

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS – 06963-11/12 WC 1

FAIS – 06965-11/12 WC 1

In the matter between:

ANN ELIZABETH ALBERTYN

First Complainant

PIETER KUYPER ALBERTYN

Second Complainant

and

TEO HERSELMAN MAKELAARS BK

First Respondent

TEOBER HERSELMAN

Second Respondent

**DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL ADVISORY
AND INTERMEDIARY SERVICES ACT 37 OF 2002 (“FAIS ACT”)**

A. INTRODUCTION

[1] In 2010, the first and second complainant collectively invested R850 000 into property syndication schemes promoted by PIC Syndications (Pty) Ltd on the advice of the second

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

respondent. The first complainant invested R500 000 into Highveld Syndication 21 while the second complainant invested R350 000 into Highveld Syndication 22. While the investments were positioned to the complainants as being secure and guaranteed, the syndications failed within two years of the complainants' investments.

- [2] The first complainant was initially advised that her investment would subsist for a period of five (5) years and that during this period, she would receive an income of 12% for the duration of the investment. In 2011, the income decreased from the 12% promised to investors to 6% and has not been restored to the initial amount promised to complainant since. The second complainant opted not to receive an income from the investment and instead for the interest to be compounded and paid to him at the end of the investment, together with his capital.
- [3] Although the complainants were led to believe that they would receive their capital back at the end of the investment period, it has been almost six (6) years since the date on which the investments should have matured and the complainants are yet to receive their capital back.
- [4] The complainants claim, amongst other things, that the second respondent was fraudulent in his representations to them and that because they relied on these representations when deciding whether or not to invest in the property syndication, that the respondents are to blame for them losing their capital.
- [5] The complainants approached this Office to assist them recover their losses from the respondents.

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

B. THE PARTIES

- [6] The first complainant is Mrs Ann Elizabeth Albertyn, an adult female whose full details are on record with this Office. The second complainant is Mr Pieter Kuyper Albertyn, an adult male whose full details are on record with this Office. The first and second complainant are married to each other.
- [7] The first respondent is Teo Herselman Makelaars BK, a close corporation duly incorporated in terms of South African law, with registration number (1995/055067/23). The address of the first respondent's principal place of business is noted in the records of the Financial Sector Conduct Authority (FSCA), or the Regulator, as 42 Church Street, Bredasdorp, Western Cape, 7280. The first respondent was previously registered as an authorised financial services provider (FSP) (licence number 9400) from 2004 but its license lapsed on 22 November 2016.
- [8] Second respondent is Teober Herselman, an adult male financial services provider and broker as well as the principal member of the first respondent. The last known address for the second respondent was 25 Long Street, Bredasdorp, Western Cape, 7280. At all times material hereto, second respondent rendered financial services to the complainants in his capacity as a representative of the first respondent.
- [9] In this determination I refer to the respondents collectively as 'respondent' and where appropriate I specify which respondent is being referred to.

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

C. THE COMPLAINT

- [10] During July 2009, the second respondent visited the complainants and recommended that they invest capital into property syndication schemes marketed by Pickvest. According to the complainants, the second respondent explained that they would be investing in commercial property that is 'very upmarket' and which 'was being leased to various tenants'. The complainants claim that the second respondent assured them they would be investing their money in a very safe investment and that their capital would be 100% guaranteed, with guaranteed growth during the investment period.
- [11] The source of the funds that complainants used for their investments was from investments they cancelled in order to be able to conclude the investments in question. The first complainant cancelled an investment that she held with Liberty, while the second complainant cancelled his investment with Stanlib.
- [12] The complainants claim that while they had signed a risk assessment attached to the application forms for the investments, the second respondent did not discuss the content of the risk assessment with them and they were therefore unaware that, contrary to the advice received from the second respondent, their investments were not guaranteed. The complainants also claim that they only learnt when they lodged their complaints, in 2012, that there was no property registered in the name of the syndications. The complainants thus alleged that the second respondent made fraudulent, alternatively negligent misrepresentations to them with regards to their investments, and they acted on these representations to their detriment.

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

D. RESPONDENT'S VERSION

- [13] On receipt of the complaints from the complainants, this Office, in accordance with Rule 6(c) of the Rules on Proceedings of this Office, forwarded the complaint to the respondent on 7 February 2012 to afford the respondent an opportunity to either resolve the complaint with the complainants or to respond fully thereto.
- [14] In the response to the complaints, the second respondent did not address the allegations levelled against him by the complainants. The second respondent instead confirmed that he recommended the investments to the complainants and proceeded to refer this Office to some of the details or information contained in the prospectus for each of the syndications into which the complainants were invested.
- [15] In particular, the second respondent mentioned how in the prospectuses, Pickvest declared that it supports the regulations of the property syndications industry and that it complies with all the requirements stated in the Government Gazette of 30 March 2006, as well as the requirements of the Companies Act. The second respondent also referred to how the 'risk statement information is disclosed in the prospectus'.
- [16] The second respondent then went on to confirm that the complainants applied for the investments with the first complainant signing the application form on 10 July 2009 and the second complainant signing the application form on 21 August 2009. The second respondent advised that in respect of the first complainant, her goal was to receive an income for the duration of the investment, while second complainant wanted to achieve capital growth without any income. The second respond thus effectively just confirmed the information already received from the complainants.

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

- [17] The second respondent then relayed t how in 2011, an announcement was made by Pickvest that there would be a reduction in the income due to those investors who had opted to receive interest for the subsistence of their investments. The second respondent also advised how a financial investors' forum was started in a bid to put pressure on Pickvest to act in the interests of the many investors.
- [18] The respondent ended the response by stating how, even with the investor's forum, the syndications managed by Pickvest, including the ones that the complainants were invested in, were placed under business rescue and how investors voted in favour of the business rescue proceedings.
- [19] After due consideration of this response, this Office found the respondent's response wanting, and was not satisfied that the allegations raised by the complainants had been adequately addressed.
- [20] Consequently, this Office, after issuing a notice to the respondent in terms of section 27 (4) of the Financial Advisory and Intermediary Services Act (FAIS Act), accepted the matter for formal investigation.
- [21] In this notice, the respondent was advised that the response to the letter sent by this Office in terms of Rule 6(c) of the Rules, as well as the documents submitted to this Office in support of the said response, were insufficient to demonstrate the respondents' compliance with the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and Representatives (the Code).

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

[22] The respondent was also referred to various sections in the FAIS Act and the Code which this Office perceived he breached, or with which there was no compliance when the financial service was rendered to the complainants. On account of these perceived breaches, this Office recommended that the respondent make an offer to the complainants that is fair and reasonable, in settlement of the complaint. Alternatively, the respondents were called on to submit the information and supporting documentation necessary to demonstrate such compliance, in the event they elected not to resolve the matter with the complainants. This Office advised that in the event that no such offer was presented to the complainants, and instead a response was received to the notice sent in terms of section 27(4) of the FAIS Act, the complaint would be resolved by way of a determination.

[23] In response to this notice, the respondent did not address this Office on any of the points raised in the section 27(4) notice. The respondent simply advised this Office that there was communication sent to investors in October 2014 in order to restructure the business rescue plan and that investors were called on to vote for or against the plan. The respondent also informed this Office of the group formed by investors and advisors for the purpose of launching a class action against the syndications, their founder and directors. The respondent mentioned that he contacted the complainants, asked them to become a part of the group and they attended the initial meeting and contributed towards the class action.

[24] The respondent attached to his response to the section 27(4) notice, his initial response to this Office and copies of:

- the prospectuses relevant to the investments;

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

- the quotations presented to the complainants detailing the amounts they invested and the illustrative values of the projected capital growth and investment return;
- the application forms that the complainants completed in respect of their investments;
- the buy-back agreement; and
- the documents pertaining to the business rescue plan, including the resolution taken by the Pickvest board to place the syndications under business rescue.

E. INVESTIGATION OF THE COMPLAINT

[25] Having considered all the responses from the respondent, this Office was of the view that both responses failed to rebut the complainants' allegations. This was communicated to the respondent in further correspondence addressed to him dated 23 August 2018, where the respondent was afforded another opportunity to address the allegations levelled against him by the complainants in light of the duties imposed by the FAIS Act and the Code.

[26] The respondent again, referred this Office to his previous responses and proceeded to attach the documents which he already submitted in support of his averments. The respondent also provided this Office with an update on the class action and referred this Office to a website on which the most recent updates on the action can be found. On receipt of this response from the respondent, dated 7 September 2018, this Office concluded its investigation into the complaint.

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

F. DETERMINATION

[27] Though afforded several opportunities to confirm or deny the allegations levelled against him, the respondent opted not to. Instead, the respondent chose to point this Office to the actions of the syndications, and more precisely those at their helm. Seemingly, the respondent did this because he holds the view that the loss occasioned to the complainants was not due to the advice, he rendered but rather the failings in the syndication and the cancellation of the buy-back and head lease agreements. This much is evident from the information that the respondent has chosen to provide or focus on in his responses, as well the documents which he attached to his responses, in support thereof.

[28] However, given the duties placed on the respondent, to, amongst others, ensure that a product or products recommended to a client are suitable to the client's needs, the question of whether the respondent is liable for the losses occasioned to the complainants turns on whether the respondent's conduct, when rendering the financial service, met the standard of a reasonable financial services provider or not.

[29] The respondent makes no outright claims that he did. Instead, he simply mentioned in his first response that there is a risk statement contained in the prospectuses with no supporting statement(s) of whether he considered, because of this risk statement, that the complainant's were conversant with the risk inherent in the investments and that he then discharged the duties imposed on him by the Code. In any event, the respondent referred to the 'risk statement' without having alleged, let alone established, that he had provided copies of the prospectuses to the complainants and the complainants alleged that they

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

signed the risk assessment without the respondent having taken them through its content. However, even without this allegation from the complainants, the respondent bore a duty, first, to recommend to the complainants a product suitable to their needs. To that end, we must consider whether the respondent did this.

Was the product recommended to the complainants suitable for their needs?

[30] This step of the advice process, recommending a suitable product to a client, is preceded by the steps detailed in section 8(1) (a) and (b) of the Code. Section 8(1) (a) - (c) of the Code states that:

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, FAIS Act, or any contractual arrangement.*

[31] From the documents attached to the respondent's responses, it appears that the respondent made some attempt to collect the information necessary to establish the needs of the complainants. It appears in the needs analysis and risk profile contained in the application forms, that the complainants wanted a secure investment that would also, in respect of the first complainant, provide an income for the duration of the investment and in respect of the second complainant, provide capital growth. These were outlined in the

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

investment proposal documents, as the principal features that the complainants wanted an investment product to offer them.

[32] In response to the complainants' needs, the respondent seemingly found the investments into Highveld Syndications 21 and 22 fitting. It is also despite the risk statement or warning that appeared in the prospectuses.

[33] The respondent acknowledged the existence of the risk statement or warning in his initial response to this Office, yet he recommended the product to the complainants anyway. It appears, given the respondent's repeated references to the prospectuses and the class action initiated against, specifically, Mr Nic Georgio, that the respondent was not dissuaded from recommending the product to the complainants even in the face of this warning because of the buy-back and head lease agreements that were said to underpin the investments.

[34] It appears on page 12 of the application forms that *'the investment is secured through a buy-back agreement and the income through a head lease agreement as disclosed in the prospectus'*. The public was advised that *'the minimum proposed investment term of the investment was five years and it must be noted that 'in order to achieve the benchmark it is not possible to guarantee the investment capital, nor the targeted return, except where the buy-back and head lease agreements apply'*.

[35] The issue with the respondent's reliance on these agreements however is that there is no evidence to show that prior to him recommending the investments to the complainants, he undertook a due diligence exercise in order to assess whether the agreements would be

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

able to deliver the promises contained therein. The need for the respondent to have undertaken such an assessment is not a fortuitous one, given that all the documentary evidence, including the complaints and the respondent's responses thereto, point to the complainants being persuaded to invest in the syndications because of the alleged guarantees they offered. These agreements, at face value, appeared to be solid and to afford the protection they claimed to.

[36] The respondent however, by implication of section 11 and 12 of the Code, bore the duty to interrogate not only the authenticity of the agreements, but their ability to protect his clients, the complainants, in the manner it said it would.

[37] The Financial Services Tribunal (the Tribunal), in the consolidated matters of Optimum Consultants (Pty) Ltd and Another v Margaretha E Lambrechts N.O. and two Others, said the following when commenting on the head lease and agreements.

'This 'lease agreement' did not disclose who the lessor and lessee are, what is let, the period of such letting or rental payment. It does not contain any other clauses specifically relating to a lease agreement. It is not clear why it is called a lease agreement.'

[38] Similarly to the respondents in the Optimum Consultants and Lambrechts matters, the complainants in this matter were insistent on the investment recommended to them being secure. Their need was rooted in that security and understandably so given their financial circumstances and their ages. The need then for the respondent to investigate the legitimacy or to judge the investment in the manner congruent with sections 2 and 8 (1) (d) of the Code, was pertinent, yet he did not.

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

[39] Providers, in terms of section 7 (1) (c) cannot be pardoned from the responsibility of ensuring that the information they rely on when rendering a financial service is accurate because it comes from a third party. This is so even if the information appears to be legitimate because it is received from a product supplier that has 'long' been in the market or whose 'track record' suggests that they are able to deliver the product in the manner promised. This is precisely what the respondent did, similarly to the appellants in the Optimum Consultants and Lambrechts matters.

[40] The respondent also relied on what he was told was the value of the properties and what the percentage yields would be and so did not conduct an enquiry to ascertain the information that informed the basis of his advice.

[41] There was evidence to the fact that the syndications' administrators, contrary to Notice 459¹ of the Unfair Business Practices Act², were withdrawing the money received from investors before the registration and transfer of the properties which were to be bought using the capital received from investors. This practice by the administrators had characterized the manner in which the syndications were run prior to the inception of Notice 459, but continued even after the Notice was published in the Government Gazette.

[42] Had the respondent thought to check whether the business was being managed in compliance with the applicable laws governing property syndications following changes in

¹ Published in 2006 in Government Gazette No 28690 published in 2006.

² Act 71 of 1988.

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

the law, he would have noticed that it was not, and would therefore not have recommended said investments to his clients.

[43] The respondent did not have the luxury to simply pass on the information he received from the promoters of the property syndication schemes. His assertion as a professional financial services provider rendered him responsible for protecting the interests of his clients which required that he conduct the necessary enquiries into the agreements on which he relied to find the investments appropriate to the complainants. I am of the view that it was unreasonable for the respondent to believe that the head lease and buy-back agreements would protect the complainants' capital, if, as the Tribunal put it, 'the bottom of the syndication fell off' when he did not undertake any enquiries to confirm that this was in fact true.

[44] The advice provided to the complainants was not appropriate to their needs and circumstance, because the information on which the respondent relied to find that it was, was not true.

[45] In light of the above finding, the respondent was not justified in presenting the investments to the complainants. Through his reference though to the fact that there was a risk statement contained in the prospectuses, the respondent would seem to suggest that the complainants were conversant with the risks inherent in the investments and that they chose them anyway. It is necessary then to consider, briefly, if the complainants in fact understood the advice provided to them and then made an informed decision when following the advice.

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

Did the complainants understand the advice and were they placed in a position to make an informed decision?

- [46] In the first instance, the respondent did not refute the allegation that though the complainant's signed the risk assessment that the respondent had not explained the contents to them. This is notwithstanding the fact that if this allegation by the complainants is true that the respondent would be in breach of section 8(2) of the Code. Section 8(2) of the Code places a duty on all providers to take **reasonable** steps to ensure that a client understands the advice provided to them and to place the client in a position to make an informed decision. (My emphasis)
- [47] It underpins the responsibility for the respondent to have regard to the specific client to whom the advice is rendered, in order to tailor the information provided to and/or questions asked of such client. This correlates with the duty imposed by section 3(1) (a) (iii) of the Code that a provider, when making representations to a client, must have regard to the circumstances of the particular financial service that is being rendered and also to the factually established or reasonably assumed level of knowledge of the client.
- [48] This means that a provider, in ensuring compliance with section 8(2) of the Code, must interpret the section purposively. That is, in a manner that recognizes that no two clients are the same. Whether or not the steps taken by a respondent are reasonable, will therefore no doubt vary depending on who the provider is rendering the service to.
- [49] At the time the financial service was rendered to the complainants, they were 64 and 66 years old respectively. It seems that they had never been introduced to property syndications, and their knowledge of investments was restricted to the investments they

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

held at the time, which were largely conservative. There is nothing, in the record of advice provided to this Office, which shows that when the respondent recommended the investments in question to the complainants, he explained to them how these investments differed from those which they had at the time, and that he explained to them the implications of investing in the property syndications. This the respondent failed to do even though the Code placed a duty on him to do so, not only so he may comply with section 8(2) of the Code but also with section 8(1) (d) of the Code.

[50] Section 8(1) (d) of the Code prescribes the procedure that must be followed where a financial product recommended to a client is to wholly or partially replace an existing product held by the client. Section 8(1) (d) requires that a provider fully disclose to the client the actual and potential financial implications, costs and consequences of such a replacement. These disclosures that the provider must make include, where applicable, full details of, amongst others, material differences between the investment risk of the replacement product and the terminated product and to what extent the replacement product is readily realisable or the relevant funds accessible, compared to the terminated product.

[51] A perusal of the documents submitted to this Office by the parties reveal that no such comparison of the products was undertaken, in contravention of section 8(1) (d) of the Code. Consequently, the complainants were therefore not fully apprised of the differences between their replaced products and the property syndication scheme investments, in contravention of section 8(2) of the Code.

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

[52] The comparison would have not only placed the complainants in a position to make an informed decision, but would have also allowed the respondent to determine if in fact the syndication investments were appropriate or not.

[53] The respondent therefore had multiple opportunities to ensure that the complainants understood the advice, but did not utilise these opportunities. The respondent's reference to a statement that he was alleged not to have explained let alone brought to the complainant's attention does not suffice.

G. FINDINGS

[54] For the reasons outlined in the preceding paragraphs, I find that the respondent's conduct, when rendering the financial service to the complainants, did not meet the standard of a reasonable financial services provider.

H. CAUSATION

[55] In light of the above, it follows that the respondent factually caused the loss suffered by the complainants. However, since it is trite that liability cannot ensue unless it be shown that the respondent was both the factual and legal cause of the loss, it is necessary now to consider whether the respondent legally caused the loss suffered by the complainants.

[56] This question is to be answered through considering if, on mentally removing the respondent's actions, the relevant consequence would still have resulted³.

³ *Lee v Minister of Correctional Services 2013(2) SA 144 (CC)* at para 41.

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

[57] The respondent quite comfortably confirmed that it was on his advice that the complainant's invested in Highveld Syndications 21 and 22. The evidence before this Office suggests that the respondent's recommendation was premised on and influenced by his belief that the head lease and buy-back agreements would provide to the complainant's the safety they sought in an investment. Yet, as discussed at length in the preceding paragraphs, this belief by the respondent was misplaced and unreasonably so.

[58] Prior to the respondent's recommendation, the complainants were invested in products that offered them the safety they desired. There does not seem to have been any threat to their capital then. Their loss ensued because they were persuaded by the respondent, relying on information which he had not taken the time to verify, to terminate their relatively safe investments in favour of one which was described as '*unlike an investment in a bank*' because it was riskier. Which risk, it was said, '*was commensurate with the returns it offered*'. The complainant's circumstances and needs at the time the advice was rendered did not reveal them to need an investment that bore this risk, yet the respondent recommended that they terminate their relatively safe investments for one that was effectively unsafe.

[59] For this reason. I find that the respondent's actions were the proximate cause of the complainant's loss.

I. THE ORDER

[60] In the instance, I make the following order:

1. The complaint is upheld.

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

2. The first and second respondent are ordered, jointly and severally, the one paying the other to be absolved, to pay to the first complainant the amount of R500 000 and to the second complainant, the amount of R350 000.
3. Interest on this amount at a rate of 10.25% per annum from the date of determination to date of final payment.
4. Complainants are to cede their rights and titles in respect of any further claims in respect of these investments to the respondents.
5. Should any party be aggrieved with the decision, leave to appeal is granted in terms of section 28 (5) (b) (i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 27th DAY OF AUGUST 2019.



NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS

Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud

Fairness in Financial Services: Pro Bono Publico

Kasteel Office Park, Orange Building, 2nd Floor, c/o Nossob & Jochemus Street, Erasmus Kloof, Pretoria
P O Box 74571, Lynnwood Ridge, 0040
Phone: (012) 762 5000 / (012) 470 9080; Fax: (012) 348 3447 / (012) 470 9097
www.faisombud.co.za