

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA.

CASE NO. FAIS 02232/10-11/MP 1

In the matter between:

JACOBUS JOHANNES MELLET

COMPLAINANT

and

ANDRIES PETRUS NEL/ Du NEL PROPERTIES

RESPONDENT

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

A. THE PARTIES

[1] The Complainant is Mr Jacobus Johannes Mellet a pensioner, residing at Frischgewaargd JT44, Moster Hoek Lydenburg 1120.

[2] The Respondent is Mr Andries Petrus Nel of Du Nel Eiendomme of 32 Buhrman Street Lydenburg, an authorised financial service Provider, with licence number 14277.

B. INTRODUCTION AND BACKGROUND

[3] This case revolves around investments made by the complainant in an entity known generally as the Blue Pointer Business Administrators (Pty) Ltd ("Blue Pointer") and PropDotcom property Consortium ("PDC"). Blue Pointer is a company managed by Baartman, which marketed property syndication investments in PDC to the general public, Blue Pointer made use of agents to sell shares in PDC to the Public.

[4] This Office is privy to a report compiled by the FSB, following an inspection conducted on the affairs of Blue Pointer entities in terms of Section 3 of the inspection of Financial Institutional Act (Act No 80 of 1998) the inspection was conducted in 2006. The mandate of the inspectors as set out in the inspection letter dated 1 December 2005 was to carry out an inspection of the affairs of Blue Pointer and its respective entities, persons and their associated institutions, PropDotCom Property Consortium, including Turquoise Moon Trading 46 Limited trading as Prop Dotcom No.1.

[5] Without going into details of the abovementioned report, reference will be confined to necessary aspects that have a direct bearing on this complaint.

- [6] The Financial Services Board's inspection into the affairs of these companies revealed that Blue Pointer acted as an unlicensed financial services provider by providing advice and intermediary services in respect of the shares sold in PropDotcom to the public.
- [7] According to the report, Blue Pointer is a name used to refer to a group of companies managed by Baartman. Blue Pointer markets property syndication investments to the general public. PropDotcom is a brand name used in marketing and promoting the property syndications of Blue Pointer, Turquoise Moon Trading 46 Limited trading as Prop Dotcom (PDC), an unlisted public company used to sell the shares to the public.
- [8] There have been many investors who invested in this scheme. They have lost millions of rand in the process.
- [9] Essentially the Blue Pointer and PropDotCom scheme involved property syndication which solicited investments from members of the public through the sale of unlisted shares.
- [10] These shares were sold on the promise that on the purchase of shares, the investors would become part owners of a property that pays an income and hopefully a capital gain when the property is sold. The attraction of these syndications is that you get a high level of income to

compensate the investor for the risk of making a long term, illiquid investment.

[11] These syndications are almost always created for individual property developments than a collection of different properties. An investor's capital and income are always at risk because investors are actually not buying a share in a property business. The investment is actually a loan to a property business.

[12] The FSB report also pointed out that the investors funds did not follow the intended path as funds destined for PropDotcom companies and were mingled with Blue Pointer's business Funds even though separate bank accounts for PropDotcom companies existed. For further details on BluePointer, refer to the B F Dudley v Lifesure Financial Services CC, case number FOC 04114/08/09 WC 1 handed down by this Office on the 7th of June 2010.

[13] The experience of the Office is that in all of these failed investment schemes, the following features may be found:

[14] All of these schemes market the investment through independent Financial Services Providers (FSP), most of who are engaged as representatives in terms of section 13 of the FAIS Act. The providers of these schemes usually apply for a licence with the Financial Services

Board, and thereafter engage independent FSPs in terms of Section 13 of the FAIS Act.

[15] These FSPs are usually, themselves, not licensed to sell the category of financial product marketed by the providers.

[16] In most cases the individual FSP was either not licensed to sell the product or not suitably qualified to do so.

[17] Having obtained a licence from the FSB, the providers then merely produce documentation which provides prima facie proof that the FSP was appointed as a representative and that the provisions of section 13 were complied with. No actual compliance on the part of these providers could be found in most cases. They certainly did not comply as contemplated in section 13, but merely paid lip service to the provisions of the Act.

[18] The individual Representative FSPs held themselves out to the public as FSB licensed FSPs, thus winning over the confidence of the unsuspecting public.

[19] In most instances, after the scheme fails and after investors lose their money the representatives often claim to be marketing on behalf of their principals, and that therefore they cannot be held liable. They conveniently hide behind their provider.

[20] For a further discussion on the interpretation and application of Section 13, I refer to the determination in **Black VS Moore Case Number: FAIS01110/10-11/WC1.**

C. THE COMPLAINT

[21] According to the Complainant, During December 2005 and beginning of January 2006, the Complainant and his wife were approached by the respondent in Lydenburg. He approached the Complainant with his wife who is a complainant in another matter with an unbelievably profitable investment opportunity. After numerous phone calls, the Respondent wanted to meet with the Complainants.

[22] During their first meeting the Respondent was accompanied by Mr Louis Baartman, who was introduced as a representative of Blue Pointer, who then advised the Complainants to invest with PropDotCom.

[23] The Complainants were advised that this was an investment for 5 years and that interest would be paid monthly. After duration of five years their capital would be paid back plus additional growth.

[24] During the first years the Complainant was advised she would receive a monthly linked loan repayments calculated on 10, 5% interest. The Complainant was further advised that this 10, 5% interest would be reinvested and increased yearly.

[25] The Respondent informed the Complainant that his wife had the same investment and that his investment was highly successful and that his interest accrued to 17%. The Complainant and the Wife decided to sign the documentation independently. The Complainant invested R300 000.00 and his wife invested R60 000.00.

[26] During March 2006 the Complainant received his investor statement from Blue Pointer indicating his monthly payment breakdown. During the month of January 2007 the Complainant received correspondence from Uniprop dated 11 January 2007 which attached a share certificate from SAGrowth. As it is, Complainant is not sure as to how his investment went from an investment loan to shareholding, he is also not sure as to who SAGrowth is.

[27] During the above mentioned period the Complainant received no feedback from the Respondent or from Blue Pointer/ PropDotCom/ Uniprop on his investment, reason being he did receive his monthly linked

loan repayments. He had no reason to suspect that there were any problems or irregularities.

[28] During August 2007 the Complainants' monthly linked loan repayments ceased. He then immediately contacted the Respondent and requested an explanation on why the repayments were stopped. The Respondent's response was that there were some minor issues to be sorted out, but that they had no reason to be concerned. He further indicated to them that he would keep them posted on any new information.

[29] According to the Complainant at that time the Financial Services Board had issued a warning to consumers to be cautious when doing business with Blue Pointer and or Mr Baartman, this warning was issued on the 22 of May 2007. Thereafter the Complainant received in a region of three sporadic linked loan repayments. The Complainant never received any feedback from the Respondent and the only communication they had with him was telephonically when the Complainant contacted him. He continuously assured them that these were no reason for the Complainant to be concerned.

[30] During June 2008 the Complainant decided to contact Uniprop directly, he made contact with Tersia Damascio at Uniprop. Complainant requested that Tersia forward their documentation and correspondence to them

directly. Upon receipt of the documents the Complainant was shocked that their worst fears were realised. It was evident from the documents that Uniprop was in a huge financial crisis, notwithstanding all the Respondent's assurances that their investments were safe.

[31] The Complainant immediately addressed the correspondence to the Respondent requesting him to urgently facilitate the repayments of his investment, plus arrears interest from Uniprop due to breach of the contract entered into during January 2006. The Respondent informed the Complainant telephonically that he could not assist them further and that they had to deal with Uniprop directly. He still insisted though that all was above board and that they had no reason to be concerned.

[32] The Complainant contacted Tersia at Uniprop on the 30th of June 2008, asking for their repayments of his investment. Tersia informed the Complainant that it was not possible and that they had to put investments up for sale .

[33] On the 20th of October 2009 the complainant received correspondence from Andrio Griessel indicating the mismanagement of investors' money.

[34] The Complainant is seeking an order from this Office compelling Respondent to refund his the capital together with interest. The Complainant has been struggling to get the money for some time without success.

[35] On the 13 of July 2010 the Complainant referred the present complaint to this Office, after the parties could not resolve the matter.

[36] Complainant further alleges that the Respondent was fully aware that he required his investment to grow. The Complainant claims damages in the amount of R 300, 000.00 plus interest.

[37] In his complaint, the Complainant suggests that the Respondent failed to properly advise him and his wife. As a result of the Respondent's failure to exercise due skill and care of a professional he held himself out to be, so the complaint goes, the Respondent lost his investment which was worth R300, 000.00.

[38] It should be noted that the Complainant did receive his monthly returns from Uniprop, though they were sporadic and later ceased.

[39] The Complainant further alleges that the monthly returns were stopped immediately. He then tried to sell the shares to the company but he was unsuccessful because he was told that the company was insolvent. The

Respondent told him that he was no longer involved with them (Uniprop) and therefore he could not help the Complainant.

D. THE RESPONSE

[40] In terms of the rules on proceedings of the FAIS Ombud, the complaint was referred to Respondent. In his reply the Respondent raised the following pertinent points:

[41] The Respondent alleges that he was a representative of Uniprop. All documents and agreements were between the Complainant and Uniprop.

[42] Payments were made to the Company and he was only a representative marketing the Uniprop product which resulted in a number of shares being sold.

[43] The Respondent further alleges that he was never involved in decision making or change of the name of the company.

[44] He is no longer marketing their products for the past three years. He did inform the Complainant that he was no longer involved with the company. He also gave the Complainant his contact details.

[45] Finally, Respondent states that, he is no longer in a position to provide financial information or advice to any person. Du. Nel Estate was never involved with Uniprop; however he believes that the Company will be prepared to answer.

E. THE ISSUES

[51] The following are the issues to be determined:

51.1 Did Respondent's conduct whilst rendering the financial service violate the provision of the FAIS Act, specifically, the duty on providers of financial services to act with due skill, care and diligence and in the interests of clients and the integrity of the financial services industry when rendering services to clients;

51.2 If it is found that the Respondent did render the financial service negligently/ and or failed to comply with the FAIS Act, whether such failure caused the complainants' loss; and

51.3 I shall confine myself in this determination to some of the more Pertinent breaches.

Did Respondent's conduct whilst rendering the financial service violate the provision of the FAIS Act, specifically, the duty on

providers of financial services to act with due skill, care and diligence and in the interests of clients and integrity of the financial services industry.

[52] For convenience, the question is dealt with under the following headings:

- 52.1 Respondent had no licence to sell this product;
- 52.2 Representation;
- 52.3 Respondent had no real appreciation of how property syndications work and the required disclosures.

F. LICENCE

[53] According to the records of the FSB report, it revealed that Blue Pointer acted as an unlicensed financial services provider by providing advice and intermediary services in respect of the shares sold in PDC to the public. The conducting of unauthorised financial services businesses is an offence in terms of the Financial Advisory and Intermediary Services Act 37 of 2002.

- 53.1 The Financial Services Board (FSB) confirmed that the license application of Blue Pointer had been declined.

53.2 It is not in dispute that, at all material times, the Respondent was a licensed FSP and was subject to the provisions of the FAIS Code. He was however not authorised to sell the PDC product.

53.3 Part ii Section 2 of the General Code of Conduct (the code), places a general duty on providers to render financial services, honestly, fairly, with due skill, care and diligence and in the interest of the client and the integrity of the Financial Services Industry.

53.4 When an FSP is licensed, it conveys to members of the public that the regulating authority has satisfied itself that the FSP is qualified to render the necessary service. Once the FSP holds himself or himself out to the public as a qualified adviser, it then follows that members of the public may safely rely on the provider's services.

53.5 It appears that the Respondent being a representative of the above mentioned scheme did not take the trouble to find out. If he did, he could have realised that Blue Pointer and this entities in appointing him in terms of section 13 were acting contrary to the provisions of the Act.

53.6 Therefore the Respondent being a Representative in selling the product to the Complainant was not exempted from the provisions of the General Code by virtue of having been appointed in terms of section 13. It must be emphasised that section 13 does not relegate the representatives into mere extensions of their principal providers.

The Respondent was still expected to bring to bear his knowledge and skill when advising the Complainant on marketed product

G. REPRESENTATION

[54] Respondent is an authorised financial services provider. However, he is restricted to certain financial services. Section 13 of the FAIS Act deals with the qualifications of representatives and duties of authorized FSPs.

54.1 Section 13 deals with the qualifications of representatives and the duties and obligations of licensed providers. In terms of section 13 (b) no person may act as a representative financial services provider, unless such person is (1) able to provide confirmation, certified by the provider, to clients that "(a) that a service contract or his mandate, to represent the provider"; and that "(b) the provider accepts responsibility for those activities of the representative are performed within the course and scope of, or in the course of implementing any such this contract or mandate".

54.2 The section places an obligation on the provider to ensure that the representative complies with the requirements of fit and proper as contemplated in section 8 of the Act. Similarly, this is a duty on the

provider to ensure that the representative has the necessary knowledge and training to market the product.

54.3 Significantly, the section makes the provider responsible for the acts or omissions of the representative.

54.4 Although the Act is silent about the duties of representatives, it however implies that the representative, equally, is under a duty to satisfy himself; as well, that the provider's product is an economically viable one, and further that he is qualified and competent to market it. Noting that the representative is not exempt from the provisions of the General Code by virtue of having been appointed in terms of section 13. It must be emphasised that section 13 does not relegate the representatives into mere extension of their principal providers. The representative is still expected to bring to bear his knowledge and skill when advising on any marketed product.

54.5 Moreover, this is an obligation on the representative that if he does not understand the product, he cannot market it to the members of the public. This is so because the Representative must have the capacity and operational ability to market the product.

54.6 It must have been contemplated in the Act that such a duty, as set out above, must be attributed to the representative FSPs. That being the case, the representative must be held responsible for marketing the product and cannot hide behind their status as mere representatives. If this is not the case; then clearly this is no incentive for representatives not to act recklessly.

54.7 The danger of making use of unqualified representatives is illustrated by the facts of the present matter.

54.8 There was a duty on the Respondent to conduct a check on BluePointer and its related entities. This he could have done by going through the relevant documents which would have shed light on the liquidity of the Companies. There is no indication that the Respondent sought to establish whether any of the SA Growth/Uniprop entities had issued any financial statements. Had the Respondent checked, he would have established that SA Growth/Uniprop did not own any assets of value. He merely relied on Mr Baartman. This was not enough.

54.9 As an authorised FSP, the Respondent had a duty to comply with the provisions of section 13 of the Act. Before he accepts an appointment as an authorised Representative FSP, the representative had an obligation to ensure that he receives proper training in order to market his product responsibly.

[55] **Respondent had no real appreciation of how property syndications work and the required disclosures.**

55.1 The Respondent had a duty to specifically point out to the Complainant the downside of investing in unlisted properties. Strangely, there is no record of any written documentation reflecting the Respondent's advice on the risks involved in the PropDotCom scheme.

55.3 In conclusion, the Complainant was an elderly lay person who had no in-depth understanding of commercial transactions, including investments. He relied entirely on the information he obtained from the Respondent.

55.4 Therefore the Respondent deliberately failed to properly advise the Complainant.

H. CONCLUSIONS

[56] On the undisputed facts before this Office the following conclusions are made:

- 56.1 The Respondent failed to make an independent and Objective assessment of the BluePointer SA Growth/Uniprop/PropDotCom company products.
- 56.2 The Respondent's Record of Advice is nonexistent and such does not conform to the requirements of Section 9 of the General Code of Conduct (i.e. summary of the information and material on which the advice was given, financial products considered and financial products recommended).
- 56.3 The Respondent could not provide proof that he did a due diligence on Prop Dot Com /SA Growth/ Uniprop/PropDotCom to ensure that the Complainant's funds were invested in a safe investment.
- 56.4 The Complainant was dependent on the Respondent for professional and sound advice on the appropriate investment he needed to make.
- 56.5 No indication whatsoever that the Respondent conducted the necessary needs and risk analysis of the Complainant.
- 56.6 The Respondent invested the Complainant's money into the BluePointer SA Growth/ Uniprop/PropDotCom project, which was a high risk investment.

56.7 The Respondent was not qualified to deal in unlisted shares and securities, nor was he licensed to do so.

56.8 The Respondent breached various provisions of the FAIS Act and is therefore liable to the Complainant.

56.9 In the premises, the complaint is upheld and the respondent is ordered to pay the complainant's claim.

I. QUANTUM

[57] The Respondent invested an amount of R 300,000.00 of Complainant's money in the SAF Growth/ Uniprop/PropDotCom Project. There is no prospect of recovering any amount from these companies.

[58] Accordingly an order will be made that Respondent pay to complainant an amount of R300, 000.00. Interest will be awarded on this amount from 1st of October 2008.

THE ORDER

1. I make the following order:

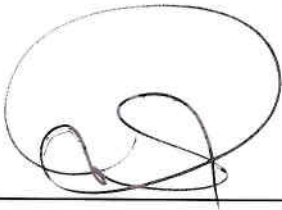
2. The complaint is upheld.

2.1 The respondent is ordered to pay to the Complainant the amount of R300, 000.00;

2.2 Interest on the amount of R300, 000.00 at the rate of 15, 5% per annum from the 1st of October 2008 to date of final payment.

3. Respondent is ordered to pay the case fee of R 1,000. 00 to this Office within thirty (30) days of date of this determination.

DATED AT PRETORIA ON THIS THE 9th DAY OF MAY 2011.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS

