

**IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS,  
PRETORIA**

**CASE NO: FAIS 04697/10-11 EC 1**

**In the matter between:-**

|                                 |                    |
|---------------------------------|--------------------|
| <b>DANIEL PETRUS SMALBERGER</b> | <b>COMPLAINANT</b> |
| <b>and</b>                      |                    |
| <b>MARIUS BARENDSE</b>          | <b>RESPONDENT</b>  |

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

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**A. PARTIES**

- [1] Complainant is Daniel Petrus Smalberger an 80 year old male who resides in Aberdeen, Eastern Cape.
- [2] Respondent is Marius Barendse who trades under the name and style, Barendse Makelaars. Respondent is an authorised financial services provider in terms of the FAIS Act, and conducts business at 84 Birdstraat, in Beaufort West.

## **B. THE COMPLAINT**

- [3] In 2005 the respondent invested both the complainant's and the complainant's late wife's pension money in an entity then known as Dividend Investments, (Dividend). Dividend later merged with another company called City Capital and formed a new entity which called itself Capital Investments. This company was formed to promote several property syndication schemes. For the sake of convenience and the purposes of this determination, I refer to the entity in which the complainant's money was invested as Capital Investments.
- [4] In his complaint, the complainant alleges that the respondent told him and his wife that he was investing their money in a property investment. The complainant further alleges that the respondent assured him and his wife that they would have easy access to the invested money within a year of the investment.
- [5] The complainant alleges that respondent did not, at any stage, explain to them that he had invested their pension money in a property syndication scheme. The complainant further alleges that the respondent failed to explain the pros and cons of investing in property syndications, nor did he explain to them that the investment was not liquid. Complainant says he learnt of the difficulties involved in the investment when his wife passed away and ABSA administered her estate.
- [6] The complainant invested R70 000 of his own funds together with R70 000 of his wife's. The total of the investment came to R140 000. The complainant was

married to his wife in community of property, and the invested money formed part of their joint estate.

- [7] The respondent advised the complainant and his wife simultaneously, and they invested their funds at the same time.
- [8] Following the respondent advice, the complainant and his deceased wife both invested an amount of R70 000 each in Dividend Investments. The investment was made in both their names.
- [9] According to the assertions made by the respondent, in the first year the complainant and his deceased wife were theoretically meant to receive an income of R586.00 each per month. This monthly income would increase to R610.00 in the second year, R658.00 in the third year, R711.00 in the fourth year, and R768.00 in the fifth year.
- [10] When the monthly payments were not received as promised, the respondent assured the complainant and his wife that their payments would be available in the following months but did not give any definite day.
- [11] The complainant alleges that he and his wife were under the impression that their money was invested in a one year investment. In reality, they were invested for five years.

[12] Furthermore, the complainant alleges that he never received a written record of advice as all correspondence occurred telephonically. The only form of written communication was a short message system ("sms") sent by the respondent to the complainant's daughter assuring her not to worry and insisting that her parents' money was safe. Later in this determination, I will deal with the issue of the record of advice.

### **C. RELIEF SOUGHT**

[13] The complainant submits that the respondent failed to render financial advice in accordance with the FAIS Act. Accordingly, he wants to be compensated for the full capital amount of R140 000 that he and his late wife invested in Capital Investments.

### **Investigations by this Office**

[14] This Office sent a letter in terms of section 27 of the FAIS Act notifying the respondent of the complaint and asked him to furnish his response.

[15] Furthermore, this Office invited the respondent to give reasons for the change in the FSP's licence number from 7702 to 33430. It is worth mentioning that in his response, the respondent did not address this issue. No further discussion of this avoidance will follow as no points turn on this issue.

[16] Following the section 27 notice, the respondent filed his response. In what follows below, I deal with the salient aspects of the response.

#### **D. THE RESPONSE**

[17] On the 4<sup>th</sup> July 2005, respondent invested an amount of R140 000, on behalf of the complainant and his wife in a property syndication entity known as Dividend Investments in a shopping Centre in Thabazimbi.

[18] The respondent alleges that another client of his had informed him of the complainants' interest in investments. He does not say which investments complainants had shown interest in and how he came to the conclusion that Dividend investment is the investment appropriate for the complainants' circumstances. . According to the respondent, the complainant informed him that he had no desire to invest in established financial institutions as he had previously lost money when he had invested in those. As I point out later, none of the respondent's allegations are substantiated by any documentary evidence as required by the FAIS Act ("the Act"). The respondent could not produce any record of advice indicating compliance with the Act.

[19] The respondent further states that he explained to the complainant and his wife that he could invest in property on their behalf and they would receive rental income every month.

[20] In that regard, the respondent asserts that he also explained that although the proposed investment in Dividend Investments would be a five year investment, the company could release the investment after one year in the event of finding a buyer for their shares .The respondent says he mentioned to the complainant that the process would normally take approximately 60 days with Dividend Investments. The point to mention here is that respondent is equivocal about the liquidity of the investment. He also fails to mention that it is not Dividend Investment's nor is it his responsibility to find a buyer for complainant's shares. Complainant needed to know that a fundamental feature of this investment is that it is not liquid, which is also a key determiner of the price of the investment.

[21] Respondent further stated that the complainant and his wife mentioned that they had no desire to invest in shares on the stock market because they did not want to deal with market volatility. Respondent says he then explained that the shares were unlisted shares in property syndication and that only a limited amount could be invested. He also explained about the rental income and the annual increase pointing out that even if the stock market were to drop, their share in the building would remain unaffected. It may be the case that the complainant did not want to deal with market volatility, which is still not supported by any contemporaneous document from the respondent's side, but they needed to be informed of the kind of trade off they were making against that risk and in this case, they were heading for institution specific risk, which could include embezzlement.

[22] As a result of the advice rendered, the complainant decided to proceed with the investment proposed by the respondent. The respondent further claims he then conducted a risk analysis in respect of the couple.

[23] The respondent concedes to the complainant's allegation that he explained to them that in the first year, both the complainant and his wife would receive an income of R586.00 each per month. This monthly income would increase to R610.00, in the second year; R658.00 in the third year; R711.00 in the fourth year, and R768.00 in the fifth year. The respondent says he also provided the complainant and his wife with individual quotations.

[24] In his response, the respondent alleges that after the merger between Dividend and City Capital took place, certain suspicious things started happening. He alleges that it appeared as though management of Capital were deliberately mismanaging the various properties so that later they would be able to make an offer (to investors) which was far less than what the investors had initially paid. This would have the effect of management buying good properties from investors at a reduced price. The objective facts surrounding the collapse of Capital Investment are in the public domain as its liquidation was finalized in court. Accordingly, I do not deem it necessary for present purposes to comment on the validity of the respondent's allegations.

[25] The respondent says he and other brokers then decided to each raise funds to initiate a lawsuit against the board of Capital. Subsequently, the Western Cape

high court ordered that the Dividend properties be separated from City Capital properties and the brokers devise a management plan to manage the properties. This led to various meetings being held and mandates sent in order to choose management.

[26] According to the respondent, the properties were to be properly managed, renovated, and occupied by tenants and arrear rental collected. These reforms took a long time to actualise and in the interim investors' income dropped and in certain cases income ceased completely pending the execution of the proposed reforms.

[27] The indisputable fact however in all of this is that investors such as the complainant did not receive the promised monthly income. The property syndication scheme collapsed, and predictably, the directors resorted to liquidation.

#### **E. THE ISSUES**

[28] The pertinent issues that arise in this determination are :

- (a) Whether the respondent was negligent in advising the complainant and his late wife to invest in Dividend Investments;
- (b) Whether the respondent rendered advice in accordance with the provisions of the FAIS Act and its General Code?



(c) If the respondent was negligent, and/or failed to comply with the Act, whether such negligence and contravention/s led to complainant's loss?

**F. DETERMINATION AND ITS REASONS**

[29] The respondent did not bother to personally enquire into and establish exactly what Dividend Investments was all about. Despite this office's request to the respondent to furnish it with copies of the record of advice and all documents indicating compliance with the Act, the respondent could not comply with this simple request. The respondent's failure to produce documentation in terms of the FAIS Act lends credence to the complainant's allegation that the entire advice was rendered through the telephone and that no written record was kept. The respondent further failed to produce records of transcripts of the telephone conversations or tapes of the actual conversations.

[30] The requirement that providers should maintain a record of their advice was meant to prevent unnecessary disputes as to what was said during the process of rendering financial services. The law simply requires a provider to maintain a record of advice and this becomes helpful whenever a dispute has arisen between the provider and their client as regards the quality of advice rendered. Thus for example, the question of whether the provider has acted fairly and honestly, with due skill and care, will often be gleaned from this record of advice. The record is a helpful indicator of how the advice was rendered. It is unhelpful

for a provider to blatantly proffer an oral account of events coupled with his personal view that he acted in compliance with the Code only when a complaint has been lodged with this office. A mere say so by the advisor cannot create a material dispute of fact. The Code requires the provider to do more. There is an obligation on the provider to maintain a record of advice, and this becomes a written memorial of what transpired during the rendering of advice.

[31] The requirement that the provider should act honestly, fairly and in the interests of their client and the integrity of the financial services industry is encapsulated in section 2 of the General Code of Conduct, and proceeds 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.”*

[32] In the same vein, section 9 of the Code requires that:

**“9. Record of advice**

(1) **A provider must**, subject to and in addition to the duties imposed by **section 18 of the Act and section 3(2) of this Code**, **maintain a record of the advice furnished to a client** as contemplated in section 8, which record **must reflect the basis on which the advice was given**, and in particular-

*(a) a brief summary of the information and material on which the advice was based;*

*(b) the financial product which were considered;*

*(c) the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the client's identified needs and objectives."(Own emphasis)*

[33] As noted in the preceding paragraphs of this determination, one can only know of the type and quality of advice rendered and whether there has been compliance with the Code only if the provider has maintained a record of advice as contemplated in section 9 of the Code.

[34] The respondent could furnish no documentary proof indicating that he informed the complainant about possible risks involved in investing in the property syndication. There is also no indication that the respondent ever satisfied himself as to the financial soundness of Dividend Investment.

[35] There is no evidence that suggests that the complainant was placed in a position in which he could have understood the risks involved in the placing of his investment in the property syndication scheme. The fact is that at the time of the advice, the complainant and his deceased wife were already of advanced age. The complainant was 80, and his wife was four years his junior. They were both

pensioners who were dependant on their life savings and were dependent on the income derived from the investment.

[36] By virtue of the complainant's age alone it can be deduced that the risk profile of the complainant was unsuited to investment in a property syndication. No prior reference to the complainant's risk tolerance is made as there is no evidence of attempts made by the respondent to ascertain such information. The fact that the respondent described the investment as "an investment in commercial property" was equally misleading. That was merely part of the truth. The reality that such an investment was high risk was never fully and frankly disclosed to the complainant in accordance with the Code. This office has in previous determinations pointed out what escalates the risk when dealing with property syndication investments. Refer in this regard to the cases of Bernard F Dudley and Elaine Barnes, (available from this office's website). In this case, proper full disclosure required the respondent to explain to the complainant that his investment was solely dependent on the fulfilment of the promises made by the promoters of the property syndication. The respondent was obligated to disclose the fact that there was no visible governance and risk management structures in place to assist in the prevention of fraud and theft against investors. Failure on the part of the respondent to make these disclosures meant that complainant and his wife stood to lose their entire investment in the event that the promises made were not fulfilled. Therefore, it was not prudent to invest in the Dividend Investment scheme on behalf of pensioners who cannot stand to risk the loss of their entire capital.

[37] The failure to make the disclosures to the complainant is confirmed by the respondent's inability to submit documentation which shows compliance with the Code. The only reasonable inference that one can draw is that there was no compliance with the Code. In that regard, the respondent was in breach of Section 7 (1)(a) of the Code which requires that:

*"A provider must provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to the client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision."*

[38] Furthermore, I could not find that the respondent attempted to take any steps to ensure that complainant understood what investment in a property syndication scheme entailed. In that connection Section 8 (2) of the Code provides that:

*"The provider must take reasonable steps to ensure that the client understands the advice and that the client is in a position to make an informed decision."*

[39] Again, the only way of demonstrating compliance with section 8(2) would have been for the respondent to produce the record of advice evidencing such compliance. In the present matter, the respondent failed to indicate that he

maintained a record of advice which recorded steps taken during the rendering of advice.

## **G. FINDINGS**

[40] In the premises, I find that:

- 40.1 The respondent advised the complainant and his late wife to invest R140 000 of their money into Dividend Investments;
- 40.2 At the time of the advice, the complainant was married to his late wife in community of property, and the invested money therefore formed part of the joint estate of both spouses;
- 40.3 The respondent was negligent when he advised the complainant and his late wife to invest in property syndication scheme;
- 40.4 The investment in property syndication was incompatible with the needs and personal profile of the complainant and his wife as they were solely dependent on the income of the investment and, as pensioners; they had no other means of recouping any loss of their capital investment.

40.5 The respondent breached various provisions of the FAIS Act when he advised the complainant and his late wife to invest in Dividend Investments;

40.6 But for the inappropriate advice given to the complainant by the respondent, the complainant would not have invested in a high risk property syndication scheme;

40.7 As a result of the inappropriate advice rendered to the complainant by the respondent, the complainant lost his income and capital when Dividend Investments was liquidated;

40.8 The respondent is therefore liable for the loss suffered by the complainant.

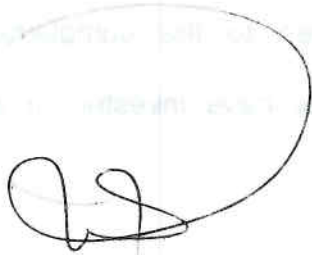
## **H. ORDER**

In the result, I make the following order:

1. The complaint is upheld;
2. Respondent is hereby ordered to pay the complainant the amount of R140 000;

3. Interest at a rate of 15,5%, seven(7) days from date of this order to date of final payment.

**DATED AT PRETORIA ON THIS THE 7<sup>th</sup> DAY OF MAY 2013.**



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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**