IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 02381/09-10/GP1

In the matter between:-

PAUL JAMES JOSEPH RAUCH **Complainant**

(In his capacity as Trustee of the Clifford James Rauch Testamentary Trust, in terms of the letters of appointment by the Master of the High Court)

and

JACOB JOHANNES VAN ZYL **1st Respondent**

HENDRIK CHRISTOFFEL LAMPRECHT **2nd Respondent**

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

A. PARTIES

[1] The complainant is Paul James Joseph Rauch, an adult male, residing at Kyalami, Halfway House, in Johannesburg.

[2] The first respondent is Jacob Johannes van Zyl, an adult male, who was at all material times related to this matter a Director, Key Individual, and Head of

Commercial Legal Division of Blue Zone (Pty) Ltd and related companies. The first respondent resides at 16 Raytonridge Road, Rayton, and Bloemfontein.

[3] The second respondent is Hendrik Christoffel Lamprecht, an adult male who at all material times related hereto, was a director, and managing director of Blue Zone. Second respondent's address is 76 Jollify Ring, Mooikloof Estates, Pretoria

The Issue

[4] The issues arising in this determination are:

4.1 Whether an employee and representative of Blue Zone, one Peter Wildman, rendered advice in contravention of the FAIS Act and its Code, and

4.2 Whether the respondents are liable in their capacities as directors and key individuals of Blue Zone for the financial loss sustained by the complainant.

B. BACKGROUND

[5] Complainant brings the present complaint in his capacity as a co-Trustee of the Clifford James Rauch Testamentary Trust ("the Trust"). In addition, the complainant obtained the power of attorney from his elderly mother who is the sole beneficiary of the Trust.

[6] The complainant's father passed away in 1982 after having appointed Standard Bank as executors of his estate. In addition, the complainant, his brother and mother were also appointed as co-executors and administrators of his late father's estate. The deed of trust states that any money from the complainant's father's (the deceased's) investments is to be kept in trust and income derived is to be utilised solely for the benefit of complainant's mother (Mrs Rauch).

[7] In the late 80's, complainant met Peter Wildman (Wildman), who was then in the employ of Standard Bank as a financial advisor. Wildman took care of complainant's retirement annuity (RA) and life insurance requirements. In addition, the respondent was aware that Standard Bank looked after the deceased's testamentary trust.

[8] In 2004, Wildman resigned from Standard Bank and joined the Bluezone Group. It was around that time that Wildman introduced the Bluezone investment to the complainant and advised him to consider it.

[9] Wildman was employed by Blue Zone as its sales director, and was also its authorised representative in terms of section 13 of the FAIS Act. It was in the latter capacity that he rendered financial advice to the complainant. Sometime during 2006, Wildman made a presentation on Blue Zone to Standard Bank. However, after consideration of the presentation, Standard Bank rejected the investment as they were unhappy with the entire idea of investing in Blue Zone. They reckoned that the scheme itself posed high risk to the trust, and their view was that it would not be in the interest of the Trust's beneficiary. They accordingly informed the complainant that if he persisted with the Blue Zone investment, they would have no option but to resign as co-executors.

[10] The complainant alleges that he informed Wildman that the trust was his mother's only source of income and that they could under no circumstances go into risky investments as her health was also deteriorating. In that regard, the complainant states that Wildman responded by saying that the Bluezone investments were sought after and that a secondary market would exist as soon as all the first tranches had been taken up.

According to the complainant, Wildman also informed him that the company they would be investing in was a blue chip stand-alone company with property portfolios. Wildman also advised that income would be derived from long term leases signed by principal tenants.

[11] When the complainant asked what the risks were, Wildman responded that the principal tenants had signed long term leases and were typically blue-chip companies such as major banking groups and well known IT companies. The implication here is that the investment came with very low risk. The complainant was also informed by Wildman of capital growth and the return of approximately 10% per annum, which did not in any way require high risk ventures.

[12] Based on the information received, the complainant and his family decided to invest in Bluezone and informed Standard bank of their decision. Standard Bank notified the Master of the High Court of the circumstances of their withdrawal as trustees, and during 2007 conveyed their resignation in writing.

[13] During November 2007 Wildman advised the complainant to transfer the trust money to Honey & Partners' trust account. Complainant did as advised.

[14] Wildman advised the complainant to purchase an investment in Bluezone's Spitskop Village Properties and presented documents to him for his signature. The complainant says prior to the investment, he only received the Bluezone Group overview. He was not furnished with any of Spitskop's disclosure documents.

[15] On 10 October 2007 the complainant received a letter from Bluezone which was signed by Wildman. The letter stated that his mother would receive an income of 10.12% interest, which income would increase to 10.87% later.

C. THE COMPLAINT

[16] In addition to submitting his complaint in the prescribed form, the complainant furnished comprehensive submissions which set out the basis of his complaint. I should mention that the complaint was forwarded to the respondents and their response was sought. In what follows, I proceed to sum up the complaint.

[17] Complainant alleges that Wildman and Bluezone never furnished him with a copy of the Disclosure Documents. He mentions that several material aspects of the Spitskop project were either misrepresented or never disclosed to him. For instance, he states that he was not told that the land sold to the investors :

(a) was agricultural land which first had to be re-zoned;

(b) was the subject matter of a pending land claim for restitution by some community members;

(c) that there was an application for the liquidation of Spitskop Village Properties Limited;

[18] He mentions that these material facts only came to his attention after the Spitskop project had collapsed. The complainant states that had these disclosures been made to him, he would not have invested in the scheme.

[19] The complainant further states that sometime in June 2009 he learnt about a Bluezone's investors' meeting at which a special resolution was to be passed. He then tried to get information and assistance from Wildman who responded by saying he was unwell and too weak to get involved. Wildman however assured the complainant that all investors would receive their money back.

[20] Upon reading reports about Blue zone's financial difficulties in the media, the complainant says he became concerned about his investment. He visited the Bluezone offices where he was informed by a certain Mr Izak Butler, the administration manager that all the facts pertaining to his investment were clearly spelt out in the Disclosure Document. The complainant asserts that it was only then that he had sight of this disclosure document. After reading the disclosure document, the complainant then wrote to Bluezone complaining about Wildman's and Blue zone's failure to make such material disclosures at an earlier stage. He claimed that since the invested money was to provide income for his elderly mother, it should never have been placed in as high a risk investment as the Spitskop project. The complainant remains adamant that he was at no stage during the advice, made aware of the fact that Spitskop was a high risk investment.

[21] As Wildman could not assist, he provided the complainant with contact details of Johan van Zyl, ("second respondent") who was also the head of Bluezone's legal division and compliance. The complainant then made an appointment and went to see van Zyl where here laid his entire complaint to him. When he asked van Zyl about what could be done, Van Zyl advised him to put everything in writing, stating that it was possible that his investment would be cancelled. As advised by van Zyl, the complainant duly put the information in writing and had it submitted to Bluezone on 22 July 2009.

[22] In some of his written correspondence to this Office, the complainant was critical of the role played by the directors of Bluezone and their attorneys, Honey and Partners. I deem it necessary to quote from one such correspondence as an illustration of the point. In one of his numerous letters which were sent to this office, the complainant states:

> "*I do believe that I have a strong Case against the two directors, namely Hendrik Christoffel Lamprecht and Jacob Johannes Van Zyl as well as Mr HE Van der Walt of Honey and Partners. I learnt that this investment was sold to me after the application for liquidation was lodged against Bluezone. I immediately went to see Mr Van der Walt. I requested a full refund to be made. He told me to complete claim forms. He delayed providing me with these claim forms and ignored my calls. Only once the company was liquidated, I received mail from his PA to inform me that it was now out of his control and that my claim had to be lodged with the liquidators."* (Quoted as is)

[23] In the same vein, the complainant expressed his unhappiness with Bluezone's attorneys Honey and Partners in yet another letter sent to this office. Below, I reproduce the letter in its original form:

"I do also believe that there is a claim against Honey and Partners the Lawyers acting for the Spitskop Village Properties Limited before they were liquidated.

I personally visited their Offices in JHB and met with Mr HE Van Der Walt and informed him that I had been made aware that there was an application for Liquidation of Spitskop before I was sold this Investment. He confirmed that this was in fact the case. This was never disclosed to me by the financial advisor or the Directors of Spitskop.

I requested that my application be cancelled and the money refunded. He gave me reason to believe this will be done. He also said that I should fill in the claim forms which I did. I continuously tried to get hold of him afterwards and he ignored and avoided my calls. A few weeks later I was then informed by one of his assistants that the matter was now out of their hands as Spitskop Village Properties had been liquidated and I needed to lodge my claim with the liquidator.

I am firmly of the opinion that this was delay tactics on his part and I lodge my Claim and Complaint against Honey and Partners and Mr HE Van Der Walt.

I believe it is also prudent to mention that:

1. *Mr Jacobus Johannes Van Zyl (Director of Spitskop Village Properties Limited) was also a partner of Honey and Partners!!*
2. *Mr Peter Wildman the Advisor who sold me this Investment has since Deceased.*
3. *I am in possession of a letter from the Liquidator Mr PD Kruger dated the 3rd May 2011 wherein he has applied for an extension for a period of 12 months from the master of the high court for lodging of the Final Liquidation and Distribution accounts.*
4. *Please also note that the amount that was in the Trust account when Mr Kruger was appointed as the Liquidator was in the region of R100, 000,000 and now the balance is R60, 000,000. There is a very real danger that by the time this matter is ready for any distribution ruling there will be nothing left.*

I look forward to hearing from you and your offices as soon as possible.

Yours Sincerely.

PJJ Rauch.'

[24] Included in the bundle of documents submitted to this office by Bluezone, was correspondence between van Zyl and Wildman. In one such correspondence to van Zyl, Wildman makes the following startling concession:

> "…*in hind sight this was not the ideal investment for the requirements of the trust."*

[25] Indeed, among documents submitted to this office was another e-mail from Wildman sent to van Zyl, and dated 6th of August 2009, in which he requested the full investment amount to be refunded to the complainant.

[26] As a result of an accident, the complainant's mother suffered a broken pelvis. That injury necessitated a hip surgery, which, owing to lack of funds, the complainant's mother could not afford. It was simply beyond her financial means. Having lost the investment in the Spitskop investment, the complainant was unable to meet the needs of his elderly mother, the sole beneficiary of the trust.

[27] During the year 2010, Wildman passed away. To date, the complainant has not received any of the capital invested. The complainant seeks compensation for the capital and interest the trust lost as a result of Wildman's advice.

D. INVESTIGATION BY THIS OFFICE

[28] In its investigation, this office established that Wildman rendered financial advice to the complainant in his capacity as a fulltime employee of Bluezone Property Investments Pty Ltd, an authorised financial service provider with license number FSP 21227. The complaint and all relevant correspondence were directed to Bluezone and its directors. As already stated, van Zyl was the director of Bluezone, its key individual, and head of its legal division. Since the Spitskop project had been placed under liquidation, the complaint was also served on the liquidators.

E. THE RESPONSE

Response from the Spitskop's liquidators

[29] The liquidators' attorneys sent a response which may be summed up as follows:

[30] Spitskop Village Property was liquidated on 21 August 2009. In support of this, the attorneys furnished this office with a copy of the liquidation order of the high court.

[31] Bluezone Property Investments, the promoter of the scheme were provisionally liquidated on the 17th of November 2009. A copy of the provisional liquidation order was furnished to this office. It is worth mentioning that joint liquidators were appointed in respect of the liquidation of Spitskop and Bluezone.

[32] Bluezone, apart from Spitskop, promoted at least fifteen other syndication schemes. It is these other syndications that have been placed under business rescue.

[33] In order to fulfil their duties, the judicial managers in various other syndication schemes retained the services of some of the employees of Bluezone until such time that a report was made and filed in Court. Such report would indicate whether the companies would ever become viable or whether it was in the interests of the creditors that they be wound up.

[34] The attorneys contended that the liquidators of Spitskop and the provisional liquidators of Bluezone could not be held liable for the loss suffered by the complainant.

[35] They further submitted that in their view, it would appear that the complainant invested in the Spitskop syndication scheme without having been afforded the benefit of proper financial advice by his broker. Among other submissions, it was acknowledged that the contents and meaning of the disclosure document were never explained to the complainant.

[36] In the main, the attorneys' response provides a classic example of difficulties investors often experience when trying to recover their investments. Investors have to tread the cumbersome and often technical process which they find so bewildering that it becomes almost impossible to recover their investments.

First and Second Respondents' Response

[37] The first and second respondents filed their respective responses. The responses were essentially the same. They all raised various legal points which sought to

dispose of the complaint. Below, I deal with the salient points raised in the respondents' responses.

Complainant received a spotter's fee

[38] The respondents submitted that the complainant received the so-called "spotter's fee" from Bluezone. In my view, nothing turns on this fact. The complainant was frank and candid with this office and disclosed that he had been offered and accepted from Bluezone a "spotter's fee" for having referred the trust's investment. In his submission, the complainant mentioned that the so called "spotter's fee" was a once off nominal payment given to him as a gesture of appreciation for having referred his investment to Bluezone. However, there is no gainsaying that when the complainant decided to invest in Bluezone, he did so as a result of financial advice given by Wildman. It is not in dispute that the complainant placed an investment in the amount of R720 000.00 in Bluezone's Spitskop project and the present complaint emanates from the advice furnished to him.

"No complaint in terms of section 27 of the FAIS Act has been lodged against the respondents"

[39] The respondents submit that they have not been cited by the complainant as parties to the complaint, therefore the Office of the Ombud has no jurisdiction to entertain the matter. This submission proceeds upon an erroneous premise that the Ombud is merely an impassive umpire who takes no active participation in the inquisitorial investigation of the complaint. This flies in the face of several provisions of the FAIS Act. In that regard, the provisions of section 20 (3) of the FAIS Act are instructive and they provide as follows:

"(3) The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to -

(a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and

(b) the provisions of this Act."

[40] It is clear from the provisions of section 20(3) that the Ombud may go beyond the established legal principles if it would be equitable to do so. It is not possible to set out all the circumstances in which the Ombud may deem it equitable to depart from established legal principles. However, each case will necessarily turn on its own facts, and the Ombud is thus vested with discretion to decide when it will be appropriate to apply the principles of equity.

[41] Complainants who submit their cases to the Ombud are normally lay people who often have no training in the law. The legislature in creating the office of the Ombud intended to create a dispute resolution body that deals with disputes unencumbered by the technicalities that exist in the court processes. The complainant cannot be expected to draft his/her complaint as though they were lawyers drafting pleadings. To equate the complaint submitted by the complainant to a pleading is to misdirect one self. Once the complainant has sustained financial loss out of financial services rendered, or prejudice, they often approach the Ombud. The FAIS Act makes it clear that the Ombud investigates and determines complaints. The investigation

takes an inquisitorial approach in terms of which the Ombud must take an active participation in the identification of the issues between the parties.

[42] The respondent is obliged by the Act to submit all documentation evidencing compliance with the Code during the rendering of financial services. If it appears to the Ombud that there were breaches of the Code, these are drawn to the attention of the respondent who is then invited to formally respond. The respondents' defence is unsustainable simply because investors had no way of knowing that respondents are answerable to their complaints.

The Ombud failed to comply with the provisions of section 27 (4)

[43] The respondents also charge that the Ombud has failed to comply with the provisions of section 27(4) of the Act. In that regard, the respondents allege that they have not been provided with such particulars as would enable them to respond to the allegations against them. There is no merit to this submission. Incidentally, in paragraph 10 of their response, the respondents make the following telling submission:

> *"10. Purely fortuitously, our clients have been placed in possession of a copy of the complaint in question. It is apparent therefrom that there is no complaint against our clients personally, and that no basis whatsoever has been laid for any alleged personal liability on the part of our clients."*

[44] Two important facts emerge from the above-cited passage:

(a) The respondents were in possession of the full complaint

(b) The respondents contend that the complaint is not directed at them, nor does it seek to hold them personally liable for the complainant's loss.

[45] Despite their submission to the contrary, the respondents were indeed served with the complaint, documents relating thereto, and the notice notifying them of the complaint. Importantly, the respondents were requested to furnish this office with their responses. It was for that reason that their attorneys were able to file a comprehensive response on their behalf.

[46] Perhaps the question that merits attention is whether the Ombud was correct in citing the two respondents, and thus seeking to saddle them with personal liability for the complainant's loss?

[47] The Ombud is charged with the duty to go beyond the traditional role played by the courts. The Ombud cannot be confined to the wording of the complainant as though it were pleadings. The Ombud must resolve the real issue in the complaint and direct the complaint to those answerable in terms of their duties as set out in the FAIS Act.

[48] The powers of the Ombud are set out in the Act as follows: "investigate and determine" complaints. The Ombud is obliged to investigate and not merely act as an arbitrator.

[49] In the present matter, van Zyl was a key individual of Bluezone. The submission that his citation in the present complaint would adversely affect him is partly correct. However, one should not lose sight of his position as a key individual. One of the implications for being a key individual of an FSP is that a person may be cited as a

party to proceedings such as the present one. The respondents were all sent section 27 notices informing them of the complaint and the allegations against them.

[50] The respondents raise the issues of jurisdiction of the Ombud and allege contravention of Rule 7 (b) (5) on the Rules of Proceedings in the Office of the Ombud. These issues merit further exploration.

Background on Blue Zone (Pty) Ltd ("Blue Zone")

[51] It is appropriate to refer to this office's previous determination of *Sydney Perumal Naidoo v Christiaan Johan Swanepoel (and two others) FAIS 04214/09-10/NC1*. The determination which concerned the Spitskop Village property syndication and Blue Dot Properties provides a useful backdrop against which issues in the present matter should be viewed since it concerns the same issues. In that matter, as with the present one, the disclosure documents of Bluezone raised certain concerns set out below.

[52] On 12 May 2003 the respondents who were also the directors of Blue Dot Properties 1330 Ltd at the time, bought a piece of agricultural land in a farm known as Spitskop for an amount of R1 057 00. 00

[53] The same piece of land was later sold to Spitskop Village Properties Limited in the amount of R118 million despite there being no evidence of any development or improvement on the land.[1]

[1] See Naidoo determination for the full discussion on the question of disclosure documents from para 37

[54] The meteoric rise in the value of the land, from just over R1 million in 2003 to R118 million in 2006 was attributed to so called “desk top valuation” by a valuator working on the instructions of the respondents. There existed no economic or rational basis to account for the huge leap in the value of the unused agricultural land to justify using investors’ funds to purchase Spitskop for R 118 million.[2]

[55] The disclosure documents and other correspondence received by this office indicate that the1st and 2nd respondents as directors of Blue Zone, Spitskop and Blue Dot, were involved in the following:

(a) They signed an agreement which purported to sell the property from Blue Dot to Spitskop. Significantly, the board resolutions to buy and sell were taken by both directors (van Zyl and Lamprecht) in their dual capacities as directors of Spitskop, on the one hand, and Blue Dot, on the other.

(b) The purchase price of the property was grossly overstated and not in line with market prices for similar properties in the area of Spitskop in 2006.

(c) The purchase price of the property was arbitrarily determined by Lamprecht. It is clear that the inflated valuations conducted were only designed to provide justification for the subsequent overstatement of the purchase price.

(d) The purchase and sale agreement provided for Spitskop to start paying money to Blue Dot even though the land had not been transferred to Spitskop. No interest was paid to Spitskop for these advances. The money in Spitskop was directly derived from investors’ funds.

[2] Naidoo, at para 38

[56] I repeat what I set out in the *Naidoo* determination that the inescapable conclusion one draws from the facts is that the directors of Bluezone ran the Spitskop scheme fraudulently. As a telling illustration of Bluezone directors' culpability in the fraud, I once again mention their actions when the reports about the legality of the scheme started surfacing. It is worth emphasising that the 1st respondent was also a key individual of Bluezone. Later in this determination, I deal with the significance of the 1st respondent's position as a key individual and its impact on the present complaint. There is correspondence, mostly drafted by the 1st respondent, to investors painting a picture which was contrary to objective facts regarding the state of the Bluezone companies, particularly Spitskop.

[57] Investors, such as the complainant, began receiving warnings that the Spitskop project was essentially a violation of the Banks Act. In one such letter, the South African Police Services cautioned members of the public against investing their money into Spitskop. The same warning was sounded to investors by the South African Reserve Bank. Such warnings are contained in documents furnished to this office by both the complainant and the respondents.

[58] Even when he must have been aware of the legal concerns around Spitskop, the first respondent went out of his way to advise the investors to ignore the SAPS letter in circumstances where all objective facts were indicating that the scheme was clearly headed for liquidation. The first respondent advised the investors that all was well with their funds.[3] He wrote to the investors and assured them that the project "was well ahead of schedule". This was despite the fact that the Spitskop project was not underway at that time. There can be no question that because the

[3] Naidoo at para 46-47

directors ran the Bluezone scheme fraudulently, they opened themselves up to personal liability.[4]Even on the respondents' version, the inference is entirely inescapable that the directors of Bluezone deliberately misled investors such as the complainant, and their conduct could only have been calculated to deceive the investors.[5]

Personal Liability of Blue Zone's Directors

[59] The Office of the Ombud is a creature of statute and is obliged to act within the four corners of its founding statute; namely the FAIS Act. In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others*[6] the court made reference to the importance of piercing the corporate veil when it was stated:

> *"…trite is the fact that a court would be justified in certain circumstances in disregarding a company's separate personality in order to fix liability elsewhere for what are ostensible acts of the company…the focus then shifts from the company to the natural person behind it or in control of its activities as if there was no dichotomy between such person and company (Henochsberg on the Companies Act 5th ed, vol 1 at 54) In that way personal liability is attributed to someone who misuses or abuses the principle of corporate personality."*

[60] It is common cause, that both first and second respondents were the directors of Bluezone and were the co-founders of the Spitskop village project. The eventual liquidation of the Spitskop project was a direct result of how that company was run by the directors.

[4]Naidoo at para 41
[5] Para 45
[6] 1995 (4) SA 790 (A) at 802

[61] Documents furnished on behalf of Bluezone indicate that the respondents treated Bluezone and Spitskop as one entity. The two entities clearly did not have an arms' length relationship. This is more evident in the correspondence sent by the respondents to the investors, as well as the directors' treatment of the investors' monies in the attorneys trust account. This led to the prejudice of the investors. The continued selling of such a flawed product (flaws that were known to the directors) marked a contravention of the FAIS Act and General Code.

[62] As enunciated in the *Naidoo* determination, when the scheme collapsed, the directors promptly filed for liquidation, and then took refuge in this legal process.[7]

[63] There is no reason in law or fact that would exclude the Bluezone directors from being held personally liable for the failed investment scheme. Spitskop project never commenced and yet investors' funds amounting to about R425 million remained unaccounted for and were never refunded to the investors as the law requires.[8]The directors could not account for the investors' funds.

F. JURISDICTION TO DISPOSE OF THE COMPLAINT

[64] The respondents submit that there is no complaint against them as they are not cited by the complainant in his complaint. This is inaccurate as the complainant made reference to the directors of Blue Zone and the attorneys who handled the trust account into which the investors' funds were deposited. Their contention

[7] Naidoo at para 39
[8] Para 48

seems to be premised on the narrow point that the complainant, when filling the complaint form of the FAIS Ombud did not mention the directors as subjects of his complaint. I add that respondents are simply being opportunistic here. The entire complaint including letters referred by complainant to them indicates that the complaint is lodged against Blue Zone and its directors.

[65] Regard must be had to section 27(5)(a) of the Act which stipulates that the Ombud:

> *"may, in investigating or determining an officially received compliant, follow and implement any procedure which the Ombud deems appropriate…"*

[66] Once again, the discretionary power of the Ombud is evident. Nowhere is it stipulated that the Ombud is bound by the four corners of the piece of paper on which the complaint is submitted. The Ombud may utilize any evidence which provides assistance in investigating and resolving the complaint.

[67] The effect of section 27(3)(c) is that the Ombud retains jurisdiction over a complaint unless she exercises her discretion and decides that the matter should be dealt with by a court or alternative dispute resolution tribunal. As a measure of protection against contemptuous conduct, the legislature deemed it necessary to make it a contempt for any party to pre-empt the determination of the Ombud, and this is set out in section 31 (b) (i) of the FAIS Act

[68] The respondents also submitted that the matter is pending before the high court. In that regard, they rely on section 27 (3) (b) (i) and section 27 (3) (b) (ii) of the FAIS Act which states:

"The following jurisdictional provisions apply to the Ombud in respect of the investigation of complaints:

(i) The Ombud must decline to investigate any complaint if, before the date of official receipt of the complaint, proceedings ***have been instituted by the complainant*** *in any Court in respect of a matter which would constitute the* ***subject matter of the investigation****,*(own emphasis)

(ii) Where proceedings contemplated in subparagraph (i) are instituted during any investigation by the Ombud, such investigation must not be proceeded with."

[69] An ordinary reading of the words in the above-mentioned provisions reveals that emphasis needs to be placed on the qualification of "subject matter". The subject matter of the complaint relates to the rendering of financial services. The question arising before the Ombud is whether the respondents acted in compliance with the FAIS Act. The section is also concerned with the complainant instituting proceedings. The two were directors of an entity which purported to render financial services to members of the public. Indeed, the first respondent was also a key individual of Bluezone and held licences as a financial services provider. He was bound to ensure that there was compliance with provisions of the FAIS Act. The issues before the High Court relate to the liquidation of Spitskop. There is no issue between the complainant and the respondent that is pending before the high court or any other forum, nor has the complainant instituted the court proceedings.

[70] That being the case, I am satisfied that the present complaint relates to the respondents' liability as directors of an entity that was licensed to render financial services in terms of the FAIS Act. By contrast, the proceedings in the High Court concern an inquiry into the liquidity of those entities.

I add that the allegations made in the complaint to the Ombud are not the same as those faced by the respondent in the pending High Court proceedings.

Personal liability of the respondents

[71] The new Companies Act[9] has codified director's common law duties and also extends their liability and *locus standi*. At common law, it is trite that the company's directors are under a fiduciary duty to act with care and skill. These duties are imposed with the purpose of keeping directors accountable for their actions, which in turn creates an obligation for directors to act in the interests of its shareholders.

[72] In a previous determination of *Hester Cornelia Bronkhorst versus Pieter Van Der Merwe Makelaars & Finansiele Adviseurs BK and Nicolaas Van Der Merwe*[10], the Ombud had occasion to hold that particular attention needs to be paid to the legislature's intention. In that determination it was emphasised that it is not plausible that the legislature intended that a financial service provider rendering a financial service through a corporate entity should be protected by the proverbial 'corporate veil'. The determination referred to the well-known passage from the decision of the appellate division (as it then was) in *Shipping Corporation of India Ltd v Evdomon Corporation and Another* , which stated as follows:

> *"The corporate veil may be pierced where there is evidence of fraud or dishonesty or other improper conduct in the conduct in the establishment or the use of the company or the conduct of its affairs in this regard it may be convenient to consider*

[9] Companies Act 71 of 2008
[10] Case no. FOC 1402/07-08/FS (5) at para 37

whether the transaction complained about was part of a 'device', 'stratagem', 'cloak' or a 'sham'[11].

[73] Similarly, our courts have held that "when there is fraud, dishonesty or some other improper conduct, policy dictates that the court engages in a balancing exercise. The court considers the circumstances and the facts of each case to determine whether, in the appropriate case, it is proper to disregard the corporate personality and apportion liability where it belongs."[12]

[74] Section 28 of the FAIS Act sets the powers of the Ombud when making determinations.

> ***"28. Determinations by Ombud***
>
> *(1) The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5)(c) has not been accepted by all parties concerned, make a final determination, which may include -*
>
> *(a) the dismissal of the complaint; or*
> *(b) the upholding of the complaint, wholly or partially, in which case*
>
> *(i) the complainant may be awarded an amount as fair compensation for any financial prejudice or damage suffered;*
> *(ii) a direction may be issued that the authorised financial services provider, representative or other party concerned take such steps in relation to the complaint as the Ombud deems appropriate and just;*
> *(iii)* ***The Ombud may make any other order which a Court may make****."*
> (own emphasis)

[11] The Shipping Corporation of India Ltd v Evdomon Corporation and Another 1994 (1) SA 550 (A) at para 43 to 44
[12] Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others 1995 (4) SA 790 (A) at para 31 and 32

[75] In particular, provisions of section 28(1) (b) (iii) are instructive. The submission that the Ombud may not look beyond the proverbial corporate veil is not borne out by section 28(1) (b) (iii). A plain reading of this provision makes it clear that the Ombud is entitled to make any order which a court may make. There is therefore no substance to the submission that only the court may pierce the company's corporate veil. The Ombud may, where circumstances justify it, disregard the corporate veil and hold the directors personally liable. In my view, the facts of the present matter require that I disregard the consideration of Bluezone and Spitskop as separate entities, and hold the directors liable.

[76] It follows then that section 28(1) (iii) of the FAIS Act empowers the Ombud to make the same ruling as a court, and this must necessarily include piercing the corporate veil. As already mentioned, the position at common law is set out in the cases of *Salomon v Salomon*[13]**,***Lategan v Boyes*[14]and *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others*[15]*.*

[77] It has been enunciated in previous determinations that in most Ponzi schemes, once the scheme has collapsed, the directors hide behind the liquidation process in an attempt to divert attention from the fact that they mislead shareholders and members of the public. Directors of these failed schemes often evade scrutiny and liability for the schemes demise through these means.

[13] *Salomon v A Salomon & Co Ltd [1897] AC 22*
[14] *Lategan v Boyes 1980 (4) SA 191 (T)*
[15] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd 1995 (4) SA 790 (A)*

[78] Accordingly, it is worth repeating the words of the Ombud in the *Sydney Perumal Naidoo v Christian Johann Swanepoel, Jacob Johannes van Zyl and Hendrik Christoffel Lamprecht*[16] determination:

> *"The primary purpose of the FAIS Act is to protect the consumer and strengthen the integrity of the financial services industry. It therefore seems to me that the time has come to look beyond the corporate veil that protects the directors of these companies that perpetrate these fraudulent investment schemes.*

[79] Documentation submitted by both parties clearly indicates that no development on the Spitskop project ever got off the ground. Despite their knowledge that Spitskop would not yield any positive results for investors, the respondents as directors of Bluezone and Spitskop persisted in giving false assurances to the investors. There can be no doubt that by running the Bluezone scheme fraudulently, the directors of Bluezone opened themselves up to be held personal liable.

Non-compliance with Section 27(4)

[80] The respondents also submit that the Ombud has failed to comply with the provisions of section 27(4) of the FAIS Act. Nothing could be further from the truth. I have already pointed out that the respondents were served with the complaint, including correspondence from the complainant to this Office. This much appears from the lengthy response which makes constant references to various aspects of the complaint, and in particular to complainant's correspondence to this Office which formed part of the complaint.

[16] Case no. FAIS 04214/09/10/NC1 at para 43

[81] Section 27(4)(b) of the FAIS Act[17] provides that the Ombud must not proceed to investigate a complaint unless the Ombud:

> *"is satisfied (emphasis added) that all interested parties have been provided with such particulars as will allow the parties to respond thereto…"*

[82] The words in the provision, '*is satisfied'* give the Ombud discretion. The Ombud has the discretion to decide whether sufficient information has been furnished to the parties so as to afford them an opportunity to respond thereto. Consequently, the Ombud will only be in contravention of section 27(4)(b) of the FAIS Act[18] if she were not to satisfy herself that all interested parties had been provided with sufficient information and yet persisted in investigating the complaint. I am satisfied that the respondents were furnished with sufficient information so as to enable them to respond to the allegations set out in the complaint.

[83] Furthermore, as already mentioned, the respondents concede in their response that they are in fact in possession of a copy of the complainant's complaint. In my view, if the Ombud is satisfied that the respondents' possession of such documentation is enough to allow the respondent to respond thereto, there is compliance with section 27(4).

Analysis of evidence in the present matter

[17] Ibid.
[18] Supra, note 1.

[84] The respondents do not dispute the fact that at the time of the investment, Wildman was a representative of Bluezone in terms of section 13 of the FAIS Act[19]. This section simply stipulates that no person may carry on business by rendering financial services to clients for or on behalf of any person who is not authorized as a financial service provider. Section 13 also deal with the question of representatives of authorised financial services providers and stipulates what needs to be met before anyone may act as such. Considering the advice aspect, I have no doubt that Wildman's conduct of explaining and selling the product to the complainant, falls within the definition of section 1[20] of the Act.

[85] At the outset, I should mention that documentation furnished by the respondents to indicate compliance with the Act, indicates that Wildman advised the complainant to invest in the Bluezone/Spitskop scheme.

[86] Based on the advice received, the complainant and his family decided to invest in Bluezone and informed Standard bank of their decision. Wildman further promised complainant capital growth and a return of approximately 10% per annum, which, in his view, did not require high risk ventures. This was clearly advice as envisaged in the Act. What is more is that the advice was furnished after the commencement of the Act. There is therefore no doubt that the office of the Ombud has jurisdiction to entertain the matter.

[87] In *C.J Ferreira v Tyraz Investment CC*[21] the Ombud emphasized that even if discussions about the investment took place prior to the jurisdiction of the office and the initial advice took place well within the jurisdiction of the Office, then the Ombud

[19]Section 13 (1)(a) (i)

[20] FAIS Act 37 of 2002
[21] FOC 1142/06-07 KZN (5

has jurisdiction to hear the matter. The argument raised by the respondents in relation to the jurisdiction of the office has no basis, considering the points mentioned above.

[88] The provisions of section 2 of the General Code state:

> "*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 service provider"*

[89] Section 3 (1) (a) (i) of the Act requires that:

> *"When a provider renders a financial service, representations made and information provided to a client by the provider must be factually correct."*

[90] The complainant alleges that they were given the Bluezone Group overview and not that of Spitskop Village Properties. Clearly, the representation made and the information provided was not factually true. Furthermore, the Code requires that the provider makes full and frank disclosures of any information that would reasonably be expected to enable the client to make an informed decision. In the event the advice was furnished orally, it must be reduced into writing.

[91] The complainant further alleges that he was not told that the land had to be re-zoned, that there were pending land claims, and that there was an application for the liquidation of Spitskop Village Properties Limited.

[92] All of the above indicate that there were false representations made by Bluezone to the complainant which led to his financial loss. As set out in *Black v Moore*[22] there is ample proof that the directors of failed schemes are often the masterminds and beneficiaries of these fraudulent scheme and this applies to the present case.

G. FINDINGS

[93] In the premises I make the following findings:

1. Wildman was a representative of Bluezone, and rendered financial services to the complainant in that capacity;

2. The respondents were directors of Bluezone at the time of the rendering of advice to the complainant;

3. When rendering financial advice to the complainant, Wildman was acting within the course and scope of his employment as a Sales Director and representative of Bluezone;

4. Bluezone marketing material contained many factual inaccuracies and misleading information on the Spitskop project for which the directors must be held accountable.

5. The complainant was induced by the advice given by Wildman in investing in the Blue Zone Scheme.

[22] FAIS 01110/10-11 WC 1

This determination will be referred to the SAPS, SARS, and the NPA.

H. ORDER

In the result, I make the following order:

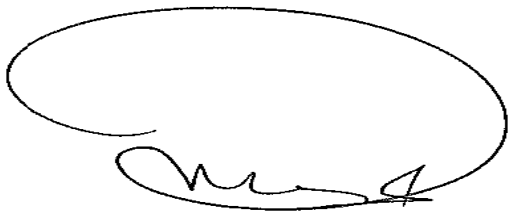
1. The complaint is upheld.

2. The respondents are jointly and severally liable for the loss sustained by the complainant, the one paying the other to be absolved.

3. The respondents are ordered to pay the complainant, jointly and severally, the amount of R720 000.00

4. Interest at the rate of 15.5%, seven days from the date of this decision.

DATED AT PRETORIA ON THIS THE 23rd OF MAY 2013.



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OMBUD FOR FINANCIAL SERVICES PROVIDERS