

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO. JS FOC 4318/09 – 10/NC 1

In the matter between:

Willem Johannes Jacobus Van Riel

Complainant

and

David Kotze

First Respondent

Distinctive Choice Investments CC

Second Respondent

**DETERMINATION IN TERMS OF SECTION 28(1) (a) OF THE FINANCIAL
ADVISORY AND INTERMEDIARY SERVICES ACT 137 OF 2002 (“the Act”)**

A. THE PARTIES

- [1] The complainant is Willem Johannes Jacobs Van Riel, a pensioner who resides at 3 Kleinbron Avenue, Kleinbron Estate, Brackenfell.
- [2] The first respondent is David Kotze an adult male businessman of 44 Vleiland Street, Sonkring Brackenfell.
- [3] The second respondent is Distinctive Choice Investments CC, a close corporation duly incorporated in terms of the laws of South Africa, with its principal place of business being, 44 Vleiland Street, Sonkring,

Brackenfell. The first respondent is a member of the second respondent. The first and second respondents were engaged in the business of rendering financial services. Both first and second respondents were not licensed by the Financial Services Board (FSB).

B. INTRODUCTION

- [4] The complainant invested an amount of R300 000 – 00 in a property syndication upon the advice of the first respondent. The scheme collapsed and complainant lost his investment.
- [5] The parties were unable to resolve the matter and the complainant lodged a complaint to this Office in terms of the Act.

C. THE COMPLAINT

- [6] The complainant is an elderly pensioner who referred a complaint to this Office after investing in what appears to be a property syndication scheme. According to the complainant, he knew the first respondent while the latter was employed at Standard Bank. The first respondent was employed by the bank as a financial adviser.
- [7] Whilst the first respondent was in the employ of the bank, complainant's investments were handled by the first respondent. A client relationship existed between the complainant and first respondent.
- [8] On the 14th January 2007 complainant received a letter from the first respondent, written on a letterhead of the second respondent, informing complainant that he had resigned from Standard Bank and had joined the

second respondent. In the same letter the first respondent indicates that “ Ek het nou die kans om vir u n groter verskeidenheid van beleggings produkte te bied.” The first respondent then states that he will approach the complainant to discuss his investments.

- [9] On the 1st March 2007 first respondent made an appointment to see the complainant to discuss a good and sound investment that he had found. The complainant states that there was a relationship of trust between him and first respondent that developed while the latter was employed at Standard Bank.
- [10] The complainant explained to the first respondent that as a pensioner he could only invest on a 12 month basis. Complainant made it clear that the capital and interest must be guaranteed and that the term of the investment must be 12 months.
- [11] The complainant requested that the first respondent should check the contract to ensure that his requirements are met. He emphasised that the investment term be limited to 12 months. First respondent agreed to check whether the investment could be made for 12 months.
- [12] Thereafter first respondent telephoned the complainant and informed him that there was indeed an investment for 12 months in “Fisherman’s Haven”. Complainant then received a brochure from Limestone Finance (Pty) Ltd titled “Property Investment Vehicle” which explained that an investment of 12 months was available. These documents were forwarded to complainant by the first respondent.

- [13] According to the complainant he understood, from these documents, that an investment period of 12 months was available where he would earn 20% per annum on the amount invested. Complainant, on the advice of the first respondent, invested an amount of R300 000 – 00 on the 5th March 2007.
- [14] First respondent however, failed to deliver copies of the contract and debenture certificates. The complainant made repeated telephone calls to first respondent requesting the debenture certificates. The complainant stated that the certificate was important to him as he expected to find “‘n begin en ‘n einde datum” in the certificate.
- [15] The first respondent then informed the complainant that he was having trouble with the company and that they were ignoring his request for the certificate.
- [16] On the 3rd March 2009 complainant wrote a letter to first respondent demanding a copy of his debenture certificate. The letter was delivered personally to the first respondent who signed an acknowledgement of receipt.
- [17] On the 15th March 2009 a copy of the debenture certificate and a contract were delivered to the complainant. Complainant points out that to date he has not received a cent from his investment.
- [18] The first respondent, out of desperation, began contacting the directors of Fisherman’s Haven to find out what became of his investment. He spoke to Mr. Neil van Schalkwyk, the financial manager who merely informed the

complainant that his attorney will respond in a letter. To date, no such letter was received. Complainant also pointed out that he was supposed to receive a statement every 4 months indicating how the investment was performing. These statements were never delivered on time.

[19] The complainant was unable to contact van Schalkwyk again as the latter had switched his telephone off. Complainant even went to the offices of the company, but was unable to secure an audience with the directors. Complainant even spoke to Mr Brouwer, a director, with no success.

[20] After the investment was made, the complainant, from time to time, received newsletters from Fisherman's Haven. The newsletters stated that 10 homes and a cafe/shop had been completed and that "phase one" of the development was complete. The complainant drove to the site and was horrified to see that no homes were completed and the cafe did not exist. Complainant states that he had been lied to.

[21] He submitted in his complaint that he was not treated honestly and fairly. His view is that his investment is lost and he wants to recover it.

D. THE RESPONSE

[22] The complaint was forwarded to respondents. Initially, the documents came back marked "unclaimed", but on the 29th January 2007 the first respondent responded by email. Thereafter the respondents instructed a firm of attorneys to respond to the complaint.

[23] The first respondent merely stated that the second respondent was “never” registered to be a financial service provider and has since “closed”. He then added that he was merely a person who was approached by Limestone Investments to “get them clients”. First respondent then stated that the complainant invested directly with Limestone in terms of a contract with the latter. The first respondent then concluded by giving the names and telephone numbers of the directors of Limestone, suggesting that since the latter had a licence this Office should contact them.

[24] On the 22nd April 2010 this office received a letter from the respondent’s attorneys, E Groenewald and Associates, wherein they state why the respondents should not be held liable for the complainant’s loss.

[25] The attorneys’ representations are set out hereunder:

25.1 First respondent is a member of the second respondent and both were not licensed in terms of the FAIS Act.

25.2 Respondents concluded a “mandatory agreement” with Homebound Investments 2 (Pty) Ltd in terms of which, respondents, and in particular first respondent, acted as a representative of Homebound “as envisaged in Section 13(1)(b) of the FAIS Act”. Homebound was a licensed financial service provider.

25.3 During March 2007 when the first respondent recommended the investment to the complainant, the agreement between Homebound and respondents was an oral agreement. The terms

of the agreement were then put in writing. A copy of the agreement was attached. I deal with the agreement elsewhere in this determination.

- 25.4 The oral agreement was concluded on the basis that respondents were unlicensed and they acted for Homebound to market one product only, namely “debentures in the Fishermans Haven Development at Yzerfontein”
- 25.5 First respondent was sent on a course by Homebound and wrote “the regulatory examination” in order to qualify to render financial services in relation to the product. First respondent had six years of experience as a broker in the employ of Standard Bank and successfully completed the RFP1 and RFP2 examinations.
- 25.6 Complainant’s complaint was that he was unable to redeem his investment after 12 months. Complainant was an experienced investor who understood that “all investments are subject to risk”. The “debenture expiry date” is the date of registration of the unit to which the debenture is linked. Transfer had not yet taken place as there were delays due to “market conditions”.
- 25.7 Since March 2008 respondents no longer marketed Homebound’s products. First respondent is now “working in another trade” and can no longer comment further on the viability of the investment. First respondent had no first-hand information about developments at Yzerfontein after March 2008 and relied on the brochures from Homebound.
- 25.8 The attorney concludes by referring this Office to Homebound.

E. THE ISSUES

The following are the issues to be determined:

- 26.1 Whether the respondents rendered the financial service herein negligently and/ or in a manner which is not compliant with the Act;
- 26.2 If it is found that the respondents did render the financial service negligently/ and or failed to comply with the Act, whether such failure caused the complainant's loss;
- 26.3 Quantum

F. THE INVESTMENT

- [27] The complainant invested R300 000 – 00 in what he was led to believe was an investment with a 12 month term and wherein his capital and interest were guaranteed. This was represented to him by the first respondent. First respondent does not dispute that his mandate was to invest the money in a 12 month term investment with the capital guaranteed.
- [28] On the first respondent's own version he was not a licensed FSP and could only sell financial products to members of the public as a representative of a licensed FSP as contemplated in section 13 of the Act.

At the time, first respondent was not licensed to sell any other product to the complainant. This means that the first respondent was going to sell this product to the complainant without giving the latter any choice.

- [29] Complainant applied to subscribe for secured debentures to be issued by Homebound Investments 2 (Pty) Ltd, being the debenture company. The debentures were linked to a unit in the development. The debenture company claimed to develop homes in a project known as “Fishermans Haven – Yzerfontein. A copy of the application form was handed to this Office. I note that the application form states a “debenture start date” of 1st March 2007 and provides for a “debenture end date”, this date was not filled in and the form is left blank. The application form also provides for the “linked unit number”, this too was left blank.
- [30] The debenture agreement was also sent to this office. The agreement clearly links the debentures to units within the development. Although it appears that an investment was capable of being redeemed within 12 months, this was possible only after transfer of the linked unit took place. This was not likely to happen within 12 months. This was not explained to the complainant by the respondents.
- [31] The agreement provides that “The debenture company guarantees the Holder the capital amount invested as well as the monthly interest payments.” The agreement also points out that there are risks of delays due to rezoning and transfer problems. There is no evidence that this was explained to the complainant.

- [32] The investment was marketed through a company called Limestone Finance (Pty) Ltd. This company is a sister company of Homebound. Correspondence between the debenture company and investors was through Limestone.
- [33] The complainant invested in 300 000 secured debentures at a par value of R1 each. More than three years later, complainant did not receive a single cent in return for his investment.
- [34] As I already pointed out, complainant did not receive any documents from respondents and Limestone after he paid the amount of R300 000 – 00. Only after dogged persistence did he manage to get some documentation. The complainant then received documents that were confusing. He received signed application forms for two different debenture companies in respect of the same property development, namely Fishermans Haven – Yzerfontein. In one form the debenture company is described as Homebound, while in the other form the debenture company is described as Ixia Trading 599 (Pty) Ltd, this is another sister company. The complainant was also given two different sets of debenture agreements in respect of the same investment. These agreements were not dated and one was not signed by the debenture company. This was most disturbing.
- [35] As it turned out the whole scheme collapsed. The directors of Homebound blamed, inter alia, the rise in interest rates and the “subprime mortgage crises in the US”. Both Homebound and Ixia were liquidated. No development was completed at Fishermans Haven. The directors of

Homebound, Ixia and Limestone are the same two individuals, Niel Van Schalkwyk and Mark Brouwer.

G. THE RESPONDENTS' CONDUCT

- [36] The first respondent was employed by Standard Bank as a financial advisor. It is here that he met the complainant who was a client of the bank. First respondent provided the complainant with financial services relating to the latter's investments. An advisor – client relationship developed.
- [37] The first respondent left Standard Bank to start his own business as a financial services provider. He became a member of the second respondent close corporation with the intention of starting a financial services business. In order to generate business for his new enterprise the first respondent contacted his former clients from Standard Bank offering to assist with their investments. This is what led to complainant investing in Homebound.
- [38] It must be said that an examination of the complainant's investment portfolio reveals that he consistently invested in moderate to medium risk investments. The first respondent was already familiar with the complainant's risk profile.
- [39] The first respondent requested a meeting with the complainant in order to assist the latter with his investments. At the meeting the complainant indicated that he had available an amount of R300 000- 00 for investment.

[40] It is not disputed by the first respondent that :

- 40.1 he was aware that complainant was a pensioner and was also aware that complainant was not willing to invest for a period of more than 12 months;
- 40.2 complainant wanted an investment where his capital and interest were guaranteed;
- 40.3 complainant specifically requested the first respondent to make certain that the Fishermans Haven investment catered for his specific needs; and
- 40.4 first respondent confirmed that the product would accommodate the complainant's requirements.

[41] On the first respondent's own version:

- 41.1 neither he nor the second respondent were licensed in terms of the Act;
- 41.2 when he gave the advice he was acting as a representative of Homebound in terms of section 13;
- 41.3 when he gave the advice there was an "oral agreement" between himself and Homebound;
- 41.4 when he gave the advice, he was not licensed nor authorised in any other way to sell or present any other financial product to the complainant; and

41.5 first respondent did not give the complainant a choice of appropriate investments but was merely selling the Homebound product.

[42] At all material times first respondent held himself out to the complainant that he was competent and able to give financial advice. First respondent also relied on the established relationship between himself and the complainant. First respondent enjoyed the trust of the complainant. He was also obliged to act in the best interests of his client.

[43] The first respondent was employed as a financial advisor by Standard Bank. Although first respondent was not licensed by the regulator in his own right, he was well aware of the provisions of the Act and the General Code of Conduct for authorised financial services providers and representatives (the Code). This Office may justifiably attribute such knowledge to the respondents.

[44] First respondent claimed to have acted lawfully, in selling the product, as a section 13 representative of Homebound. In this regard the first respondent forwarded to this Office a copy of an agreement between Homebound and the second respondent. I will refer to this agreement in more detail elsewhere in this determination.

[45] On the respondents' own version, he did not carry out any due diligence on Homebound and Limestone. He merely accepted the information that was given to him by these companies and in particular from the brochures

that he received. There is no evidence that respondents took any steps to verify any information that they received from Limestone and Homebound.

[46] A matter of concern is the licence status of these companies. This Office made an inquiry at the FSB and found as follows:

46.1 there is no record of any licence being granted to Homebound and Limestone;

46.2 no licence was issued to Ixia Trading 599 (Pty) Ltd;

46.3 a category one licence was issued to a company called Ixia Trading 235 (Pty) Ltd on the 13th February 2007. It is not known whether this is a sister company, and

46.4 The two directors, Bouwer and van Schalkwyk, were also not licensed in terms of the Act.

[47] It appears from the records of the regulator that none of the entities that respondents represented were in possession of a valid licence, namely a licence that authorises the parties to deal in unlisted shares and debentures.

[48] If the first respondent conducted a simple and inexpensive enquiry with the regulator, he would have found out that the promoters and debenture company were not licensed to sell their product. In fact first respondent would have established that both Limestone and Homebound were acting illegally and in violation of section 7 of the Act.

[49] The first respondent was obliged, as a financial services provider, to inform the complainant that the providers of the product were unlicensed. I have no doubt in my mind that had the complainant been informed of this, would not have invested. The complainant was entitled to believe that first respondent checked and was acting in the interests of the former. The complainant would not even have suspected that these entities were unlicensed.

[50] In his response to this complaint the first respondent delivered an agreement that the second respondent had concluded with Homebound. It is this agreement that the respondents rely on to submit that they acted as representatives as contemplated in section 13 of the Act. The following can be said about this agreement:

50.1 the whole agreement can be treated as a joke,

50.2 the agreement is written carelessly in the most appalling English,

50.3 many paragraphs simply defy meaningful interpretation,

50.4 the agreement begins as follows," Whereas, the company decided to make use of accredited and qualified financial brokers to market their products; and Whereas the broker him/herself capable (sic) and willing declare to market and distribute the products of the company" .

This agreement was intended for qualified brokers or licensed brokers and not for the respondents who readily admit that they were both unlicensed and unqualified to sell this product,

50.5 Homebound is the company entering into this agreement that purports to make the respondents representatives in terms of section 13 of the Act. This was impossible as Homebound itself was unlicensed. Section 13(1) provides as follows:

“ A person may not -

(a) carry on business by rendering financial services to clients for or on behalf of any person who -

(i) is not authorised as a financial services provider; and.....”

50.6 the agreement provides that before the signing thereof, Homebound satisfied itself that the broker had the necessary training and that he “passed the required examination”,

50.7 the broker is expected, 90 days after signing the agreement, to provide Homebound with proof that the broker applied for a category 1.8 licence,

50.8 Commission is dealt with as follows:

“ The company hereby undertake, unless beforehand otherwise agree, to pay the Broker 6% (VAT excluded) of the total investment within 14(fourteen) days after clearance of the money, that is on a return of 17.5%. Any percentage over 17.5% will be deducted from the commission. There is a total of 23.5%

to negotiate with. The same principal will apply for the ongoing commission.”

It is difficult to understand what this means. I am certain that if this was disclosed to the complainant, the latter might not have invested.

50.9 the agreement provides that the broker's rights and obligations come into operation after signing of the agreement and on condition that proof is provided of an application for a valid licence by the broker. The significance of this is that on the respondents' own version this agreement, for what it is worth, was not applicable when first respondent sold the product to complainant.

50.10 the agreement is not signed by any representative of Homebound.

[51] It is abundantly clear that the agreement is nothing more than a sham and a pathetic attempt by the respondents to suggest that they acted legally. One must then question the judgement of the respondents for attempting to rely on it in their response to this complaint.

H. FINDINGS

1) On the respondents' own version, the following findings can be made :

- 1.1 When first respondent sold the investment to the complainant, neither the former nor the second respondent were licensed in terms of the Act,
- 1.2 Respondents purported to act as representatives of Homebound in terms of an oral agreement which was later reduced to writing,
- 1.3 When the respondents acted as representatives in terms of section 13 of the Act, there was no written agreement between themselves and Homebound, one cannot be a section 13 representative in terms of an oral agreement,
- 1.4 The oral agreement itself is of no assistance to the respondents as :
 - a) it was entered into only after the complainant invested.
 - b) Homebound itself was not licensed in terms of the Act. One cannot act as a representative of an entity that is not licensed,
 - c) The agreement was not signed by a representative of Homebound,
 - d) The agreement is so badly drafted as to question its authenticity.
- 1.5 The first respondent did not carry out any needs analysis for the complainant, in order to satisfy himself as to the appropriateness of the investment.
- 1.6 The first respondent did not carry out any risk analysis;

- 1.7 First respondent did not give the complainant any choices but was simply going to sell the Homebound investment to the latter.
- 1.8 Respondents failed to act in the interests of the complainant.
- 2) First respondent took advantage of his relationship with the complainant and failed to disclose that neither he nor the second respondent were licensed FSPs. The complainant naturally assumed that the first respondent was licensed. The respondents were obliged, in terms of the Act, to provide the complainant with accurate information about their own licence status as well as that of their principal. I have no doubt that the complainant would not have invested if he knew that no one was licensed.
- 3) It is not in dispute that the complainant gave the respondents a specific mandate. The complainant wanted the money to be invested for no more than 12 months with capital and interest guaranteed. It is equally undisputed that first respondent knew the complainant's investment history and knew that complainant did not invest in high risk investments. The respondents simply ignored their mandate and sold the complainant a product where the investment was not likely to be accessed after just 12 months and there were certainly no guarantees.
- 4) The respondents were under an obligation to give the complainant accurate information about the investment product. This did not happen. It is apparent, from the facts before me, that the complainant did not understand the nature of the investment offered by the respondents. Unlisted shares and debentures issued by a property syndication, are at

best risky. Complainant was not given enough information in order to appreciate the risk.

- 5) I have doubts about the first respondent's capacity to sell this type of product. Although he claims to have received training from the product supplier, this Office received no proof that this ever took place.
- 6) I find that, in the circumstances, the first respondent acted recklessly, negligently and unlawfully in rendering financial advice to the complainant.
- 7) The respondents were attracted and motivated by the lucrative commission on offer from the product supplier. The respondents received a commission of 6% of the invested amount. In this case the respondents did practically nothing to earn the commission. To make matters worse, respondents failed to inform the complainant about the commission and how the product supplier intended to pay it. This was important information that the respondents failed to provide their client.
- 8) I have no doubt in finding that the respondents acted in a manner that undermines the integrity of the financial services industry.

On the undisputed facts before me:

- i) I find that, in rendering a financial service, the respondents breached the provisions of the Act.
- ii) I find further that the complainant's loss was caused by the respondents' conduct.

I. QUANTUM

- 1) The complainant invested R300 000 – 00 on the 3rd March 2007. Since that date the debenture company and promoter company was liquidated and there is no prospect that complainant will recover any part of his investment. The complainant must be awarded the full amount of his lost investment.
- 2) The complainant is entitled to interest from the date of investment.

THE ORDER

I make the following order:

- 1) The complaint is upheld.
- 2) The respondents are ordered to pay to complainant, jointly and severally the one paying the other to be absolved,
 - 2.1) the sum of R300 000 – 00,
 - 2.2) interest on this amount at the rate of 15.5% per annum from the 3rd March 2007 to date of payment.
- 3) The respondents are ordered to pay the case fee of R1000- 00 to this office within 30 days of date hereof.

DATED AT PRETORIA ON THIS 10th DAY OF FEBRUARY 2011.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS