

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER:

FAIS 01752/11-12/WC1

In the matter between:-

ESTER PIENAAR

Complainant

and

ROELOF JOHANNES NEL T/A R&M ADVISORS

1st Respondent

EDWARD JACOBUS HANEKOM

2nd Respondent

**DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY
AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')**

A. INTRODUCTION

[1] This is a complaint about investments made into the Bluezone group of companies ('Bluezone'). All pertinent details about Bluezone were comprehensively dealt with in the determinations of GERALD EDWARD BLACK v JOHN ALEXANDER MOORE AND JOHNSURE INVESTMENTS CC, FAIS Reference No: 01110/10-11/WC1 ('Black'). As such, it follows that this determination must be read with that of Black.

B. THE PARTIES

- [2] Complainant is Ester Pienaar, an adult female home maker, who resides in Stilbaai, Western Cape, 6674.
- [3] The first respondent is Roelof Johannes Nel conducting business as R&M Adviseurs (a sole proprietor) at 21 Dickson Street, Riversdal, 6670. At all material times the respondent was an authorised financial services provider in terms of the FAIS Act, with license number 6965. The license was issued on 11 October 2005.
- [4] The second respondent is Edward Jacobus Hanekom, an adult male and representative of the 1st respondent. At all material times hereto, the complainant dealt with 2nd respondent. For convenience, and where appropriate, I refer to 1st and 2nd respondents collectively as respondent.

C. THE COMPLAINT

- [5] During 2006 and 2008, the complainant invested an amount of R360 000 into Bluezone pursuant to the advice of the respondent. Interest payments on the investments ceased in 2009. The complainant now fears that she has lost her capital.
- [6] In her complaint to the Office, the complainant made allegations, which may be summarised as follows:
- a. As a result of the respondent's advice, the complainant eventually ended up with investments in the following three Bluezone property syndications:

1. Flextronics

Date: 03 August 2006

Product: 200 unlisted shares at a R1 000 per share = R200 000

Income: R1 500 p.m.

2. Bishops Court

Date: 03 August 2006

Product: 100 unlisted shares at a R1 000 per share = R100 000

Income: R0

3. Spitskop Village ('Spitskop')

Date: 19 March 2008

Product: 60 units of unlisted shares and debentures at R1 000 per unit = R60 000

Income: R506 p.m.

- b. The complainant asserts that she is an adult female homemaker and is over the age of 60 years. She is a layperson in respect of finances and has been a homemaker her whole life. Her only assets are a modest house and less than R500 000 in investments. She does not receive a pension and is totally dependent on her investments.
- c. She contends that property syndications are appreciably more risky than what they were made out to be by the respondent. Despite the

risk, the respondent invested 80% of her capital in an unsuitable investment.

- d. According to the complainant, the respondent informed her that no fees were payable for the financial service rendered to her. However, the complainant subsequently learnt that, in some instances, Bluezone paid brokers up to 10% commission on capital invested.
- e. The complainant contends that had the respondent made proper disclosures about Bluezone, she would not have made the investments.

D. THE RELIEF SOUGHT

[7] The complainant wants respondent to pay her an amount of R283 308, which she alleges she lost as a result of the conduct of the respondent. This amount represents the difference between what complainant invested less R 76 692 that she was able to recover upon selling her shares in Bishop's Court.

E. RESPONDENTS' RESPONSE

[8] In terms of the Rules on Proceedings of the Office, the complaint was referred to respondent to resolve. As the complaint could not be resolved, the respondent was requested in terms of Section 27(4) of the FAIS Act to provide his response as well as a copy of his file of papers to this Office.

[9] The respondent provided the Office with his response and a second response drafted by his attorneys Mostert & Bosman Attorneys ('Mostert'). I will deal

with relevant submissions made in the response of Mostert later in this determination.

[10] The respondent's response may be summarised as follows:

- a. Upon being approached by the complainant for advice in April 2005, the respondent invested R250 000 with Stanlib.
- b. In April 2006, the fund value of the complainant's Stanlib investment had increased to R304 717. The respondent asserts that the complainant was concerned that she might lose the gain she made on her Stanlib investment and wanted a more stable investment with good interest.
- c. According to the respondent, upon his recommendation the complainant made investments in two commercial properties, namely, Flextronics - R200 000 and Bishops Court - R100 000. The respondent contends that when the investments were made, he acted as a representative of Blue Zone (license no.21227).
- d. The respondent states that the investments were explained to the complainant. For example, respondent claims he explained:-
 - The term of the investment;
 - Risk (vacancy rates);
 - That the rental escalation was set at 7.5% per annum;
 - Commission was to be paid by Bluezone;
 - Penalties;

- The quotation;
 - The risk analysis he had conducted;
 - In respect of Flextronics, the tenant had guaranteed occupation until 2013.
- e. The respondent states that the complainant instructed him on 11 March 2008 to surrender a Liberty Multi Access Endowment policy. It was decided that R40 000 of the proceeds of the investment would be invested in the money market and R60 000 in Bluezone (Spitskop).
- f. The respondent asserts that Spitskop was selected as an investment as the term of the investment would have been for 18 months with a return of 10.12% per annum. The return on the investment would have increased to 10.87% per annum on 01 August 2008 according to the respondent. Although not guaranteed, respondent was of the view that the Spitskop investment had potential to grow at the rate of 20% per annum.

F. DETERMINATION AND REASONS

[11] There are three issues here:-

- a. Whether respondents acted in a manner, which is not in compliance with the FAIS Act and / or the General Code of Conduct ('the Code');
- b. Should it be found that the respondents' conduct was not in compliance with the FAIS Act and / or the Code, whether it caused the complainant to suffer damage or financial prejudice; and

- c. The amount of such damage or financial prejudice.

Licensing

[12] It is appropriate to start by considering the issue of licensing in respect of the investments made by the complainant on the advice of the respondent. The following emerged from investigations conducted by the Office:

12.1 During 2004, 1st respondent applied to the Registrar to be licensed as a financial services provider. The respondent's application was approved on 29 September 2005. However, unlisted shares and debentures were not included in the list of financial products that the respondent was authorised to deal with.

12.2 The Registrar confirmed that the 2nd respondent was appointed as a representative of 1st respondent on 01 May 2006. He was authorised to deal only with products listed on 1st respondent's license. The list does not include shares and debentures.

12.3 The first respondent was questioned about 2nd respondent's lack of authority to sell shares and debentures. The 1st respondent was quick to point out that 2nd respondent acted under Bluezone's license (no. 21227), when the investments were made. The respondent contended that Bluezone issued a certificate to 2nd respondent in terms of Section 13(1) of the FAIS Act. By issuing this certificate to the 2nd respondent, Bluezone accepted responsibility for the acts of the 2nd respondent as provided for in Section 13 of the FAIS Act. The Section stipulates that:

(1) A person may not –

(b) act as a representative of authorised financial services provider,

unless such person-

(i) is able to provide confirmation, certified by the provider, to clients -

(aa) that a service contract or other mandate, to represent the provider, exists; and

(bb) that the provider accepts responsibility for those activities of the representative performed within the scope of, or in the course of implementing, any such contract;...'

12.4 In terms of Section 5 of the Code the respondent was obliged to have furnished the complainant with full particulars of the following information:

(a)

(b) concise details of the legal and contractual status of the provider, including details as regards the relevant product supplier (or, in the case of a representative, as regards the relevant provider and product supplier), to be provided in a manner which can reasonably be expected to make it clear to the client which entity accepts responsibility for the actions of the provider or representative in the rendering of the financial service involved and the extent to which the client will have to accept such responsibility;'

12.5 The complainant maintained that 2nd respondent rendered financial services to her as a representative of 2nd respondent (R&M Adviseurs) and not Bluezone. The complainant's submission is corroborated by the following documents included in the respondent's file of papers:

- **Broker authorisation letters**

The authorisations were signed by the complainant and 2nd respondent on the days that the Bluezone investments were made. The authorisations reflect that 2nd respondent was

authorised by 1st respondent to render financial services to the complainant under FSP license number 6965, which is 1st respondent's license number.

- **Bluezone investment applications**

The applications reflect 2nd respondent as the advisor rendering financial services to the complainant. The advisor's address is reflected as 21 Dickson Street, Riversdal, 6670 and the telephone number as 028 713 2805. These contact details are those of 1st respondent who in turn is reflected as the brokerage under whose name 2nd respondent rendered financial services.

[13] Based on the evidence, I am compelled to find that when the 2nd respondent rendered financial services to the complainant, he did so under the license of 1st respondent. As mentioned in par 12.1, 1st respondent was not licensed to give advice on shares and debentures. The respondent knew this and was under a duty to disclose this to the complainant. He failed to do so.

Inherent risk in the investments

[14] The complainant is a lifelong homemaker and is 68 years of age. As the complainant did not have the necessary financial acumen, she trusted the respondent and relied on him for professional advice. The funds invested in Bluezone represent approximately 80% of the complainant's capital. It is not in dispute that the complainant requested the respondent to place her capital in stable income producing investments. The complainant was dependent on the income from the investments to fund her living expenses. As a result, she could not afford to lose any of her capital. This was also confirmed by two risk

analyses conducted when the investments in Bluezone were made in 2006 and 2008.

[15] According to the respondent, the complainant's risk profile was in line with the risk rating of the Bluezone investments. According to Bluezone's marketing material, the investments were categorised as moderately conservative. Notwithstanding the general categorisation of the investment by Bluezone, the respondent had a responsibility to make a suitable recommendation and disclose the risks inherent in the investment to the complainant. It cannot be disputed that shares and unsecured debentures are high risk investments. Unlisted shares can only be redeemed if a willing buyer for the shares can be found. This lack of liquidity increases the risk. Unlike listed companies, unlisted companies are not subjected to the same regulatory scrutiny and financial oversight. The respondent was under a duty to disclose to the complainant the high risks inherent in Bluezone. His failure to do so is a contravention of the Code. In the event that he did not understand the risks associated with the investments, which appears to be the case, then he was reckless in recommending the products to the complainant. This too is a contravention of the Code.

[16] What is of a major concern is the fact the respondent was warned of the troubles Spitskop were facing before advising the complainant to invest in the syndication. An e-mail sent to the respondent on 16 October 2007, refers to an article in a Sunday newspaper warning investors about a pending application for liquidation of Spitskop as well as investigations by the FSB and the Reserve Bank into the affairs of Spitskop. The article also warned

investors about the serious discrepancies in respect of the valuation and resale of the land on which the Spitskop syndication was sold. As was considered in the Black determination, the land of 198 hectares was bought for R1.057 million in 2003 by Blue Dot Properties. Shortly thereafter, the land was sold by Blue Dot to Spitskop for R118.3million. I am persuaded that had the article been brought to the attention of the complainant, she would not have made the investment in Spitskop.

Record keeping

[17] In his response to the complaint, the respondent asserted that explanations (see par 10(d)) in respect of the Bluezone products were made to the complainant when the financial services were rendered. In support of his version, the respondent provided the Office with *inter alia* a record of the advice ('the ROA') pertaining to the Flextronics and Bishops Court investments.

[18] At cursory glance, the ROA appeared to be a true record of what transpired on the day the respondent advised the complainant to invest in Flextronics and Bishops Court. However, upon closer scrutiny, it seemed that the signature on the ROA which purported to be the complainant's signature was in fact electronically pasted. In other words it appeared that the signature was a photocopy of complainant's original signature. When questioned about the document and signature, the complainant denied signing the document. She is also adamant that the discussions as documented in the ROA did not take place. This prompted the Office to obtain an opinion in respect of the disputed signature from a professionally recognised Forensic Document Examiner who

is also a qualified handwriting expert, ('the expert'). After examining the ROA, the expert concluded that the disputed signature of the complainant was copied from another document and pasted onto the ROA. Presented with the expert's opinion, the respondent contended that he duplicated the client advice record, but did not falsify the complainant's signature. The respondent evaded further questions about the fabrication of the document arguing that this issue falls within the jurisdiction of the regulator. The Office has since reported the respondent's conduct to the regulator.

[19] Given that the ROA was fabricated, the only reasonable conclusion to be drawn is that the purported discussions between the complainant and the respondent as documented in the ROA did not take place. In other words, the respondent did not make the disclosures as alleged by him (see par 10(d)) when the financial services were rendered to the complainant. It follows that the complainant was not put into a position to make an informed decision when she was advised to invest in Flextronics and Bishops Court¹.

[20] It is not in dispute that respondent replaced the complainant's then existing investments with Stanlib and Liberty Life with the investments in Bluezone. However, there is no evidence that the material differences between the old and replacement products were disclosed to the complainant at point of sale of the products. The differences include²:

¹ See Section 7(1)(a) of the Code

² See Section 8(1)(d) of the Code

- a. The investments with Liberty Life and Stanlib could have been realised at any time and without additional cost. In contrast the unlisted shares in the Bluezone property syndications are highly illiquid.
- b. The underlying unit trust funds in the Liberty investment are low risk funds.³ In contrast Blue Zone is a high risk investment in unlisted shares.
- c. As opposed to Liberty Life and Stanlib, Bluezone was not regulated.
- d. The commission payable on the Bluezone investments was substantially higher than that earned on the Liberty Life and Stanlib investments.

G. RESPONDENT'S FUTURE SUBMISSIONS

[21] After further enquiries by the Office, the respondent submitted a further response in the form of a 40 page document drafted by his Attorneys, Mostert. In dealing with the response I will confine myself to the relevant issues⁴.

1. Failure to comply with Rule 5(c) and 5(g) of the Rules on Proceedings of the Office⁵

The respondent's submission that the complainant failed to comply with the said Rules is dismissed for the following reasons:

³Liberty Multi Access Endowment policy: Underlying funds – Excelsior CPI Plus fund and Excelsior Conservative fund.

⁴Many of the submissions made by the respondent were dealt with in the North Gauteng High Court in Risk and another v Ombud for Financial Services and others case 38791/2011 dated 07/09/2012.

⁵ In terms of Rule 5(c) a complainant has six months after receipt of the final response of the respondent, to complain to the Office. In terms of Rule 5(g) the complainant must be advised by the Ombud of the respondent's response in order to decide whether the complaint should be proceeded with.

- a) It is surprising that respondent finds an opportunity to attack the complainant when he in the first place failed to comply with the law. Respondent had the responsibility to inform the complainant about the steps she had to follow in the event she was not satisfied with the response she received from respondent after lodging her complaint. There is no evidence that respondent complied with Part VI, Section 16 (d) of the Code. The respondent failed to inform the complainant that she may complain to the Ombud within six months after receipt of the respondent's final report⁶.
- b) Having refused respondent's offer of settlement, it is clear that the complainant at all times intended to proceed with her complaint.
- c) In any event, there is nothing fatal about complainant's failure to comply with Rule 5(c) of the Rules. The provision firstly, is not peremptory. Secondly, the prescription provision that limit the jurisdiction of the Ombud are as set out in section 27 (3) of the FAIS Act.

2. **Ombud's jurisdiction limited by the allegations made in the complaint received**

'Section 27 (5)(a) of the FAIS Act provides that:

The Ombud may, in investigating or determining an officially received complaint, follow and implement any procedure (including mediation)

⁶ See Rule 6 (b)(i) and (ii) of the Office

which the Ombud deems appropriate, and may allow any party the right of legal representation.' When investigating complaints, the Office's follows an inquisitorial system which is not akin to the procedures of a court. Therefore, the Office cannot be confined to the issues as outlined in a complainant's complaint as is the case with pleadings nor is it expected of complainants to properly formulate a complaint when they do not have the necessary skills.

3. **The complaint should be dismissed because the subject matter is pending before court - Rule 7(b)(v)**

On respondent's own admission the question of his liability is not in itself pending in any court proceedings. This defence is therefore dismissed.

4. **The complaint will be more appropriately dealt with by a Court – Section 27(3) of the FAIS Act**

The allegations made by the complainant are matters of compliance with the Code which can and are answerable by records maintained by the FSP. It is furthermore not for the respondent to dictate to the Office that this complainant be dealt with by a court. Refer to the Deeb Risk matter. The defence is therefore dismissed.

5. **Quantum of financial loss**

The respondent argues that there is no material before the Ombud to show what loss, if any, the complainant has suffered. The submission is dismissed for the following reasons.

- The complainant received her last interest payment from Bluezone more than three years ago.
- The Bluezone group of companies were wound up in 2009.
- There is no evidence that the complainant received payments from Bonatla after she lodged her complaint as alleged by the respondent.
- Notwithstanding the above, the definition of a complaint as per Section 1 of the FAIS Act includes the potential to suffer prejudice or damage and is not confined to actual loss.

6. The transactions

According to the respondent he provided the complainant with the marketing material pertaining to Liberty Lane and the Flextronics Building. He explained all material facts surrounding the investment and referred to the risks inherent in such property syndication investment. The complainant signed the client advice record, confirming that she understood the product and the risks associated with the product.

These issues have been dealt with in paragraph's 18 to 20. In addition providing a client with volumes of marketing material of an investment does not comply with the disclosure requirements of the Code. As already established, the ROA referred to by the respondent was fabricated and therefore cannot stand. The only reasonable conclusion to be drawn is that the required disclosures in respect of the investments were not made. Furthermore, Bluezone is not a

moderately conservative investment as alleged by the respondent. It is in fact a high risk investment.

7. **The Investigation is not permissible because of failure to provide necessary particulars**

The respondent contends that insufficient particulars have been provided to him to enable him to respond to the allegation that Spitskop was an illegal scheme. This submission is dismissed. The issue at hand is not whether or not Spitskop was an illegal scheme per se but rather whether the investment was appropriate in the circumstances of complainant. This has been dealt with in paragraphs 14 to 16.

8. **No advice given to complainant for or on behalf of R&M Advisers**

This issue has been dealt with in paragraphs 12.1 to 12.5.

9. **Complaint must not relate to investment performance**

The complaint clearly relates to losses suffered due to inappropriate advice and not the performance of the investments⁷.

10. **Due diligence checks**

The respondent argues there was nothing inherently risky in property syndication investments. Bluezone was a licensed financial services provider and had a solid track record in the property syndication industry. It was the promoter in approximately 14 other property syndication investment projects. All of these were successful.

⁷ In terms of Rule 4(f) the Office is precluded from investigating a complaint relating to the investment performance of a financial product which is the subject of the complaint.

The risks inherent in the investments in question have been dealt with in paragraphs 14-16. The issue at hand is not whether investments proved to be successful or not, but whether the investments in question were appropriate. As already mentioned, the investments were not appropriate given the circumstances of the complainant.

11. Complaint should be stayed pending the outcome of the proceedings in the North Gauteng High Court ('High Court') under case number 16556/2010

The respondent submits that the complaint be stayed pending the outcome of proceedings in the High Court. Firstly, the respondent is not a party to the proceedings in the High Court. Secondly, the issues before this Office relate to compliance with the Code as provided for in the General Code of Conduct. They are completely unrelated to the issues before the High Court. This submission therefore falls to be dismissed.

12. The respondent insists that he be afforded an opportunity to present evidence and legal argument before the Ombud at a hearing before a final determination is made.

The respondent contends that there are many factual issues in dispute and procedural fairness demands that he be assisted by his legal advisor and afforded an oral hearing. Respondent however, does not say what those factual issues are. Notwithstanding, the allegations against the respondent is that he invested complainant's funds in unsuitable investment products and that he did not disclose material

aspects of the products. He also failed to disclose his commission. These are all matters of compliance with the Code and are answerable by the records maintained by an FSP. The submission is therefore dismissed.

H. FINDINGS

- [22] The respondent rendered financial services in relation to unlisted shares and debentures whilst not licensed to do so.
- [23] The respondent was required in terms of Section 8 (1) (c) of the Code to identify the financial product or products that will be appropriate to the client's risk profile and financial needs. Given the complainant's circumstances, the investments in Bluezone were unsuitable.
- [24] The respondent failed to act with due skill care and diligence, and in the interests of complainant in that he invested the complainant's capital into investments that are not commensurate with her risk profile.⁸
- [25] The respondent failed to disclose his commission on the investments, including costs associated with his commission.
- [26] The 2nd respondent fabricated the ROA pertaining to the investments in Bishops Court and Flextronics. I am compelled to find that the respondent has failed to act with integrity in this matter. Respondents' conduct also brought the financial services industry in disrepute.

⁸ See Sections 2 and 8(1)(c) of the Code

I. CAUSATION

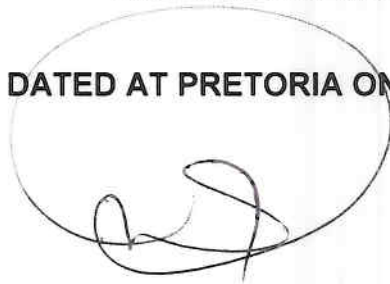
[27] I am convinced that had the complainant been made aware that she could lose all her capital, she would not have gone ahead with the investments in Bluezone. The respondent's advice to complainant to invest in Bluezone was contrary to the provisions of the Code. As a consequence of the respondent's conduct, the complainant suffered damages in the amount of R283 308.

J. ORDER

In the premises, the following order is made:

1. The complaint is upheld;
2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to complainant the amount of R283 308.
3. Complainant is to hand over, upon full payment, all documents and securities, forgo any rights or interest pertaining to the investment in favour of respondents;
4. Interest at the rate of 15.5 %, per annum, seven (7) days from date of this order to date of final payment;

DATED AT PRETORIA ON THIS THE 22th DAY OF MARCH 2013.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS