

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 04751/09-10 MP(1)

In the matter between:-

FRANSISCA VAN ZYL

COMPLAINANT

and

JOHAN WILLEM VAN DER WALT

RESPONDENT

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

A. THE PARTIES

[1] The Complainant is Mrs Fransisca van Zyl, a 64 year old pensioner of Malelane, Mpumalanga.

[2] The respondent is Mr Johan Willem van der Walt, who at all relevant times was an authorised financial services provider trading as van der Walt Brokers, with license number FSP 210. The license lapsed on 3rd September 2008 and

Respondent is currently retired and residing at unit 41, Faerie Glen Estates, Faerie Glen Road, Margate.

B. THE COMPLAINT'S VERSION

[3] It appears from the complaint that the Respondent has been the family financial advisor since 1989. He advised both the Complainant and her husband in relation to various policies.

[4] Sometime in March 2005 the Respondent approached the Complainant and her husband and advised her to surrender her unit trusts and purchase shares in an unlisted company called Imuniti Holdings ("Imuniti"). The Complainant says that she was assisted by her husband during the time of rendering the financial services by the respondent. The motivation for the Imuniti investment was that it would yield greater returns upon listing, which at the time, was said to be within the period of one month, when counted from the date of the rendering of the financial service.

[5] The Complainant contends that the Respondent made several misrepresentations which misled her. She states that Respondent compared Imuniti with the well known pharmaceutical company, Aspen. In that regard, the Complainant was told by the Respondent that in fact, Aspen was much smaller than Imuniti and that it held about 25% shareholding in Imuniti. To illustrate his point about the strong potential for growth and the typical performance of investments of that kind in the securities exchange,

complainant states that Respondent made use of old newspaper clippings which indicated Aspen's growth.

[6] She further mentioned that the Respondent had advised her that Imuniti was worth about R2.50 per share, but could be purchased at 60 cents per share. As a result of the Respondent's advice, the complainant purchased 1 466 667 Imuniti shares for the total value of R880 000, at 60 cents per share.

[7] The complainant has never received any dividends on the investment. Apparently, when Imuniti eventually listed on 12th December 2006 on the JSE's alternative exchange (ALT-X), the share price dropped dramatically and the shares are now virtually worthless. At the time of lodging the complaint with this Office, Imuniti traded at 3 cents per share.

[8] The Complainant asserts that the incorrect and untruthful representations made by the Respondent when rendering financial services to her were material and thus meant to mislead her into investing into Imuniti.

C. RELIEF SOUGHT BY COMPLAINANT

[9] As a result of the Respondent's failure to abide by the Code when advising her, the Complainant states that she suffered financial loss. She has agreed to abandon an amount of R80 000 to bring the quantum to be recovered within the jurisdiction of this Office. She therefore only seeks to recover the amount of R800 000.

D. RESPONDENT'S RESPONSE

[10] On the 02nd of March 2010, this Office referred the complaint to the Respondent in terms of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers, (the Rules). The Respondent was requested to resolve the matter with the Complainant and in the event it was not resolved to revert to this Office with his full response and supporting file or documents to the complaint.

[11] On 24 April 2010, the Respondent furnished his response to the complaint. Below, I deal with the salient points of the Respondent's response.

[12] The Respondent made various representations to the Complainant about the Imuniti shares. According to the Respondent, he explained to the investors what the buying of those shares entailed. In that regard, he furnished the Complainant with the company prospectus.

[13] Well past the advice in March 2005, and even the much later listing of Imuniti on the JSE-ALT on 27 November 2006, Respondent avers that he gave the Complainant the projected income statements for the year ending 28 February 2008, and discussed same at a meeting held at the Respondents office on 24th September 2007. Included therein was a list of directors and key BEE shareholders as at 26th June 2007.

[14] Whilst Respondent contends that the information he furnished to the Complainant illustrated the nature and composition of the Imuniti, it must be

noted that despite being requested to do so Respondent essentially provided no documentation to this Office either supporting his version or even remotely evidencing any compliance with the FAIS Act.

E. DETERMINATION AND REASONS

[15] When the Respondent failed to properly address the complaint, he was sent a Notice in terms of section 27 of the FAIS Act and informed that the complaint had been formally accepted for investigation. Accordingly, the Respondent was requested to submit a copy of his client's file and supporting documents. However, the Respondent failed to file any further response to the complaint. Several requests for response to the complaint went unheeded by the Respondent.

F. THE ISSUES

[16] The issues that arise for decision are the following:

16.1 Whether the Respondent was authorised to market unlisted shares;

16.2 Whether the Respondent acted in a manner which is not in compliance with the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and their Representatives ("the General Code") or negligently and if so, whether his conduct caused the complainant to suffer damage or financial prejudice; and

16.3 The amount of such damage or financial prejudice.

[17] It is common cause that the Respondent advised the complainant to invest an amount of R880 000 in Imuniti. Despite several requests from this Office, the Respondent failed to submit any record of advice.

[18] In his response to the complaint, the Respondent did not dispute the Complainant's assertion that he had advised her that Imuniti's share price would increase dramatically after the company's listing. The Respondent however, could not furnish any evidence or proof for his conclusion that the share price would increase after listing.

[19] The Respondent also failed to furnish any record indicating that a risk profile was ever conducted to determine Complainant's risk tolerance. The Respondent's failure to conduct any risk analysis was all the more prejudicial to the Complainant as Imuniti was unlisted and unknown at the time of rendering the financial advice. The Respondent was obliged to communicate to the Complainant the risks presented by the investment in Imuniti. Once the risk had been explained, the Respondent still had in terms of the Code to evaluate whether the Complainant's risk tolerance matched the risk in the investment and advise the Complainant accordingly. In that case, the Complainant would have been in a position to make an informed decision as to whether she wished to proceed with the investment.

[20] It is not clear whether any case for a need was ever made for the product suggested to Complainant. Given that the Imuniti was a replacement, there is

no record suggesting that a comparison in terms of section 8 (1) (d) was ever conducted. In that regard, section 8(1)(d) of the Code provides as follows:

“8(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 compared to those in respect of the terminated 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 compared to those applicable to the terminated 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;*
- (viii) *vested rights, minimum guaranteed benefits or other guarantees or benefits which will be lost as a result of the replacement; and;*
- (ix) *any incentive, remuneration, consideration, commission, fee or brokerages received, directly or indirectly, by the provider on the terminated product and any incentive, remuneration, consideration, commission, fee or brokerages payable, directly or indirectly, to the provider on the replacement product where the provider rendered financial services on both the terminated and replacement product.”*

[21] As already stated above, the Respondent could not furnish any evidence indicating compliance with the provisions of section 8(1)(d) of the Code.

Indeed, in his response, the Respondent does not even allege compliance with these “product replacement” provisions of the Code.

[22] What is undisputed at this stage is that the Respondent advised the Complainant to replace her diversified unit trust investment, with the Imuniti shares. There are several problems with this approach in rendering financial services, chief of which is that the complainant was not placed in a position where she could make informed decisions as the Code demands. Significantly, section 8 (2) of the Code places the following obligation on the FSP:

“8(2) 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.”

[23] As already evident, compliance with the FAIS Act and General Code is non-existent and it should come as no surprise to learn that respondent was never authorised in terms of section 7 (1) of the FAIS Act to sell shares in the first place.

[24] This perhaps accounts for the numerous breaches, which are perhaps best summed up by the lack of compliance with section 2 of the General Code which provides that:

“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.”

[25] By advising the Complainant to invest in Imuniti, without disclosing to her how this product was suitable to her needs, Respondent clearly failed to act with care and diligence, and in the interest of the Complainant. As already stated, the Respondent failed to establish what risk the complainant could tolerate and match that with the risk presented by Imuniti. There is not so much as even a single disclosure about Imuniti regarding the risk inherent therein. Most importantly, there is no basis for the advice that Complainant invest in Imuniti and this would be apparent from the record that must be compiled in terms of section 9 (1) of the Code. The facts of this matter indicate clearly that the Respondent, and this is apparent from his own version, failed to appreciate his duties as a provider as stipulated in the Code.

[26] The Respondent stated that he had furnished the Complainant with the company's prospectus. There is no evidence that material disclosures were ever made. That the prospectus was furnished to the Complainant does not exonerate the Respondent from complying with the Code. In any case, the information furnished to the Complainant was not useful in so far as assessing the viability of Imuniti. That being so, the financial statements furnished by the Respondent to this Office as part of his response, were not relevant as they covered the periods between 28th February 2007 and 28 February 2008. It is

common cause that Imuniti was listed on 27 November 2006 and the investment was made in March 2005.

G. CAUSATION

[27] It is common cause that Complainant had her amount of R880 000 invested in Imuniti on the advice of the Respondent. That the Complainant made the investment without a single material disclosure about the investment is apparent from the Respondent's own version. This is not a case of sour grapes or buyer's remorse but one where the Complainant could not have made an informed decision, having only been told about the discounted price of Imuniti shares and no further reference to material disclosure as to what it means to invest in a single stock equity directly as opposed to, for example, unit trusts.

[28] As a result of the Respondent's conduct which is in violation of the General Code, the Complainant suffered financial prejudice.

H. QUANTUM

[29] Having abandoned an amount of R80 000 so as to bring the complaint within the jurisdiction of this Office, I therefore intend to make an order in the amount of R800 000.

I. FINDINGS

Accordingly, I find that:

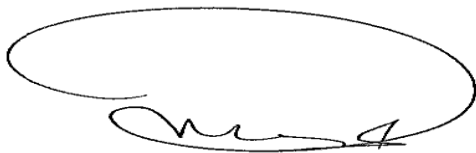
- [30] The Respondent advised the Complainant to invest an amount of R880 000 in Imuniti. At the time of advising the complainant, no material disclosures in accordance with the General Code, were made by the Respondent regarding Imuniti.
- [31] The Respondent failed to compare the two products, (the unit trusts) and (Imuniti) notwithstanding that the transaction was a replacement.
- [32] The Complainant was not placed in a position in which she could make an informed decision at the time of entering into the transaction concerning Imuniti.
- [33] The Respondent failed, notwithstanding numerous requests to provide a record of advice, which, in terms of section 9 (2) of the Code should have been furnished to the Complainant.
- [34] The Respondent failed to act with due skill, care and diligence, in the interests of the Complainant and the integrity of the financial services industry.
- [35] The Respondent's conduct violated the Code. As a result of such violation, the Complainant suffered financial damage.

J. ORDER

In the premises, I make the following order:

1. The complaint is upheld;
2. The Respondent is hereby ordered to pay the Complainant the amount of R800 000, from a date seven days from the date of this order;
3. Interest on the amount (of R800 000) at 15.5% per annum calculated from seven days after date of this order to date of payment;
4. The Respondent is to pay a case fee of R1000 to this Office within 30 days of date of this order.
5. Upon compliance with the order, the share certificates are to be tendered to respondents according to payment.

DATED AT PRETORIA ON THIS THE 17th DAY OF AUGUST 2012.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS