction. The very issuing of said letter evidences a link between 2nd and 3rd respondent. These acts in themselves amount to an intermediary service, being any act other than the furnishing of advice performed on behalf of a client, the result of which said client enters into any transaction in respect of a financial product.

[44] In this regard the receipt, acknowledgment and of course whatever eventually happened to the investment was the work of the 2nd and 3rd respondent.

[45] Now turning to the issue of whether 4th respondent can be held personally liable. Both 2nd and 3rd respondents are juristic persona with a separate personality to 4th respondent. As such except in very limited instances one would not normally pierce the corporate veil and hold a company members and directors personally liable.

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6 See para 9 in this regard.

[46] Regrettably the present instance requires that I do so. In the case of Shipping Corporation of India LTD vs Evdomon Corporation 1994 (1) SA 566 at E, Corbett CJ stated 'I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs.'

[47] This view has been echoed in successive judgments such as that of Amlin (SA) PTY LTD v Van Kooij 2008(2) SA 558 (C) wherein Dlodo J held 'It is probably fair to say that a court has no general discretion simply to disregard a company's separate legal personality whenever it regards it as just to do so. It has however, come to be accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil.'

[48] 4th Respondent in the instance represented 2nd and 3rd respondent and his role within these entities means that his actions can be attributed to them and vice versa. On the evidence 4th respondent was the principal point of contact representing these entities and integral in recommending that the investment be made in 3rd respondent. As already detailed in the preceding paragraphs there is unquestionably evidence of improper conduct on the part of 4th respondent.

[49] Additionally I have in past determinations dealt with the personal liability of the key individuals of a financial institution. It is the key individuals that themselves are accredited in terms of the FAIS Act. In this instance and as already noted in para 6, 4th respondent is a key individual of 2nd respondent.

[50] 4th Respondent's role as a director of 3rd respondent, sole member of the 2nd respondent and pivotal point of contact, meant not only that he himself was aware both of the deception and total disregard for the provisions of the FAIS Act and general Code but that this knowledge carried through to those entities which he directed namely the 2nd and 3rd respondent.

DID 1ST RESPONDENT PROVIDE ADVICE AND OR AN INTERMEDIARY SERVICE?

[51] I now turn to the role played by 1st respondent.

[52] 1st respondent's version is that he was merely carrying out complainants' instructions without rendering advice. As such he has attempted to portray complainants as seasoned investors who had a pre-existing relationship with 4th respondent, and states; 'Mr and Mrs Maritz are not your usual investors in that Mr Maritz made it his business to obtain various quotes from various companies. In other words he had researched various options available himself and he did

not merely accept the advice of his advisor'.

[53] He goes on to claim that whilst he himself only became aware of 3rd respondent on the 7th October, complainants had prior dealings with 4th respondent and as such already knew about this scheme, and as such had made up their minds by the meeting of 7 October.

[54] Complainants deny that they made it their business to obtain quotes, or that they had prior knowledge of the scheme contending instead that such knowledge emanated from 1st respondent.

[55] The initial documentation combined with 1st respondent's version led me to believe 1st respondent's version that he first learned of 3rd respondent on 7th October 2004. However, whilst examining the documentation in detail, I noted that some documentation had been signed by 1st respondent on the 2nd and 8th October 2004.

[56] The form signed on the 2nd October is a 'JAR Financial Services(3rd respondent's) form for the identification and verification of a natural person as required in terms of the Financial Intelligence Centre Act, 38 of 2001 (FICA). That of the 8th October 2004 is headed 'Onderneming' meaning undertaking. Translated, the document goes on to state. 'I/we accept and understand that JAR FINANCIAL SERVICES (in association) is only acting as an agent and that JAR FINANCIAL SERVICES will on request provide full details of my/our investment.'

[57] Enquiries with complainants elicited the response that two consultations were in fact held with 1st respondent namely on the 2nd and 7th October 2004 and that on the earlier date 3rd respondent's FICA documentation was signed. Evidence that 1st respondent became aware of 3rd respondent independently of complainants is evident from a letter to his professional indemnity insurers dated 01/02/2007 wherein he states that he first became aware of 3rd respondent after making enquiries with 4th respondent in October 2004 about Property Investment Consultants Syndications (PICS) on behalf of a client.

[58] 1st respondent would have one believe that he only became aware of 3rd respondent on 7th October 2004, thus had limited knowledge thereof. The complainants according to him knew this and would not have relied on his advice without having conducted their own prior investigation. In support thereof he states that given the time span between being informed of the property syndication by Mr De Villiers and the alleged advice to invest in JAR all of which took place on the same day it is extremely improbable that Mr and Mrs Maritz would have accepted this so-called advice.

[59] However the documentation dated 2nd October 2004 as well as his own statement about being informed of 3rd respondent whilst enquiring about (PICS) tends to confirm not only that 1st respondent had some prior knowledge of 3rd respondent going back to at least the 2nd

October 2004 but that this information did not arise out of complainants enquiries.

[60] In so far as complainants' supposed relationship with 4th respondent as claimed by 1st respondent[7], this is not supported by the evidence. 1st Respondent has presented a memo to substantiate his version but this in itself merely details the collection of a form and nothing further. Additionally 1st respondent's evidence of complainants as independent investors consists of single quotation supposedly sourced independently by complainants.

[61] In fact were complainants the type of self assured investors with an existing relationship with 4th respondent which 1st respondent seeks to portray them as, then there would be little reason for them to deal through 1st respondent. On the contrary every single one of complainants investments made subsequent to the commencement of their relationship in 2000 was initiated through 1st respondent.

[62] On his own version 1st respondent provided quotations from Old Mutual, Sanlam and Liberty as he wanted complainants to invest with these entities, but these recommendations were not accepted.

[63] Lastly and for what it is worth I note that 4th respondent himself claimed that he had no contact with complainants in so far as the advice or

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7 See para 52

placing of funds was concerned.[8]

COMPLIANCE DOCUMENTATION AND RISK PROFILE ASPECT

[64] 1st Respondent's own compliance documentation namely the Risk profile, client advice record, statutory notice and single needs analysis documentation evidences that advice was subsequently rendered and accepted. These documents are requirements of Section 8 and 9 of the General Code of Conduct for Authorised Financial Services Providers and Representatives, Board Notice 80 of 2003 (General Code).

[65] It comes as no surprise that the headings of these Sections are **'FURNISHING OF ADVICE'** and **'RECORD OF ADVICE.'** The very nature of the forms is such that they form an integral part of the advice process and not merely an answer to a routine administrative query.

[66] Upon analysing the documentation provided by 1st respondent I note the following:

66.1 A risk profile signed by 1st complainant on either the 7th or 8th (date unclear) of October 2004. 1st Complainant is clearly conservative and marked as fitting into the following: 'Conservative investors want stability and are more concerned about the security of their current investments than increasing the real value of their investments'

66.2 The undated client advice record sets out 1st complainant's needs as

8 See para 32

monthly income, products recommended as participation bonds with the attendant motivation being liveable income.

66.3 1st Complainant signed a single needs analysis document, dated 7th October 2004 which states 'Compulsory money 2/3 reinvested. 1/3 available to invest. Requested to invest at 11% interest rate in JAR properties .....participation bonds'

66.4 A risk profile was also conducted in respect of 2nd Complainant on 7th October 2004 and her client advice record reflects her, a conservative investor who had just lost R54 000 at Old Mutual and hence requiring monthly income. The product recommended was participation bond and the motivation 'looking ...in high interest'.

66.5 A single needs analysis form was also signed by 2nd complainant on 7/10/2004 the relevant sentences of which reads 'I now invest it in participation bonds' and 'Single needs analysis plan done by Mr Marius Jacobs financial advisor'

66.6 There are also various other compliance related documentation several of which are either on respondents' letterhead or reflect respondent as the financial adviser.

[67] Whilst 1st complainant's single needs analysis reflects a request to invest in 3rd respondent, the balance of the documentation clearly reflects as advice to invest in a participation bond. Had 1st respondent merely carried out complainants' instructions I would expect this to have been set unequivocally in the documentation. In so far as the 2nd complainant there is no contradiction and the documentation refers

clearly to advice.

[68] Clearly 1st respondent saw his role as that of adviser rendering financial services to complainants and not that of someone performing an administrative type of service. This is clearly not, nor has it ever been the relationship between the parties.

[69] A financial service is defined in the FAIS Act includes an intermediary service the definition of which is:

(i) '....any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier-

(a) the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or

(b) with a view to-

(i) buying, selling or otherwise dealing in (whether on a discretionary or non-discretionary basis); managing, administering, ...'

[70] There can be no doubt that 1st, 2nd, 3rd and 4th respondent all played a role in this transaction. In instance where respondents did not directly render advice they played a role in investing/accepting, acknowledging receipt of the investment or transferring the funds. This applies

particularly to the role of 2nd, 3rd and 4th respondent and I refer the reader hereof to paragraphs 39-44, wherein their role in providing a financial service is discussed.

NATURE OF THE ACTUAL INVESTMENT

[71] Whilst the compliance documentation clearly states participation bonds, 1st respondent, and contrary to complainants' version disputes that this was the nature of the investment. This is of course relevant in so far as the applicable legislation and its specific requirements, in particular potential registration in terms of the Collective Investment Schemes Control Act No 45 of 2002 are concerned.

[72] In his version 1st respondent made mention of being 'informed of the property syndication (the same day) by Mr De Villiers' in addition to 4th respondent advising him that, 'money would be secured by way of Participation Bonds and that the company would target a specific commercial property which would be bought by the Company with the money of the shareholders and that a particular Company will only buy one property at a time.'

[73] Clearly the statement above refers to both participation bonds and property syndications. However in his version at paragraph 26.1 and 26.2, 1st respondent refers to 3rd respondent as an 'open ended' privately owned company' which could purchase commercial property

and or partake in a participatory bond on a property owned by a third entity.

[74] Now a privately owned company is most certainly not an open ended company being limited to 50 shareholders by the Companies Act, 61 of 1973. The very nature of the offering of shares to the public requires that it be a public company in that Section 20 of the Companies Act, 61 of 1973 prohibits any offer to the public for the subscription of any shares or debentures in a private company.

[75] To obtain a better understanding of the differences between a participation bond and property syndication, reference is made to Investment Planning by Brian Goodall, where, at para 12.4.5 a participation bond is described as; 'Participation mortgage bond schemes makes investor's money available as loans to buyers and developers of commercial and industrial property. Relatively small amounts of capital are accumulated to create a mortgage bond for not less than R20 000. The bond is a loan secured by property and is thus only indirectly an investment in property. The management company, a banking group or financial institution, collects the funds and matches them to a particular borrower. The participation bond is registered to a nominee company. The Registrar of Collective Investment Schemes must approve a set of rules written out by the scheme. The nominee company acts as custodian of the security and is prohibited by law from

incurring any liabilities. Participants have the same rights as registered mortgagees.'

[76] In the same reference book but at para 12.4.8, a syndication is described 'as a group of investors who pool funds in order to purchase commercial or industrial property through a public company.

[77] Thus in very simple terms a participation bond is the pooling of investors money to provide loans to buyers and developers of property. To secure this loan a participation mortgage bond is registered on the property for which the money is loaned in the name of a nominee company. Participation bonds are governed by the Collective Investment Schemes Act and certain restrictions apply. In property syndication the property is purchased by the company as opposed to offering loans, and members of the public purchase shares in the company.

[78] In summation of the preceding paragraphs, quite simply 1st respondent's version no matter how he attempts to explain it does not hold water. Clearly he either does not appreciate the distinction between separate and distinct forms of investments, with their accompanying regulatory requirements or more likely given the convoluted explanation has attempted to mislead the Office.

[79] Regrettably I must conclude that it is the latter. The documentation on

its own accord confirms both complainants' and 1st respondent's understanding that they were investing in a participation bond.

WHETHER RESPONDENTS ACTED WITH DUE SKILL, CARE AND DILIGENCE.

[80] Registration of a participation bond in terms of the Collective Investment Schemes Act automatically brings with it certain onerous conditions such as:

80.1 'Any money accepted or received by the manager from any person for investment in a scheme, must be kept on deposit by the manager in the name of the nominee company on behalf of the person for whom it was accepted'

80.2 'No person other than a public or private company which has been registered as a manager of a collective investment scheme in participation bonds under this part or its authorised agent may administer any collective investment scheme in participation bonds.'

[81] 3rd Respondent was never registered in terms of the Collective Investment Schemes Act and would not likely have met any of the many requirements for registration, a fact that 4th respondent as director of 3rd respondent would have been aware of. Despite this he recklessly made recommendations to the detriment of complainants who knew no better.

[82] Given the parties understanding that they were investing in a

participation bond, I would have expected 1st respondent to note the glaring anomaly that the method of investment and accompanying forms did not reflect this position.

[83] On the contrary the cheque was made out to 3rd respondent and not a nominee company as one would expect. There is no indication of a nominee company interposed between the provider and client or even so much as a separate bank account.

[84] The forms themselves were filled out in the name of Taakmeesters Trust and later altered. No disclosures as required in terms of the rules governing a collective investment scheme in participation bonds were made. Nowhere on any form is even the allegation made of registration in term of the Collective Investment Schemes Act.

[85] 3rd Respondent was never licensed and nor did it even apply to be licensed as a Financial Services, a fact that 4th respondent was no doubt fully aware of..

[86] 1st Respondent as an experienced financial services provider having been in the business since 1985 should have been aware that there was no way that 3rd respondent could be authorised to accept funds in its own name. I must question what made him assume that this entity could take investments from the public given that it had no track record of any kind that he was aware of.

[87] Now 1st respondent essentially asserts that he conducted all the necessary checks and that after these enquiries he was satisfied that Raymond De Villiers/Taakmeester Trust/ JAR, was a safe workable investment and hence made this part of his presentations to clients. These checks occurred prior to the current investment and arose pursuant to enquiries from his mother as well as other individual clients wanting to invest with 4th respondent. These include inter alia:

87.1 Enquires with the South African Revenue Service as well as the enquiries with the manager at ABSA bank.

87.2 Interviews with investors that had invested monies with 4th respondent for a number of years.

87.3 Taking note of the apparently large accounting practice conducted by 4th respondent and hence the attendant risk to his reputation should there be a problem with the investments. In this regard 4th respondent and the TMT had according to 1st respondent conducted business in Bloemfontein for 21 years.

87.4 Interviewing the 4th respondent who advised that that he took no risk and would never expose clients to pyramid schemes.

[88] 1st Respondent mentions that interest and withdrawals were met for the first three years of his dealings with 4th respondent and TMT and I have no doubt that this enhanced his conviction that these were safe investments.

[89] In reality the enquiries conducted by respondent were nothing more

than verbal reassurances and no independent verification was conducted to ascertain, not only whether assets matched liabilities but whether the investments were being conducted in the manner stated. There were no independent auditors and any checks that respondent made with the South African Revenue Service or the bank manager, even in the unlikely situation that he could obtain such information would have been superficial at best.

[90] In a recent determination[9] I stated that a financial adviser must first obtain all the available information about the promoters as well as the financial viability of the underlying investment before the product can be presented to a client. I amplified this by going on to state that one needs to do an independent due diligence and evaluation of the scheme. The same principles are equally applicable in the present instance.

[91] 1st Respondent did not even bother to check whether a license was applied for or granted.

[92] When the above is viewed against 1st respondent's inability to spot glaring omissions in compliance with applicable legislation. I am reminded of the phrase 'Fools Rush In Where Angels Fear To Tread.' and cannot but conclude that 1st respondent failed to act with the necessary due skill care and diligence.

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9 Bernard Fredrick Dudley and Nigel Segers FOC 04114/08/09 WC1

RISK DISCLOSURE

[93] It is clear from both 1st respondents own version and documentation, that complainants were conservative investors. In what appears to be a referral to earlier investments but based on the risk profiles equally applicable in the instance, 1st respondent states; 'It was very difficult to satisfy Mr and Mrs Maritz. Their expectation as far as income is concerned did not take into consideration the fact that because they wanted guaranteed capital, income and growth, it automatically reduced the income'

[94] Section 7.(1) (xiii) of the General Code requires that a provider disclose 'any material investment or other risks associated with the product.'

[95] The risks were patently obvious had 1st respondent only bothered to exercise the necessary care and skill.

[96] Sadly this was not the case and instead 1st respondent specifically stated that he was satisfied after all his enquiries that 'Raymond de Villiers/Taakmeester Trust/JAR, 'n Veilige, werkbare en veilige belegging is' (Raymond de Villiers/Taakmeester Trust/JAR, is a safe workable investment).

[97] I must point out that 1st respondent in this context had been making reference to enquiries made prior to this investment and hence the

reference to 3rd respondent might be seen as merely a slip of the pen or keyboard in this case. However on the contrary I believe the inclusion to be intentional given that the driving entity and contact point behind both the Taakmeester Trust and 3rd respondent was 4th respondent, and on 1st respondents own version he had not only satisfied himself as to the safety of these investments, but included same in his overall submissions to clients.

[98] 1st Respondent's disclosure document setting out the products which he was accredited to market and dated 7/10/2004 specifically includes 'JAR'.

[99] In the letter to his indemnity insurers he goes on to state: 'my proposals would include all companies and options of which 'Taakmeester/Trust JAR' was a part of, and it was ultimately the client's choice. I then carried out the client's choice. My personal first choice was always guaranteed plans with Life Assurance companies and banks and only when the client would not be satisfied with the low rates and negative growth that I accepted Raymond de Villiers investments'(translated from Afrikaans).

[100] Whilst established insurance companies may well have been 1st respondents first choice it is evident that clients were advised about 1st respondent's investigations into 4th respondent and that 1st respondent was satisfied with what he had found. In this regard 1st respondent

stated; 'I specifically told my clients that Taakmeester Trust/JAR was a one man business and that Mr R de Villiers was my own accountant. I also told them that that my top clients right throughout the land, books were also done by Mr R de Villiers and recommended that a lot of faith was placed in him.'

[101] 1st Respondent in order to mitigate the risks occasioned by the fact that 4th respondent was essentially a sole practitioner had taken out life assurance on 4th respondents life.

[102] There can therefore be no question that it was part of 1st respondent's standard procedure to include 'Taakmeester Trust/JAR' as part of his standard repertoire of investments and that he regarded this is a safe and sound investment suitable for recommendation to clients. No greater proof of this can be found than in the fact that he placed his own mother's money with 4th respondent in TMT.

[103] Complainants were very conservative by nature which makes it unlikely that they would not have questioned the safety of investment and even if not, there was no reason to question it given previous assurances. 1st Respondent in turn appears to have had every confidence in 'Taakmeester Trust/JAR' and given their previous relationship as well as the fact that the transaction took place over two separate days I would most surprised if all that occurred was simply a transmission of factual data without any recommendation whatsoever.

[104] 1st Respondent was also aware that complainants were investing in a scheme orchestrated through an individual whose bona fides had been confirmed to complainants by him and as such by facilitating the investment a tacit or implied assurance existed and any concerns which complainants had would have been assuaged.

DID 1st RESPONDENT'S CONDUCT CONTRIBUTE TO THE LOSS.

[105] Having examined all the papers and based on the reasons set out above I have no difficulty in coming to the conclusion that 1st respondent wilfully or negligently rendered a financial service to complainants and that in consequence they have suffered damages. Whilst on the papers 2nd, 3rd or 4th respondent and or members/directors clearly misappropriated the monies, and misled 1st respondent, he in turn allowed this to happen and facilitated the investment. He should have known better, given that there were several clear warning signs, and bearing in mind that on his documents he has invested in participation bonds with established institutions in the past.

[106] The statement by Schutz JA in Durr vs ABSA Bank LTD and Another 1997 (3) SA 464 I-J that: 'one must be careful not to use hindsight to impute foresight to him' was uppermost in my mind whilst considering this matter against 1st respondent's experience. Despite having considered this it is clear that 1st respondent has failed to comply with

section 2 of the Code which requires that 'a provider must at all times render financial services honestly, fairly, with due skill, care and diligence.' Rather telling in this respect is 1st respondent's own argument that he had limited knowledge of 3rd respondent and hence essentially presented the facts and left complainants to their own devises.

[107] Needless to say, the actions of 2nd, 3rd and 4th respondent are the complete antithesis of the code in general and section 2 in particular.

E. QUANTUM

[108] 1st Respondent's letter to complainants to withdraw their funds from TMT and 3rd respondent is dated 22 July 2005[10]. Amongst the documentation provided by 1st respondent are applications in the name of both 1st and 2nd complainant to withdraw their funds from TMT. Whilst these forms are not dated they have a requirement on them that they reach the TMT on or before 31st August 2005. These forms are clearly in response to 1st respondent's letter of 22 July 2005.

[109] Upon enquiring with complainants as to whether any payments had been received in response to the application to withdraw funds, they advised as follows:

109.1 Immediately after receiving the letter dated 22 July 2005 they met with 1st respondent who assisted them to complete the application to

10 See para 13

withdraw funds. To the best of their knowledge 1st respondent then submitted these to TMT.

109.2 Despite numerous enquiries no monies were received and hence 1st complainant contacted TMT directly in the form of 4th respondent. Upon pleading that he needed the money to loan to his son he was successful in withdrawing R150 00011 on 25 October 2005.

[110] As to why the form only mentioned the TMT complainants were advised by 1st respondent that 3rd respondent had ceased its investment activities and consolidated these into TMT Trust.

[111] The last interest payment in respect of the investment in 3rd respondent was received in February 2006, being in respect of the January 2006 payment.

[112] 1st Respondent has raised a number of issues with regard to the payment and interest and these are as follows:

112.1 That the payment of R150 000 may amount to a preference to a creditors.

112.2 That the R150 000 should be allocated to any amounts owed by 3rd respondent.

112.3 That an expert actuarial assessment would need to be made to ascertain the difference between the interest paid in this investment and what the complainant would have obtained had they invested in

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11 See para 14

the conventional manner.

[113] In terms of a TMT curators report dated 27/06/2007, Mr Corrie Venter stated that the South African Revenue Service has a preferential claim in terms of the Insolvency Act. The curators are of the opinion that this preferential claim amounting to R8 951 384 - 00 will exceed the assets that can be located.

[114] The report further states that the curators are of the opinion that funds invested with 'Raymond de Villiers /Taakmeesters Trust' were run as a pyramid scheme and hence have reported this to the commercial crimes unit of the South African Police Service. In this regard approximately 56 affidavits have been taken from complainants by said unit.

[115] Superintendent Francois Visser from the unit has advised that whilst there is currently one case before court involving the theft of approximately R900 000 from an estate by 4th respondent, the complaints referred to by the curator still have some way to go and will in time be referred to the Specialised Commercial Crimes Court.

[116] 3rd Respondent itself according to Mr JA Callis posesses no assets.[12]

[117] It is clear that R150 000 came from the TMT and in addition the

12 See para 15

affidavit of JA Callis states that complainants funds were without their knowledge transferred to Beanstraat Trust (R130 000) and TMT (R153 000). There are no records enabling one to quantify what portion of the R153 000 belonged to 1st complainant or 2nd complainant.

[118] What is however clear is that the R150 000 was repaid to 1st complainant and that this sum significantly exceeded the R77 000 1st complainant invested with 3rd respondent in the first place.

[119] In any event it would be entirely arbitrary, albeit convenient for 1st respondent to claim that the monies paid to 1st complainant were from the monies illegally transferred to TMT when in fact 1st and 2nd complainants had made prior investments in TMT, with a combined value of R331 000.

[120] In addition to the above one cannot lose sight of the fundamental principle that complainants invested with 3rd respondent, and it was 3rd respondent that owed the funds. Repayments made by TMT must first be allocated to this entity's debts.

[121] I therefore see no reason to arbitrarily allocate the repayment of R150 000 to debts owed by 3rd respondent and deem that it is correct to credit this to the TMT debts.

[122] With respect to whether the payment of the R150 000 amounts to a

preference to creditors this is clearly an issue for the curator of TMT.

[123] Regarding 1st respondents contention that an actuarial calculation is required, I fail to see the relevance of this argument. No matter what the interest payments, the simple fact is that complainants have received neither capital nor interest since the last payment in January 2006.

[124] Clearly neither the R77 000 invested by 1st complainant or the R206 000 invested by 2nd complainant have been repaid.

[125] I note that in respect of the Beanstreet Trust, complainants attorneys have advised that all checks have as expected failed to turn up any assets.

F. CONCLUSION

[126] It is a requirement of the General Code that financial services providers 'at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.

[127] 1st Respondent was clearly out of his depth, and did not have the skills to render financial advice on participation bonds. Advice was clearly rendered, which led to complainants investing with 3rd respondent and the loss of their investment.

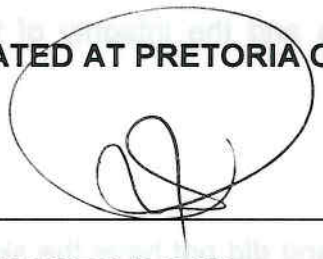
[128] The balance of the respondents not only rendered an intermediary service in contravention of the FAIS Act, given that 3rd respondent aided and abetted by 2nd and 4th respondent was not licensed to render such a service acting on their behalf.

ORDER

1. The following order is made: -

2. The Respondent is hereby ordered to compensate 1st Complainant in the sum of the R77 000 and 2nd Complainant in the sum of R206 000;
3. Interest on the aforesaid amount shall accrue at the rate of 15.5% to be calculated FOURTEEN (14) days from the date of this determination to date of final payment;
4. The Respondent is ordered to pay the case fee of R1 000 plus VAT to this Office within thirty (30) days of date of this determination.

DATED AT PRETORIA ON THIS THE 24th August 2011.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS