

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

Case Number: FAIS 01020/08-09 /GP 1

In the matter between:

MARIA CHRISTINA SMIT

COMPLAINANT

and

PETRUS STEFANUS FOURIE

RESPONDENT

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

A. INTRODCUTION

[1] This complaint revolves around an investment made in March 2006 into a company known as Network 2 – The Company Limited t/a PropDotCom no.3 ('PropDotCom'). PropDotCom is part of an entity generally referred to as the Blue Pointer Group of companies ('Blue Pointer'). All pertinent details about the Blue Pointer group of companies were comprehensively dealt with in the determination of BERNARD FEDERICK DUDLEY v LIFESURE FINANCIAL SERVICES CC, FAIS Reference No: 04114/08/09 WC 1, ("Dudley"). As such, it follows that this determination must be read with that of Dudley.

[2] According to its prospectus, PropDotCom was established for the purpose of raising capital for financing property acquisitions by its future subsidiaries. In order to raise capital for the acquisitions, PropDotCom offered linked units at R15 000.00 per unit to the public. Each linked unit consisted of Class B ordinary shares of R1.00 per share and an interest free unsecured loan of R14 999.00.

B. THE PARTIES

[3] The complainant is Maria Christina Smit, an 84-year-old female pensioner, residing in Germiston, Gauteng, 1459. The complainant was introduced to the respondent by her daughter ('Angeline'). Angeline further assisted complainant when she made the investment owing to challenges with complainant's eyesight. In order to lodge the present complaint, complainant was assisted by her daughter.

[4] The respondent is Petrus Stefanus Fourie an authorised financial services provider with licence number 21264. Respondent conducts business at Office 102, 1st floor, Newlands Centre, Lois Avenue, Newlands, Pretoria East, Gauteng, 0049.

C. COMPLAINT

[5] Complainant sold her house in the beginning of 2006 and wanted to invest the proceeds of the sale in an income producing investment. As the complainant has never made any investments before, she requested the respondent to

assist her with investment advice. In March 2006, pursuant to the advice of the respondent, the complainant invested part of the proceeds of the sale, in the amount of R195 000 into PropDotCom.

[6] The complainant contends that she requested a risk free investment with the 'highest monthly interest' rate. The respondent allegedly assured her that there were no risks with PropDotCom. Respondent is further alleged to have informed complainant that not only would she receive monthly interest on her investment, but additionally the value of her investment would appreciate.

[7] Upon concluding the investment, complainant received regular income payments of R1 706 per month commencing from April 2006 until such time that it ceased in August 2007. Her attempts to re-instate her income payments and to recover her capital proved unsuccessful.

D. RELIEF SOUGHT

[8] The complainant contends that she lost her capital of R195 000 as a result of respondent's advice. In particular she was not apprised of the risks involved in the investment, appropriate disclosure whereof would have led her to decline the investment. Accordingly she requires the return of her capital together with interest.

E. RESPONDENT'S RESPONSE

[9] In terms of the Rules on Proceedings of the Office, the complaint was referred to respondent to resolve. As the complaint could not be resolved, it was

accepted for investigation in terms of Section 27(4) of the FAIS Act. Respondent was advised accordingly and requested to furnish his response. The pertinent aspects of the respondent's response are set out below:

- 9.1 Complainant had an amount of R400 000 in her bank account. She wanted to invest the money in order to better the return provided by the bank. He proposed various investment options to the complainant amongst which were an 'Investment Income Plan with the insurers' and a 'Money Market linked income plan'. Additionally he provided the prospectuses of Blue Pointer and Sharemax. He contends that he fully explained the contents of the prospectuses to the complainant and that she had more than a week to scrutinise same and ensure that she understood the products.
- 9.2 Ultimately the complainant instructed him to invest in Blue Pointer and Sharemax. He states that this decision was to a large extent based on the fact that the complainant was struggling to make ends meet with the interest she earned on her bank deposit. He believed that the high income paid by the syndications would solve this problem.
- 9.3 Respondent asserts that the risks involved in property syndication were brought to the attention of the complainant. In his understanding these are principally; 'the Legality of the Company, the condition of the Property, the Head Lease Agreements, the Occupation Percentage, the Maintenance plan, the Registered Prospectus and the viability of the Syndication.'

- 9.4 The respondent asserts that he was invited by Blue Pointer to its public presentations, which were attended by many brokers. At the presentation he was furnished with prospectuses which as he puts it, had been approved by the Financial Services Board ('FSB'). Along with other brokers he was also flown to Cape Town and entertained by Blue Pointer's Chairman. They were provided with Blue Pointer marketing material, web site information and were introduced to a property expert who confirmed the credibility of the Blue Pointer product.
- 9.5 According to the respondent, he was 'instructed, trained, advised and controlled by the Syndication Companies'. He states that he marketed the syndication companies' products under their licences and supervision. The syndication companies took responsibility for compliance matters.

F. DETERMINATION AND REASONS

[10] The issues to be decided are:

- 10.1 Whether the respondent failed to comply with the requirements of the FAIS Act and the General Code of Conduct ('the Code') and if so,
- 10.2 whether such conduct caused the complainant to suffer damage or financial prejudice; and
- 10.3 the amount of such damage or financial prejudice.

Whether the respondent failed to comply with the FAIS Act and the General Code of Conduct ('the Code')

Licensing

[11] At the outset, it would be appropriate to consider the issue of licensing of the respondent. Investigations conducted by the Office revealed the following:

11.1 On 29 September 2004, the respondent applied to the FSB for a license to render advice and intermediary services. This was granted on 17 August 2005.

11.2 However, this authorization did not extend to the sale of unlisted shares and debentures. Questioned about his lack of authorisation to market shares and debentures, respondent argued that the PropDotCom investment was concluded under the license of Blue Pointer. The problem with this statement is Blue Pointer was never authorised as a financial services provider and respondent had access to that information at all relevant times. Respondent's conduct of rendering financial advice on products of an entity that is not licensed is a violation of the law.

Risk inherent in the Blue Pointer product

[12] According to complainant the R400 000 represented 90% of her capital, and being 77 years of age when the Blue Pointer investment commenced, she depended thereon to fund her income needs. As will become evident, nothing on file which includes respondent's version, assists me to understand why an

unregistered and high risk scheme such as PropDotCom was recommended and how it would be likely to satisfy complainant's needs in the circumstances.¹To simply say that complainant's income needs could not be addressed with the low return paid by banks does not assist respondent. The risks far outweigh any potential returns and respondent furnished no document evidencing that the risks inherent in the PropDotCom investment were disclosed to complainant; in particular that she could lose all or a portion of her capital. This marks a breach of the Code which requires full and appropriate information of the any material or other risks associated with the product²

[13] The respondent asserted that according to a risk analysis, complainant was established to be a moderately conservative investor. Whilst the shares issued by PropDotCom are unlisted and generally regarded as high risk, respondent argued that PropDotCom is a low to medium risk investment. Yet without a formal market for unlisted securities, investors may be unable to sell their shares thereby substantially increasing the risk.³ Furthermore, unlisted shares are not subject the same degree of public scrutiny as listed shares none of which appears to have been explained to complainant. I could not find anywhere in the respondent's file of papers that he disclosed this to the complainant. His failure to do so is a contravention of the Code.⁴ If the respondent did not understand the risks associated with the investment, which, given his lack of training appears to be the case, then he was reckless

¹ Section 9 (1) (c) of the General Code

² Section 7. (1) (C) (XIII) of the General Code

³ FSB –What should investors know before they invest in unlisted securities

⁴ See Section 7(1)(c)(xiii)

in recommending the product to the complainant.

Record keeping and suitability

- [14] In terms of Section 9 of the Code a provider must maintain a record, which record must reflect the basis on which the advice was given and in particular-
- 14.1 'a brief summary of the information and material on which the advice was based;
 - 14.2 the financial product which were [*sic*] considered;
 - 14.3 the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the clients identified needs and objectives...'
- [15] In support of his version, the respondent provided the Office with his file of papers which includes a document titled 'Record of Advice and Compliance Checklist' ('ROA'). The ROA consists of a single page and can aptly be described as a 'tick-box template' requiring a prospective client to indicate by ticking a 'YES' or 'NO' box whether certain compulsory disclosures were made.⁵ Contrary to the respondent's contention that he proposed numerous products to the complainant which included an 'Investment Income Plan with the insurers' and a 'Money Market linked income plan', his papers reflect that property syndication alone were considered for the investment. Yet the ROA offers no explanation as to why the PropDotCom was likely to satisfy the complainant's needs and objectives. In short, the ROA merely pays lip service to the FAIS Act and the provisions of the Code.

⁵ I have in many of my previous determinations given my views on tick-box templates and reasons as to why they do not comply with the provisions of the Code.

[16] During the investigation of this complaint, enquiries were made with the respondent regarding his commission and proof of disclosure. It was established that he was paid commission of 5% of the amount invested (R195 000). No proof was furnished that commission was disclosed or any other costs attended to the investment. This marks a violation of the Code⁶

[17] Given the complainant's reliance on her capital to fund her living expenses, I am persuaded that she would not have invested in PropDotCom had she been informed that:

17.1 PropDotCom is a high risk investment, which means she might lose her capital;

17.2. the respondent lacked the capacity as well as a license to give advice on PropDotCom;

17.3 neither Blue Pointer nor respondent was not authorised to render financial services to the public and the implications thereof.

G. FINDINGS

[18] Respondent rendered financial services in respect of products of which he had no authorisation. He failed to disclose his license status to the complainant.

[19] The respondent failed to disclose the risks inherent in PropDotCom to the complainant, thus he failed to appropriately advise the complainant.

⁶ See Section 7(1)(c)(vi) of the Code

[20] Respondent's conduct undermines the Code in so far as the duty placed on providers to act in their client's interest when advising clients. In this regard, the act of advising a client on a product respondent had no knowledge of shows not only disregard for the law but his client's interests.

[21] But for the conduct of the respondent, complainant would not have invested her capital into the PropDotCom investment.

[22] The respondent failed to disclose the commission he earned on the PropDotCom investment.

H. QUANTUM

[23] Complainant invested R195 000 in PropDotCom. It is now approximately 5 years since she last received a payment from Blue Pointer. All indications are that she lost her capital of R195 000. There can be no question, that it was respondent's conduct that occasioned the complainant's loss.

I. ORDER

1. The complaint is upheld;
2. The respondent is ordered to pay the complainant;
3. The amount of R195 000.00;
4. Interest on the amount at 15.5 per cent per annum calculated from seven days after date of this order to date of payment;

DATED AT PRETORIA ON THIS THE 1st OF OCTOBER 2012.

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

NOLUNTU N BAM

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