

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

**Case Number: FOC 3901/08-09 WC (1)**

In the matter between:-

**MAGDALENA PETRONELLA SWARTS**

**1<sup>st</sup> Complainant**

**DJ SWARTS**

**2<sup>nd</sup> Complainant**

and

**ANDRIES PETRUS NEL t/a DRIES NEL BROKERS**

**Respondent**

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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. THE PARTIES**

[1] The 1st complainant is Mrs. Magdalena Petronella Swarts who is married in community of property to 2nd complainant, Mr. Daniel Jacobus Swarts. Complainants reside at, No. 65 Viljoen Street, Lydenberg, 1120.

- [2] The respondent is Andries Petrus Nel trading as Dries Nel Brokers, residing at 32 Buhrman Street, Lydenburg, 1120. The respondent has never been authorised.

## **B. COMPLAINT**

- [3] Between April 2005 and December 2007, the complainants purchased shares in a property syndication company called Network 2 Ltd t/a PropDotCom ('PropDotCom') marketed by Blue Pointer as well as shares in Seriso 688 (Pty) Ltd (Seriso) which purports to be a property development company. The shares were purchased on the advice of the respondent and the total value of the purchases amount to R795 000.

- [4] Details of the complainants' respective investment are as follows:

### 1<sup>st</sup> complainant

01/04/2005 – PropDotCom R15 000 (received income per month – R137, 37)

04/07/2005 – PropDotCom R15 000 (received income per month – R137, 37)

02/08/2005 – PropDotCom R15 000 (received income per month – R137, 37)

10/05/2005 – PropDotCom R60 000 (received income per month – R549, 48)

31/01/2006 – PropDotCom R15 000 (received income per month – R131, 24)

13/12/2006 – Seriso R150 000 (received income per month – R1 500)

21/11/2006 – Seriso R30 000 (received no income per month)

**R300 000**

2<sup>nd</sup> complainant

02/06/2005 – PropDotCom R165 000 (received income per month – R1 511, 07)

04/07/2005 – PropDotCom R15 000 (received income per month – R137, 37)

11/04/2007 – Seriso R270 000 (see below)

07/12/2007 – Seriso R45 000 (R270 000 +R45 000 produced income of R625)

**R495 000**

[5] According to complainants they were advised by respondent to liquidate their investments with Sharemax. The respondent informed the complainants that they should no longer invest with Sharemax as Sharemax is “skelm” and that there was no prospect of growth. The respondent further informed the complainants that he knows everything about Louis Baartman of Blue Pointer and Seriso and they would be able to obtain returns of 300 per cent plus income and escalations.

[6] Respondent described Blue Pointer and Seriso as giant companies that would provide a safe haven for the complainants’ money.

[7] The complainants knew the respondent for a long time and had conducted business with him involving financial services. The complainants trusted the

respondent who at all material times held himself out to be qualified to give financial advice.

- [8] All payments of income from the investments stopped during January and February 2008 and the complainants have not received any income since. Equally the complainants were unable to recover their capital. From investigations carried out in this Office, including access to a very comprehensive report that was produced by the Financial Services Board ('FSB'), in respect of Blue Pointer it is clear to us that the shares purchased by the complainants are worthless. There appears to be no prospect of complainants recovering their capital.

#### **C. RELIEF SOUGHT BY COMPLAINANTS**

- [9] The 1<sup>st</sup> complainant seeks to recover her capital of R300 000 together with interest and 2<sup>nd</sup> complainant seeks to recover his capital of R495 000 together with interest.

#### **D. RESPONDENT'S RESPONSE**

- [10] In correspondence with this office the respondent presented his response to the complaint and his letters are annexed hereto marked 'A', 'B' and 'C'.

[11] In the request the respondent was asked to forward to this Office the contents of his entire file and in particular all compliance records. These documents were never provided by the respondent. I have to proceed on the basis that they do not exist.

[12] Respondent's response may be summarised as follows:

12.1 In 2004, respondent applied for a license with the FSB and was allocated a number being 14277. According to the respondent his license application was unsuccessful due to the fact that he did not have the necessary experience. It was during this period that he acted as a marketer under "key individuals of Sharemax, Blue Pointer and Dividend Investments".

12.2 Respondent claims that he placed business with these companies in the understanding that their prospectuses were approved by the registrar of companies. The respondent therefore claims that he did not believe that he could be held responsible for the actions of these companies and their directors. He states that he did everything possible to ensure that investors' investments were safe.

12.3 According to the respondent the investments in Seriso were not investments in financial products, but was a private transaction between the shareholders of Seriso and the complainants. Accordingly he states that he cannot be held responsible for the actions of Seriso and cannot be held liable for matters that are beyond his control.

12.4 The respondent states that he forwarded all the documentation to the companies in question.

12.5 According to the respondent the Blue Pointer products were marketed under registration "F.S.B. 26/10/14277 Verw. 90329" which he describes as his own number and after which he conducted business under the "key individual, Chris van Tonder". He states that he received the assurance that Blue Pointer were marketing under "F.S.B. license of Chris van Tonder"

12.6 Respondent also received assurance that the investment in Seriso fell outside of the FSB and that this product had to be marketed through a registered estate agent. At the time he was a registered estate agent.

12.7 According to respondent the complainant's were aware that he was involved in the property market and that they dealt directly with the project manager of Seriso. He states that he understood that Seriso also had its own risks, but that he received an assurance that investors' capital will be secured by the property itself and a loan account. It was only due to poor market conditions that Seriso was unable to pay the complainants the promised monthly income. In his letter, annexure 'B', respondent expressed the view that conditions have changed and that Seriso will continue to pay 10% per annum.

12.8 Before the respondent began marketing Blue Pointer products he claims to have received marketing materials and training. He states that in the interim Blue Pointer changed its name to Uniprop. He had nothing to do with this change. This was between Blue Pointer and their clients. He stopped doing business with Blue Pointer after the 1<sup>st</sup> of November 2006.

12.9 The respondent denies that he is any way liable for the complainants' loss.

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

[13] The issues to be decided are:

13.1 Whether 2<sup>nd</sup> respondent was authorised to market shares and debentures;

13.2 Whether 2<sup>nd</sup> respondent acted in a manner which is not in compliance with the FAIS Act and General Code of Conduct for Financial Services Providers their Representatives ('General Code of Conduct')/or negligently and if so, whether his conduct caused the complainants to suffer damage or financial prejudice; and

13.3 The amount of such damage or financial prejudice.

## F. LICENCE

[14] It would be convenient to begin with the whole issue of licensing and qualifications in respect of the investments made by the complainants through the respondent. The following is what emerged:

14.1 During 2004, respondent applied to the FSB to be licensed as a financial services provider to give advice and to render intermediary services on the following financial products:

- i) Long term products (Category 1.1)
- ii) Shares (Category 1.8)

14.2 Respondent's application for a license was lodged with the FSB on the 29<sup>th</sup> of September 2004. On the 29<sup>th</sup> of June 2006, the application was finally rejected. The application was refused by the FSB which cited as the reason that respondent failed to provide his statement of assets and liabilities and also failed to complete a questionnaire on FICA requirements, as such the Registrar could not fully determine if he is fit and proper to be granted a license.

14.3 The respondent attempted to persuade this Office that he marketed these products under a Blue Pointer license. It is now a known fact that Blue Pointer never had a license from the FSB. Respondent states that he worked under the license of Chris van Tonder. Mr. Chris van Tonder was investigated by the FSB and his license had been withdrawn on the 30<sup>th</sup> of November 2006. Mr. Van Tonder was the only



key individual under the license and no representatives were registered under the license. It is not possible for an entity such as Blue Pointer to have operated under the license of Mr. Van Tonder.

14.4 On the facts before me and on the respondent's own version, when he marketed the Blue Pointer and Seriso products to the complainants he was not licensed to do so. On the respondent's own version, he took no steps to satisfy himself that Blue Pointer was properly licensed. A simple telephone call to the FSB would have sufficed. Equally he failed to check on van Tonder's license.

14.5 By all accounts, I am compelled to find that when respondent advised the complainants to invest in Blue Pointer and Seriso, he was unlicensed. I must also find, on the facts before me that the respondent knew that he was unlicensed, but nevertheless proceeded to give financial advice when he was not competent to do so. This is a serious infraction of the FAIS Act and the General Code of Conduct.

[15] It is not in dispute that at the time when respondent advised the complainants to invest in Blue Pointer they had already invested their funds in other investments, in particular Sharemax. The respondent knew this and advised the complainants to move their funds out of Sharemax and into Blue Pointer and Seriso. In this regard the Section 8(1)(a) to 8(1)(d) General Code of Conduct requires the FSP to do the following:

15.1 (1) 'A provider other than a direct marketer, must, prior to providing a client with advice-

- (a) take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;
- (b) conduct an analysis, for purposes of the advice, based on the information obtained;
- (c) identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangement; and
- (d) where the financial product ("the replacement product") is to replace an existing financial product wholly or partially ("the terminated product") held by the client, fully disclose to the client the actual and potential financial implications, costs and consequences of such a replacement, including, where applicable, full details of-
  - (i) fees and charges in respect of the replacement product;
  - (ii) special terms and conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided, which may be applicable to the replacement product;
  - (iii) in the case of an insurance product, the impact of age and health changes on the premium payable;

- (iv) differences between the tax implications of the replacement product and the terminated product;
- (v) material differences between the investment risk of the replacement product and the terminated product;
- (vi) penalties or unrecovered expenses deductible or payable due to termination of the terminated product;
- (vii) to what extent the replacement product is readily realisable or the relevant funds accessible, compared to the terminated product; and
- (viii) vested rights, minimum guaranteed benefits or other guarantees or benefits which will be lost as a result of the replacement.'

15.2 The respondent provided this Office with no proof whatsoever that he complied with any of the above provisions of the General Code of Conduct. In fact the respondent does not deny that he merely told the complainants that Sharemax was "skelm" and that there was no further prospect of growth. Nor does the respondent dispute that the complainants moved their funds from Sharemax and invested in Blue Pointer and Serisio upon his recommendation

[16] I have no hesitation in finding that Respondent is in breach of Section 8 of the General Code of Conduct.

[17] Apart from merely stating that he received training from Blue Pointer, respondent provides no proof that he properly researched and obtained

relevant information in making an assessment of the Blue Pointer and Seriso investments. The respondent did not even give details of the training that he received. On the respondent's own version he was an estate agent. He can refer me to no particular skills which gave him any capacity to market investments in property syndication.

[18] There is no evidence that the respondent carried out enquiries into these investments with the due care, skill and diligence required of an FSP. On the respondent's own version he did not have the capacity to do so. He nevertheless proceeded to advise his clients to move their funds into the Blue Pointer and Seriso investments which he knew at the time was an investment into Louis Baartman's companies. The motivation could only have been the attractive commissions respondent will earn. There are no facts before me that show that respondent acted in the interest of his clients.

[19] Contrary to the provisions of Section 9 of the General Code of Conduct respondent failed to keep any record of the advice given.

[20] The respondent can provide no proof that he had procured all the necessary information which was needed by the complainants to make an informed decision to move their funds from existing investments into Blue Pointer and Seriso. I have no hesitation in finding that the respondent is in breach of Sections 2, 7, 8 and 9 of the General Code of Conduct. It is such breach which resulted in the complainants losing their capital and income.

## **FINDINGS**

[21] At all material times the respondent:

21.1 Did not have the capacity to market investments in unlisted shares and debentures;

21.2 Was not licensed to market such investments;

21.3 Notwithstanding such incapacity he held out to the complainants that he was capable and professionally competent to give such advice;

21.4 Failed to obtain the information that he required to satisfy himself that these investments were secure;

21.5 Failed to give the complainants all the necessary information they required in order to make an informed decision; and

21.6 He failed to act with due skill, care and diligence in the interest of his clients.

[22] Accordingly the respondent was in breach of the General Code and undermined the integrity of the financial services industry. In fact respondent's conduct was both criminal and reckless. He must therefore be held responsible for the respondent's loss

## **G. QUANTUM**

[23] The 1<sup>st</sup> complainant lost an amount of R300 000 and received no income since 2006 She is entitled to receive interest from to date of payment. The 2<sup>nd</sup> complainant lost an amount of R495 000 and received no income since 2007 he is entitled to receive interest from to date of payment.

## **ORDER**

I make the following order:

1. The complaint is upheld;
2. The Respondent is ordered to pay:
  - 2.1 1<sup>st</sup> complainant R300 000 together with interest at 15.5 per cent per annum calculated from seven days after date of this order to date of payment;
  - 2.2 2<sup>nd</sup> complainant R495 000 together with interest at 15.5 per cent per annum calculated from seven days after date of this order to date of payment;
3. The Respondent is to pay the case fee of R1 000.00 to this Office.

**DATED AT PRETORIA ON THIS 26<sup>th</sup> DAY OF JANUARY 2011.**



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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**