

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 02028/09-10/ EC 1

In the matter between:-

HENRY SCHMIDT

Complainant

and

COMPTON CONSULTING (Pty) Ltd

1st Respondent

DANIEL JOHANNES DU PLESSIS

2nd Respondent

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

A. INTRODUCTION

[1] The complaint arises out of a failed investment in a public property syndication scheme known as Genesis Property Holdings, (GPH) or the Genesis Property Group, hereinafter referred to as Genesis.

[2] Complainant claims that respondents, in investing his retirement savings into Genesis, had failed to take into account his circumstances and violated the trust in their relationship.

- [3] In making the case to complainant for the Genesis investment, respondent is alleged to have insisted that it was a better investment and completely ignored complainant's requests to reinvest his funds into Investec.
- [4] Notwithstanding respondent's insistence, complainant maintains he had repeatedly asked respondent not to invest with Genesis, only to be told by respondent that the investment had already been effected.
- [5] Complainant holds respondents responsible for the failed investment and accordingly requests this office to order the necessary refund.

B. ABOUT GENESIS

- [6] A company by the name Property Inter Action Group changed its name into Genesis Property Group (Pty) Ltd in 2004 (Genesis). The company had been founded by Marelize Lombard.
- [7] Genesis, a Cape Town based company marketed itself as a company specialising in property 'as an opportunity and commodity'. Some of the products offered included :-
- 7.1 Property with additional benefits (PAB) and tax benefits;
 - 7.2 Investment packages which include Capital Growth @ 25 % per annum and Income @15 % per annum. Income was paid monthly;
 - 7.3 Monthly investments;
 - 7.4 Off-shore – available through Genesis Global

- [8] The group's leadership prided itself not only on running the day to day business of the company on what it called, 'uncompromised ethics', but 'sound Biblical business principles.'
- [9] In its mission statement, the group stated that it wants to be a mature Christ company, set the trend in funding the Great Commission, help others to become financially free and operate on the same biblical principles.
- [10] Genesis claimed to have played a leading role in the founding of the South African Association of Property Syndicators.
- [11] At the time of rendering financial services to complainant, the directors of the Genesis group were:
- Danie Lombard- Executive Officer;
 - Leon Jansen – Managing Director;
 - Dean Moldenhauer- Director, Group Ministry, Systems and HR;
 - Toit Malan – Director Sourcing;
 - Adriaan Janse van Rensburg – Director Group Marketing;
 - Andre van der Merwe – Director Operations, Logistics and Funding;
 - Johan Lourens – Director Sales;
 - Johan Meyer – Director Project Management;
 - Jan Davel – Regional Director Gauteng;
 - Jan Strydom – Non Executive Director;
 - Mark Visser – Non Executive Director, also described as the CEO of Prophetic Equipping Ministries and based in KZN.
- [12] Genesis was liquidated through the Cape High Court in 2009.

C. THE PARTIES

- [13] Complainant is Henry Smith, an adult male retiree, whose details are on file in the office.
- [14] First respondent is Compton Consulting (Pty) Ltd, registration number 2002/019401/23, a private company duly incorporated in terms of the company laws of South Africa, with its principal place of business No. 2 Winsor Road Somerset West 7130.
- [15] Second respondent is DANIEL JOHANNES du Plessis an adult male whose full and further details are unknown to this office. His last known address was 2 Winsor Road, Somerset West, 7130.
- [16] At all times material hereto, second respondent rendered financial services to complainant on behalf of first respondent.
- [17] According to the regulator's records, first respondent's license was issued on 12 August 2004. Respondent's license lapsed on 10 August 2011.
- [18] At the time of rendering financial services to complainant, respondents were not authorised to render financial services in respect of unlisted shares and debentures.
- [19] In this determination, respondent or respondents must be read to mean both respondents, unless otherwise stated.

D. COMPLAINT

[20] On 9 November 2010 complainant filed the present complaint against respondent. He alleged that during the year 2000, sometime between January and March, he received a call from respondent, who at the time was unknown to complainant. Respondent is said to have introduced himself as a financial advisor employed by Pentagon Financial Solutions and mentioned to complainant that he had been informed by the head office of the South African Police Services, (SAPS), that complainant was about to take a retrenchment package from SAPS. Respondent offered his services to assist complainant to have his benefits paid out quicker as he, (respondent) allegedly had contacts within the SAPS head office.

[21] Having acceded to respondent's offer, complainant says respondent suggested a meeting in order to discuss investment possibilities.

[22] Complainant later invested an amount of an amount of R770 000 with Investec. From this amount, complainant received a monthly income of R7 000 over a period of five years until the investment matured during 2005.

[23] Complainant says he had suggested that the funds be re-invested with Investec but respondent pointed him to a better alternative, Genesis. Complainant claims he was unhappy and told respondent that he wanted his funds to be re-invested into Investec but respondent prevailed. The investment into Genesis was made on 24 August 2005 with respondent signing all the necessary papers on behalf of complainant.

- [24] Complainant says he acquiesced to the investment in Genesis as he trusted respondent's expertise. An amount of R840 000 was invested into Genesis with a projected return of 8.5% annually. This return apparently, had to be paid to complainant as monthly income.
- [25] Following the first payment of R5679, complainant raised his dissatisfaction about the investment and asked respondent to withdraw his investment but respondent refused. Complainant continued to receive his income in the amount of R5679 until June 2008, when it was abruptly stopped.
- [26] He says he was told by respondent that income payments had been stopped due to mismanagement by the directors of Genesis. As a result it was unknown when the income would be restored.
- [27] Sometime during July 2008 complainant says he was informed that a company by the name of Bunker Solutions Pty Ltd and a Derrick de Necker had taken over the administration of Genesis. Complainant says he again asked respondent to withdraw his investment but respondent informed him that the investment could not be withdrawn.

E. RELIEF

- [28] Complainant has asked this office to order respondents to pay his investment in the amount of R800 000. Complainant states that it was respondent's actions that led to the investment into Genesis. Respondent on his own signed the application forms for the investment and later persuaded complainant that it was a better investment compared to Investec. Complainant is of the view that he has lost his capital.

F. REFERRAL OF THE COMPLAINT TO RESPONDENTS

[29] On 27 November 2009 and in terms of rule 6 (b) the complaint was referred to respondent to resolve it with his client. No response was received from respondent.

[30] However, respondent in his e-mail of 9 November 2009 to complainant persuaded complainant to withdraw his complaint from the FAIS Ombud, pointing that he would rather spend his time finding a buyer for Genesis' only remaining property, known as Lord's Walk instead of consulting lawyers to defend the complaint. In respondent's view, finding a buyer would go a long way towards paying complainant's investment. Respondent claimed he had no money after all and was living off loans and sustained by the generosity of his parents.

G. INVESTIGATION

[31] On 24 February 2011, a notice in terms of section 27 (4) was referred to respondent informing him of this office's intention to investigate the complaint. No response was received from respondent.

[32] A follow up notice in terms of section 27 (4) was sent to respondents on 23 March 2016. The notice invited respondent to demonstrate, using records of advice, the reasons why the investment was deemed appropriate to the needs and risk profile of the complainant, and whether complainant had been informed of the risks inherent in investment.

H. DETERMINATION

[33] Having done everything that was in this office's power to bring the complaint to the attention of respondent and obtain his version, respondent has still failed to respond. The complaint therefore, is determined without the benefit of respondents' version.

Issues for determination:

[34] The issues to be determined here are:-

- 34.1 whether this is a complaint as defined in section 1 of the FAIS Act;
- 34.2 if so, whether the jurisdictional grounds for the investigation of the complaint in section 27(4) have been fulfilled;
- 34.3 whether respondents, in rendering financial services to complainant violated the FAIS Act and the Code in any way;
- 34.4 should it be found that respondents' conduct breached the FAIS Act and the Code, whether such violation caused the loss complained of;
- 34.5 quantum.

Does this complaint meet the requirements of a complaint as defined in section 1 of the FAIS Act?

[35] In his letter of 11 November 2010, complainant alleged that:-

- (i) respondents advised him to invest in Genesis.

- (ii) the basis for the recommendation to invest in Genesis was that it was a better investment.
- (iii) no other information was imparted regarding the Genesis investment. Importantly, complainant was not advised about the risk inherent in the Genesis investment.
- (iv) as a consequence of respondents' actions, complainant is of the view that he has lost his investment.

Thus, the complaint meets the requirements of a complaint as defined in section 1 of the FAIS Act.

Whether the jurisdictional grounds - set out in section 27 (4) of the FAIS Act - for investigating the complaint have been fulfilled?

[36] Section 27 (4) of the FAIS Act prescribes that the Ombud shall not investigate a complaint unless all the interested parties have been duly notified and afforded the opportunity respond to the complaint. The notice in terms of section 27 (4) referred to in paragraph 31 informed respondent of the complaint against him and afforded respondent ample time within which to file his response. The notice further advised respondent that:

36.1 the office required a response from him because he as viewed as a respondent;

36.2 upon receipt of his response, the office intended to investigate the complaint and that a determination of the matter shall be made without any further reference to him.

[37] It can be concluded therefore that the grounds set out in section 27 have been fulfilled.

Did respondents render financial services to complainant in a manner calculated to undermine the FAIS Act and the General Code?

[38] There has been nothing forthcoming from respondents, despite repeated requests for their version. What is known is the following:

38.1 Complainant's investment in Genesis constituted his entire life savings;

38.2 At the time, complainant's wife and their 26 year old son were dependant on complainant. Fortuitously, complainant insisted on settling his mortgage loan at the start of his relationship with respondent.

38.3 Complainant's undisputed version is that respondent on his own accord, completed the investment forms to effect the investment. Complainant later received documents from Genesis confirming his investment. The papers, which confirm the investment and complainant's monthly income in the amount of R5679 were submitted to this office.

38.4 Information furnished by respondents to complainant points to mismanagement and lack of governance in and around Genesis.

38.5 Genesis was liquidated through the Cape High Court in 2009. Several investors including complainant lost their life savings with the demise of Genesis.

38.6 There is no information suggesting that respondent had carried out due diligence on Genesis as required by section 2 of the Code.

38.7 There is also no information suggesting that respondent had complied with the Code in respect of sections 8 (1) (a) to the (c) and sections 7 (1).

38.8 Complainant was informed that Genesis was a better investment than Investec. Precisely in what respects was Genesis better than Investec, complainant was not informed. In this respect, the suggestion is that respondent may have compared the two investments on the basis of their returns and in so doing, misled complainant.

38.9 Complainant, although he had disagreed with respondent and insisted that his funds be reinvested into Investec, he later acquiesced as he trusted respondent's expertise.

[39] There is no doubt in my mind that trust had played an important role in the relationship between the parties. For complainant to have acceded to invest into Genesis on the basis of the bizarre comparison of the two investments and even condone respondent's signing of the application forms for the investment, he clearly must have been relying on respondent to guide him, which was a grave mistake.

[40] Had complainant known any better, he would have known that there can be no credible result in respondent's comparison of apples with oranges. Respondent simply preyed on complainant and abused the trust relationship for his own gain.

[41] In addition to violating his own license conditions, respondents, without any regard to the absence of regulatory protection and in complete disregard of the FAIS Act, recommended the unlicensed Genesis to complainant.

[42] There can be no question whether respondent acted in complainant's interest when he set in motion the series of acts which resulted in the investment in Genesis.

[43] Respondent's actions violated the FAIS Act and the General Code.

I. CAUSATION

[44] Complainant's uncontroverted version is that respondents made the investment into Genesis after recommending it as better investment than Investec. No material disclosures were made about the Genesis investment; certainly no evidence of due diligence has been provided by respondents. Having successfully blindsided complainant, whether by intention or negligence, the investment was made. Genesis was placed into liquidation following several claims of mismanagement and violation of sound corporate governance principles. Respondent's own version to complainant in the e-mail of 9 November 2010 points to criminal charges against the board of Genesis.

[45] Still, respondent does not even make reference to what the registered auditors of Genesis said in their report. Most of these poor governance red flags would have been apparent in the auditors' report.

[46] In complete disregard of his legal duties, respondent recommended the investment to complainant.

[47] It is important to note that it is not what happened in Genesis which caused complainant the loss but respondent's disregard of the law. Had respondent carried out his duties as set out in the Code, no investment would have been made into Genesis. Respondent would have realised that the risks in Genesis were not suitable to complainant's risk capacity.

[48] Respondents' conduct caused complainant's loss

J. QUANTUM

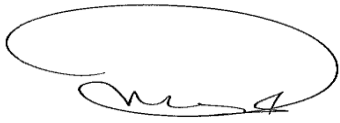
[49] Complainant's version is that he contributed R 840 000 into the investment with Genesis. Complainant agreed to abandon the amount in excess of R800 000 to bring the amount of the claim within the jurisdiction of this office. Of the amount invested in Genesis, respondent has not paid anything to complainant.

K. ORDER

[50] In the premises the following order is made:

1. The complaint is upheld;
2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to complainant the amount of R800 000;
3. Interest at the rate of 10.25 %, per annum, seven (7) days from date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 16th DAY OF MAY 2016

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a cursive 'BAM'.

NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS