IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 05491/11-12/ FS 1

In the Matter Between:

PETER JOHN PARKS **First Complainant**

JENNIFER ANNE PARKS **Second Complainant**

and

JACOBUS NAUDE STANDER **Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO 37 OF 2002 (the Act)

A. INTRODUCTION

[1] Complainants are married to one another and on the recommendation of respondent (Stander), invested their retirement funds in PIC Syndications: Highveld Syndication No 21 Ltd (HS21) and Highveld Syndication No 22 Ltd (HS22). First complainant invested R150 000 and second complainant invested R300 000.

[2] At first, the investment appeared to perform as expected; but soon after investing the interest payments decreased and eventually ceased altogether. PIC

Syndications (Pty) Ltd (PIC), the promoters of this investment went into business rescue and complainants believe they have no prospect of recovering any part of their funds from PIC. They believe they were given poor or inappropriate financial advice by respondent and accordingly filed a complaint with this Office.

[3] Although Mr and Mrs Parks represent two different investors and complainants, I will treat them as one for purposes of this determination. The factual circumstances of the complainants are exactly the same and I will refer to them collectively as "complainants".

B. THE PARTIES

[4] First complainant is Peter John Parks, an unemployed adult male who is married to second complainant. Second complainant is Jennifer Anne Parks, an unemployed adult female. Their particulars are on file with the Office.

[5] Respondent is Jacobus Naude Stander a financial services provider (FSP) of 13 Roux Street, Bethulie, Free State. Respondent was at all material times, licensed with the FSB with FSP No: 20878 to sell category 1.8 and 1.10 related products. Stander traded as a licensed FSP under the name and style of Naude Stander Makelaars.

C. THE COMPLAINT

[6] Complainants had invested their life savings in Stanlib and Liberty Life respectively. First complainant had invested R150 000 and the second complainant R300 000. They noticed that these investments were not performing and decided to withdraw

their funds and deposit same into a money market account. They attempted to do this themselves but became frustrated by red tape. Respondent was a well-known FSP in Bethulie and complainants decided to approach him to seek assistance in retrieving their investments. In December 2010, he agreed to assist and did indeed successfully release complainants' funds.

[7] Respondent called at complainants' home to assist them with their investments in Stanlib and Liberty. On one such visit he spoke about PIC and pointed out that he did not deal with any other company as everything with PIC was guaranteed. Respondent explained that with PIC, capital couldn't be lost and interest rates couldn't change because there are guarantees and head leases in place. He further explained that PIC was a management company and did not own the shares, so if anything should go wrong with PIC, investors' capital will be safe because of ownership of buildings.

[8] Respondent assured complainants that PIC had an excellent track record and advised them to invest. He indicated that HS 21 and HS 22 were available and gave complainants quotes. He also gave them the prospectuses for these two companies. Complainants claim to have tried to read the prospectus but were unable to understand it.

[9] Complainants were persuaded by respondent and decided to invest their money in PIC through him. Respondent made it clear to complainants that the promotor would not own any shares and only the investor would own the shares. The property will be transferred into the company and effectively complainants will own

a part of the building. The interest was guaranteed by the rental income from the building which was in turn guaranteed by a head lease. With regard to HS22, there was a guaranteed buy back so that the promised growth was guaranteed. Respondent stated that the investment had to be made before the 16th December 2010.

[10] Complainants agreed to invest and respondent called on them to fill out the application forms. Both complainants state that the forms were filled in by respondent and they merely initialed and signed on his instructions. These documents were also not read to them by respondent.

[11] Complainant states that respondent explained that the shares could not be easily bought and sold as they were unlisted shares. He explained that it was possible to sell the shares but complainants would have to find a buyer with no assistance from PIC. This did not trouble complainants as they were investing for a period of 3 years and 9 months. However, at no time did respondent explain that this was a risky investment with the potential for capital loss. Complainants allege instead that respondent had placed great emphasis on the investment being safe and "guaranteed", stating that respondent positioned it as a "what you see is what you get" kind of investment.

[12] Complainants state that they had no understanding of property syndications and relied entirely on the advice of respondent. The investment was made on the 16th December 2010.

[13] Interest was thereafter paid for a few months, as promised, until 2 April 2011 when interest was suddenly paid at a much lower rate than agreed. Noting this change, complainants took this up with respondent who in turn gave assurance that their capital was safe as they owned part of the buildings. He explained that the problem was caused “by the Reserve Bank throwing its weight around” and that all will be resolved soon.

[14] Late in April 2011 complainants received a notice from PIC, dated 1st April 2011. The notice stated, that the rate of interest on investments would be adjusted downwards and giving an undertaking to safeguard capital. Respondent again assured complainants that complainants’ money was safe as they owned part of the buildings.

[15] Since then payments continued to be erratic. During or about September 2011 complainants received a letter from PIC informing them that the issue of late payments would be addressed, and that there was a business rescue plan for HS22. In spite of these assurances the frequency and the monetary value of the payments did not improve.

[16] Frustrated with the situation complainants again called on respondent to find out what was going on in and around November 2011. Respondent provided no better explanation than had been provided on earlier occasions standing by his word that complainants’ capital was safe. This time however complainants requested a refund of their capital given that interest was not being paid as promised in their contract and on the further realization that the head lease on the property was not

in place anymore. On hearing this respondent merely advised complainants to consult a lawyer. At this stage complainants pointed out that they had suspected that PIC was in trouble before making the investment, and that the Reserve Bank was the cause of the problem with interest payments. Respondent simply brushed this aside and made a further promise that complainants' funds will be paid back "sooner than you think".

[17] After this meeting, complainants attempted to find the PIC web site; while doing this they stumbled across a number of news articles pertaining to the PIC investments. The content of these new articles caused alarm and complainants printed them and went back to see respondent. He explained that the money being received was no longer interest but rental from the tenants in the buildings, part of which complainants owned.

[18] At this meeting the news articles were handed to respondent and the following was pertinently drawn to his attention:

18.1 Complainants pointed out that from what they gathered, PIC was already in trouble (financially) before respondent sold the investment to them. One of the news articles reported that the valuators had retracted their permission to use their certificates in the prospectus months before respondent advised them to invest; but the version of the prospectus handed to complainants (by respondent) had included valuator certificates, but respondent failed to draw this to their attention;

18.2 Among some of the alarming discoveries made through the news articles is that the properties had never been transferred into the names of the investors, meaning that what they purchased was not delivered. Incidentally, complainants point out that since making the investments no share certificates were ever received;

18.3 The message carried by these news articles suggested that investors should never have purchased shares after March 2010. This, complainants found distressing, as it now appeared that they were misled by respondent who must have or should have known that PIC was in trouble before he sold the investment to complainants.

[19] Respondent's response to this information was that he had not heard of these things and would investigate. Respondent suddenly remembered that complainants' funds had not been put through HS21 and HS22 and was instead "floating" somewhere. Without providing a credible basis for how, he gave further assurance that complainants' funds would be refunded in November 2011.

[20] By the end of November 2011, no money was received and at this stage complainants were unable to reach respondent. Respondent's office was locked and he did not answer his phone calls. With no further avenue for relief complainants then filed a complaint against respondent with this Office.

[21] Complainants stated the following in their complaint:

21.1 they were given bad financial advice by respondent;

21.2 they were given promises and guarantees that fell apart after a few months of investing;

21.3 they realised that PIC was in trouble months before they invested but this information was withheld;

21.4 what they signed for never materialized;

21.5 they never received any share certificates; and

21.6 respondent was unable to explain what became of their money.

[22] Complainants state in no uncertain terms that had they been told about PIC's difficulties, they would not have invested as the funds were their life savings, they are both unemployed and incapable of replacing lost capital. Complainants want respondent to be held responsible to refund their money.

D. RESPONDENTS' RESPONSE

[23] The parties were given an opportunity to resolve the dispute with the complainants in accordance with the rules of this Office, but this came to naught. It was only after a notice in terms of Section 27 (of the FAIS Act) was issued, did respondent submit a written response. In it respondent states that in assisting complainants with this investment he complied with all the requirements of the FAIS Act and General Code. The following are the material submissions made by respondent:

23.1 He admits that there was a reduction in income paid to investors and he attributes this to a down turn in the economy. In support of this he quotes from the business rescue plan.

23.2 He alleges that the complainants “willingly” made the investments in PIC and the funds were paid into the trust account of attorneys practicing under the name and style Eugene Kruger Inc.

23.3 After the complainants had an opportunity to study the prospectus, they instructed respondent to discontinue their investments with Stanlib and Liberty and to make alternative investments in HS21 and HS22. Complainants were unhappy with their current investments and were looking to earn better returns. This is what attracted them to the PIC investment.

23.4 Respondent gave the complainants copies of the prospectus so that they may familiarize themselves with the nature of the investment and the risks associated with investments in unlisted shares. They thereafter called respondent and requested him to withdraw their funds and make investments in HS21 and HS22.

23.5 Respondent gave complainants ample opportunity to ask questions about the investments but “they were glad to be able to receive a higher return on their investment.”

23.6 He carried out a needs analysis which indicated that the complainants wanted income and capital growth. HS21 provided the income and HS22 the capital growth. Although the rental income was reduced, it was still paying 6% which was within their expectation of between 5 and 12%. Respondent notes that income is still being paid and the capital is still safe

23.7 According to respondent, complainants were experienced investors and did not have to be “handled with extra care and consideration”. They had also provided funds for “unforeseen circumstances”;

23.8 The “Advice Record of mutual understanding” contains the following:

a. The investment is in unlisted shares.

b. The capital is “secured” (and not guaranteed).

c. Potential volatility associated with property owing to market conditions could result in negative movements of the value of the investment portfolio, and it is confirmed that clients understand and accept the underlying market risks in this regard.

d. It is not possible to guarantee the investment capital, nor the targeted return.

e. Investors receive interest income derived from the distribution of the net profit of the syndication company. The net profit is earned from rental income received, less related company expenses.

f. The shares are less marketable.

g. Clients understand that there is a three (3) day cooling off period.

23.9 Complainants knew all along that they were investing in unlisted shares and that they had no access to their investment capital. The product was never sold as one where the investor had instant access to capital. This fact was also stated in the prospectus.

23.10 Respondent points out that there was no issue regarding the advice process on the product. He states that he cannot be held liable for changes in the contractual terms of the investment that took place after his advice was given. Respondent then makes the point that this Office has no jurisdiction regarding changes to the contractual nature of the agreement between investor and product provider. In such cases the investor must sue on the non-performance of the agreement.

23.11 Respondent then points out that complainants “have not suffered any financial loss” in investing in HS21 and HS22. They still receive reduced income and complainants’ rights are protected in the share certificates which they hold. Should complainants require access to their capital the unlisted shares (of which they hold the share certificates) will have to be sold.

23.12 This was a “single need transaction” where the risks were explained to the investors. A risk assessment was concluded and showed the complainants to have a moderate risk profile. An investment in PIC, confirmed in the prospectus, is associated with moderate risks.

23.13 Respondent denies that he sold the product as “a guaranteed product”; he states that complainants were aware of the inherent risks associated with this product. Full disclosure was made to the complainants regarding this product. Furthermore, the complainants had a legal obligation to acquaint themselves with the contents of the prospectus.

23.14 Respondent also states that he “performed informal due diligence on the Highveld Companies” and he was satisfied that they could deliver on the responsibilities placed on them by the investments.

23.15 Respondent concludes by stating that he acted in the best interests of his clients as he acted on their direct instructions and made all disclosures about possible risks. He complied with the provisions of the General Code and has documentary proof.

23.16 Finally he submits that complainants do have access to their capital “as they can instruct Pickvest or myself to assist in a re-sale process”.

E. THE CONTRACT AND PROSPECTUS

[24] For purposes of this determination it is important for me to consider what was sold to complainants by respondent by considering the contract signed by complainants and the content of the prospectus. I will also point out what actually happened and how this impacts on the conduct of respondent.

[25] To begin with; respondent claims to have carried out an “informal due diligence” on the Highveld Companies. Exactly what he meant by this was unexplained. Respondent failed to state what documents he considered and how he went about this “informal due diligence”. As a licensed FSP, he must have been aware of the fact that he had to carry out due diligence on the PIC syndication companies before he sold their products to the investing public. Of significance, is the fact that he had to carry out due diligence on the company that held the head lease in order to

satisfy himself that they were able to pay the promised returns. He also had to carry out due diligence on the company that promised to buy back the property or the shares; was it able to deliver on this promise? Respondent had to show that, at the very least, he called for and analysed the financial statements of all of these companies. There is no evidence that he did any of this due diligence before he sold this product. In fact, as will appear below, respondent carried out absolutely no due diligence.

[26] In respondent's own version, he claims not to have known that PIC was in trouble even before he sold the investment to complainants. The fact is that the Reserve Bank, in about August 2010, had written to PIC about their scheme and that possibly it contravened the Banks Act. Meetings were convened for PIC representatives with the Reserve Bank. This fact was well known amongst the brokers and representatives of PIC. A further problem that had emerged was that in March 2010, the valuators used by PIC for the valuation of properties in HS21 and HS22, Carl Nel and Joe Knipe, withdrew their permission for Picvest to use their valuations. The consequence being that there was no independent professional opinion to support what PIC claimed the underlying buildings were worth. There was then a contravention of Section 10 of Notice 459 of 2006, Government Gazette 28690, (Notice 459).

[27] If respondent did not know about the Reserve Bank notice to PIC, this was reckless on his part as it was his business to know about such action. I consider the fact that, by his own admission, at the time of making this investment respondent sold only PIC products and nothing else. If he knew about this, then it was equally

reckless of him to fail to disclose this to complainants. On this basis alone, respondent should have stopped selling PIC to anyone, including complainants. On this basis alone, he can be held liable for complainants' loss.

[28] I must accept that respondent, as a so called responsible FSP selling property syndication, was aware of the contents of Notice 459. The purpose of this Notice was to offer consumer protection. All property syndication companies had to comply with this. Section 10 provides for duly registered valuers (in terms of Section 20(a) of the Property Valuers Profession Act, 2000), to provide a certificate that the valuation of the syndicated properties was consistent with an open market value or syndication value. This information, including full information of the valuers had to be presented in the prospectus. I must assume that respondent knew, in December 2010, that in March 2010 the valuers, as stated in the prospectus had withdrawn their certificates. He must have known that the prospectus was no longer compliant with Notice 459. He failed to disclose this to his clients. Indeed, with this knowledge, he should have stopped selling PIC products immediately. He was also under a duty to disclose to complainants that the prospectus was no longer compliant. He did not disclose this to complainants. He therefore failed to place them in a position where they could make an informed decision. It is also significant that in his response, respondent conveniently failed to deal with these material non-disclosures. In fact he unjustifiably alleged that he made full disclosure to his clients before they purchased the product. Again, based on this, he can be held responsible for complainants' loss.

[29] Respondent's recklessness keeps on mounting; he repeatedly makes the point that the prospectuses were handed to complainants who had ample time to study same. I will accept that respondent had read the prospectus and understood its contents. The prospectus for HS21 and HS22, prospectus numbers 212148 and 228711 respectively, state that the "opening date of the offer" is 9th February 2009 and the "closing date of offer" is 8th May 2009. It appears that respondent offered shares to complainants 19 months after the offer closed. This might explain why complainants never received their share certificates. Again he failed to disclose this to complainants and failed to deal with this in his response. Stander should never have sold this investment to complainants in the first place.

[30] The prospectus as well as the application forms state that client funds will be kept in the trust account of Eugene Kruger Inc. and the funds will be utilised to "take occupation of the properties" (my emphasis). Section 2 (b) of notice 459 provides as follows:

"*Funds shall only be withdrawn from the trust account in the event of registration of transfer of the property into the syndication vehicle; or underwriting by a disclosed underwriter with details of the underwriter; or repayment to an investor in the event of the syndication not proceeding."* (My emphasis)

Notice 459 does not provide for the trust money to be withdrawn to take "occupation" of the property, what is required is "transfer" of the property. In this respect the prospectus did not comply with Notice 459. Respondent did not query this and failed to disclose this to his clients.

Ironically, the prospectus contains the following declaration by the directors of PIC:

"*PIC Syndications supports the regulation of the property syndication industry. PIC complies with all of the requirements stated in the Government Gazette of 30 March 2006."* (Notice 459)

As appears in the paragraphs above, nothing could be further from the truth.

[31] With regard to the purchase of the actual properties; the prospectuses state as follows:

"*The properties were bought by the promoter at the Purchase Price, and are sold to Highveld Syndication 21 (and 22) Ltd at the Selling Price".*

"The company will be the sole owner of the land and buildings."

This Office knows that no properties were transferred to HS21 and HS22. The offer closed on the 8th May 2009. If the shares were not fully subscribed as at this date, investors' funds had to be returned. If the properties were not transferred to HS21 and HS22, again investor funds had to be returned. This did not happen. I must accept that as at December 2010, (nineteen) 19 months after the offer closed, respondent had to check if the properties were transferred to the syndication companies as promised in the prospectus. By his own account, he did not carry out this most basic of due diligence. Had he checked, he would have realised that something was wrong and he would not have sold the PIC investment to his clients.

[32] In his response, respondent repeatedly pointed out that complainants had their share certificates and therefore their capital was safe. The fact that HS21 and HS22 did not own any property simply means the shares were worthless. Respondent in his response still offered to assist complainants to sell their non-existing shares, an indication of his complete incompetence.

[33] The hard truth is that the investors did not get ownership of the properties they contracted for and their funds were diverted elsewhere with scant regard for the provisions of Notice 459. Investors' funds were paid over to Bosman and Visser without the knowledge of the investors and in contravention of Notice 459.

The investment in HS21 was meant to provide an income, yet it had no trading history and no assets. It had no income from which to pay investors. The inference goes without saying that HS21 paid investors from their own funds.

Between the 9th February 2009 and December 2010, respondent could easily have found this out even by making rudimentary inquiries. By his own version he did not do so. More irresponsible conduct.

F. FINDINGS

[34] I repeatedly described respondent's conduct as reckless. I find that he failed to act in the interests of his clients. He also failed to carry out the most basic due diligence in satisfying himself that it was safe to sell the PIC Syndication product. I find that he contravened the provisions of section 2 of the General code; which provides as follows:

"A provider must 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."

[35] On the facts before me, I find as follows:

35.1 Respondent, in providing financial advice; failed to provide his clients with information that was factually correct.

35.2 Respondent failed to provide information about the product that was adequate and appropriate.

35.3 Respondent failed to provide full and frank disclosure of information complainants required to enable them to make an informed decision.

35.4 Respondent failed to ensure that his clients invested in a product that was appropriate for their needs and consistent with their tolerance for risk; and

35.5 Respondent failed to take reasonable steps to ensure that complainants understood the advice and were in a position to make an informed decision. In the premises I find that respondent also contravened the following sections of the General Code: Sections 3 (1) (a) (i) and (iii); Section 7 (1) (a) and Sections 8 (1) (c) and (2).

[36] I also find that there is now, no prospect that complainants could recover any of their funds. HS21 and HS22 are no longer trading, have no assets and were placed into business rescue.

[37] I find that complainants' loss was caused as a direct result of respondent's failure to comply with the provisions of the General Code. Had he complied, he would not have sold the product in the first place.

[38] In addition, he knew that complainants would rely on his advice in deciding to make the investment. He therefore owed complainants a legal duty of care to carry out due diligence to satisfy himself that it was safe to sell this product. I find that; in negligent breach of the duty of care, respondent failed to carry out due diligence and as a consequence advised complainants to invest in a company that was already in trouble. He must then be liable for complainants' loss.

G. QUANTUM

[39] First complainant invested R150 000; and second complainant invested R300 000. These are the amounts that respondent will have to repay, plus interest on those amounts. The interest will be calculated from December 2011 as it is this date that was given to complainants as the date by when their funds will be repaid.

H. THE ORDER

[40] For reasons set out above, I make the following order:

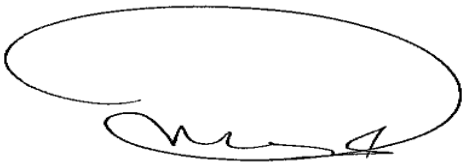
1. The complaints in respect of first and second complainants are upheld;

2. Respondent is ordered to pay first complainant the amount of R150 000;

3. Respondent is ordered to pay second complainant the amount of R300 000; and

4. Respondent is ordered to pay interest on the said amounts at the rate of 10.25 % per annum from January 2012 to date of payment.

DATED AT PRETORIA ON THIS 7th DAY OF SEPTEMBER 2016.



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OMBUD FOR FINANCIAL SERVICES PROVIDERS