

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

Case Number: FAIS 04437/11-12/LP 3

In the matter between:-

JUDITH AUGUSTA THEOPHIEL EDUARD

CAMPIONI-DE VLEESHAUWER

COMPLAINANT

and

SUZETTE BRICKHILL

1ST RESPONDENT

MATHYS JOHANNES MARAIS t/a

PROTEA MAKELAARS

2ND 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 Judith Augusta Theophiel Eduard Hugo Campioni-De Vleesshauwer, an adult female of Westville, Kwazulu-Natal.

[2] First respondent is Suzette Brickhill ('hereinafter referred to as Brickhill or simply, 1st respondent'), an adult female who rendered financial services to the public on behalf of second respondent from her residence at 14 Mopanie Street, White River.

[3] Second respondent is Matthys Johannes Marais ('Marais'), a sole proprietor and authorised financial services provider (License no. 3820) who trades as Protea Makelaars ('Protea') at 6A Northern Street, Piet Retief.

B. COMPLAINANT'S COMPLAINT

[4] The complainant's complaint may be summarised as follows:

- 4.1 During June 2010 complainant mentioned to one of her customers that she needed short term insurance cover for her home and vehicle. The customer recommended his short-term insurance broker, Brickhill.
- 4.2 Upon being contacted by the complainant, Brickhill visited the complainant at her residence. According to the complainant, Brickhill proposed insurance cover with Santam and advised complainant to pay an upfront annual premium. The motivation used was that complainant would receive a discount on the annual premium equal to 3 monthly premiums.
- 4.3 The complainant accepted Brickhill's recommendation and paid an amount of R15 344.31. The funds were paid directly to Brickhill on 17 June 2010 in order to effect the insurance cover. The policy inception date was scheduled for 01 July 2010. On 04 May 2011, the complainant paid a further amount of R12 180.11 to Brickhill in order to renew the Santam policy for a further twelve months.¹

¹ 01 July 2011 to 30 June 2012.

4.4 According to the complainant, she reported three insurance claims to Brickhill during May and June 2011.² The claims were unpaid. Dissatisfied with Brickhill's excuses for the non-payment of the claims by Santam, complainant contacted Santam directly for explanation. Upon contacting Santam, she was shocked to learn that she actually had no insurance cover under which she could lodge a claim. It became clear to the complainant that Brickhill never paid any premiums to Santam to effect the short term insurance policy.

4.5 Brickhill and Marais' failure to resolve the complainant's complaint led to the present complaint..

C. RELIEF SOUGHT

[5] The complainant seeks a refund from both respondents of the amount of R27 524.42, which she alleges was misappropriated by 1st respondent.

D. FIRST RESPONDENT'S RESPONSE

[6] The 1st respondent was requested in terms of Section 27(4) of the FAIS Act to provide the Office with her response to the complaint as well as documents in support of her response. First respondent failed to adhere to the request in terms of Section 27(4) of the FAIS Act.

² Claims for damages to garage door and fridge.

[7] Despite being given due notice of the complaint, it is apparent that the 1st respondent has no intention of responding to the complaint. The determination will therefore be made on the available facts and information. The information available consists essentially of the version of the complainant, 2nd respondent's version, complainant's bank statements, invoices, e-mails exchanged between the complainant and respondents, information provided by Santam and the Regulator.

E. SECOND RESPONDENT'S RESPONSE

[8] Marais' response to the complaint may be summarised as follows:

8.1 According to Marais, he employed the Brickhill as a representative of Protea on 1 May 2001. Before her appointment, Brickhill had eight years' experience of working as broker at a well-known bank. Marais asserts that he provided her with in-service training during 2001 and visited her office on a monthly basis from 2002 to 2004. Marais conducted quarterly audits on Brickhill's clients' files until 2005 when he switched to annual audits. Marais further states that on his visits to first respondent's office every six to eight weeks, they would discuss pending and finalised claims. All insurance claims were sent directly to him per e-mail by Santam.

8.2 Marais states that it appears from a forensic investigation report of Santam, that Brickhill started committing fraud during January 2010. Her modus operandi was to recruit new clients and then persuade them to pay annual premiums on their policies. Brickhill would provide clients with false invoices created on Protea letterheads using Santam's VAT number and

her own banking details. Unbeknown to the clients they paid monies into Brickhill's personal bank account. Marais asserts that the files of those clients who were defrauded by Brickhill were not kept in her office; as such he was unaware of their existence.

8.3 Marais asserts that he had measures in place to prevent fraud, Brickhill was so cunning and dishonest that she still managed to commit fraud. After Brickhill's dishonesty was discovered, she was immediately dismissed. Marais contends that he should not be liable for complainant's loss as Protea neither intended to deceive clients nor benefited from Brickhill's actions.

Investigation by the Office

Enquires made with Santam

[9] Upon request, Santam provided the Office with a report of an investigation of a complaint of theft by Brickhill of Protea. According to the report, in July 2011 Santam received information from a client alleging that Brickhill stole his money after requesting him to pay an annual premium on his policy into her bank account.

[10] Santam instituted an investigation and discovered that there were a number of clients who paid money to Brickhill after she requested them to pay annual premiums on their Santam policies. It is alleged that Brickhill made use of fabricated tax invoices and policy schedules to deceive clients into thinking that they were insured. According to the report neither Brickhill nor Marais had a mandate to collect premiums on behalf of Santam. Further evidence uncovered

raised suspicion that various other acts of dishonesty might have been committed by Brickhill. Santam opened a fraud case against Brickhill and reported the matter to the Registrar.

Enquiries made with the Registrar

[11] The Registrar confirmed that it instituted its own investigation following receipt of Santam's report. The Registrar's investigation resulted in Marais paying an administrative penalty of R150 000 for the following contraventions:-

- i. Section 13(3) of the FAIS Act – Failure to maintain a register of representatives, and key individuals of such representatives, which must be regularly updated and be available to the registrar for reference or inspection purposes;
- ii. Section 17(1)(a) of the FAIS Act – Failure to appoint a compliance officer to monitor compliance with the Act by the provider or its representatives, particularly in accordance with the procedures contemplated in subsection (3)³, and to take responsibility for liaison with the Registrar.
- iii. Section 2 of the Code⁴ - Failure to act with due skill, care and diligence, and in the interest of clients and the integrity of the financial services industry.

³ In terms of Section 17 (3) of the FAIS Act 'An authorised financial services provider must establish and maintain procedures to be followed by the provider and any representative concerned in order to ensure compliance with the Act.

⁴ General Code of Conduct for Authorised Financial Services Providers and Representatives.

- iv. Section 11 of the Code - Failure to efficiently employ resources, procedures and appropriate technological systems that can reasonably be expected to eliminate as far as reasonably possible, the risks that clients, product suppliers and other providers or representatives will suffer financial loss through **fraud, theft**, other dishonest acts, poor administration, negligence, professional misconduct or culpable omissions. (own emphasis).

F. DETERMINATION AND REASONS

[12] The essential questions are:

- i. Whether there is sufficient evidence for finding on a balance of probabilities that Brickhill, in violation of her duty in terms of the General Code, acted dishonestly by misappropriating monies paid to her by the complainant, which caused complainant to suffer financial loss;
- ii. If it is indeed found that Brickhill caused the complainant to suffer financial loss, whether both respondents should be held liable for the loss.

Documentary evidence

[13] The complainant provided the Office with invoices in support of her complaint. The invoices were sent to her by Brickhill when she agreed to pay annual premiums upfront for the Santam policy. The invoices contain *inter alia* the following information:

PROTEA INSURANCE BROKERS

TAX INVOICE

VAT NUMBER - 4440102095

J A T E DE VLEESSCHAUWER

ANNUAL PERSONAL POLICY

POLICY NUMBER – 747/19959295

INSURER - SANTAM

ANNUAL PREMIUM – R15 344.31

[14] In his response to the complaint, Marais made it clear that the invoices issued to the complainant and other clients are fictitious. Santam confirmed that the

complainant was not covered by Santam. Furthermore, Brickhill and/or Protea:

- Did not have a mandate to collect cash premiums;
- Is/are not empowered to give any cover of risk;
- Is/are not mandated to bind Santam to any agreements;
- Is/are neither mandated to enter into short-term policies nor amend such policies.

[15] Bank statements provided to the Office by the complainant show that that the following amounts were transferred to Brickhill's personal bank account held at FNB⁵.

17 June 2010 - R15 344.31

04 May 2011 – R12 180.11

⁵ FNB confirmed that the bank account into which the monies were transferred is Brickhill's personal bank account.

Cause of Loss

[16] First respondent failed to provide the Office with a response to the complainant's complaint. In my view, 1st respondent's failure to address the allegations bolsters the fact that she does not have a valid defence to allegations made against her. Having regard to the allegations in the complaint, first respondent's failure to tender a response to the allegations, evidence uncovered by Santam's investigation, findings made by the Registrar against Protea relating to *inter alia* this complaint and the documentary evidence, there is no doubt that Brickhill not only misrepresented facts to the complainant about the existence of the policy, but also misappropriated the money paid to her resulting in the complainant suffering financial loss.

Vicarious liability

[17] Having found that Brickhill caused complainant to suffer financial loss, liability must be dealt with. It is not in dispute that Marais allowed Brickhill to render financial services to the public whilst not being registered at the Registrar as his representative⁶ in terms of Section 13 of the FAIS Act. In other words, she was not licensed to render financial services. In simple terms Brickhill had no business rendering financial services to the public and both Marais and Brickhill were fully aware that they were violating the law in this regard. She also did not

⁶ Brickhill was employed by Marais and rendered financial services to complainant. In terms of Section 13(6) of the FAIS Act: 'A person who on the date contemplated in Section 7(1) complies with the requirements of this Act for a representative and on such date acts as employee of mandatory for any person who on or after such date becomes an authorised financial services provider, is for the purposes of this Act.....regarded as a representative'

have the requisite qualifications to render financial services without supervision.⁷ On Marais' own admission, since 2005, he conducted audits on Brickhill's clients' files only once a year and visited her every six to eight weeks to discuss pending and finalised claims. Marais was obliged to have entered into a supervisory agreement with Brickhill that detailed the procedures regarding the rendering of services under supervision.⁸ Marais was also required to ensure that Brickhill was supervised at all times when executing her duties, which included the observation of selected meetings of Brickhill and her clients as well as the assessment of advice provided by her.⁹

[18] Apart from his obligation to have properly supervised Brickhill¹⁰, Marais was also required to have taken reasonable steps to ensure that she complied with the Code¹¹ and to have efficiently employed resources, procedures and technological systems to eliminate as far as reasonably possible, the risk that clients might suffer financial loss.¹² Marais failed to discharge these obligations. He left Brickhill to her own devices to do what she pleased to the detriment of the public.

⁷ Board Notice 104, Government Gazette 15 October 2008.

⁸ Section 9 (b) of Board Notice 104, Government Gazette 15 October 2008.

⁹ Section 9 (c) of Board Notice 104, Government Gazette 15 October 2008.

¹⁰ Ibid.

¹¹ As required by Section 13(2)(b) of the FAIS Act.

¹² As required by of Section 11 of the Code.

[19] When Brickhill rendered financial services to the public she did so for and on behalf of Marais. Brickhill was employed to *inter alia* sell short-term insurance on behalf of her employer (Marais). Whilst acting in the course and scope of her employment, Brickhill misappropriated insurance premiums paid to her by the complainant. For all of these reasons, there is a case to not only hold 1st respondent, but 2nd respondent liable for the losses suffered by the complainant.

G. ORDER

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

1. The complaint is upheld;
2. Respondents are hereby ordered to pay, jointly and severally, the one paying the other to be absolved, to complainant the amount of R27 524.42;
3. Interest at a rate of 15, 5% per annum, seven (7) days from date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 21st DAY OF JANUARY 2014.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS