

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

Case Number: FAIS 05228/11-12/MP 3

In the matter between:-

AUBERGE GUEST LODGE CC

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 Auberge Guest Lodge CC, ('Auberge'), a closed corporation (registration 2005/177499/23) duly incorporated in terms of the laws of South Africa with its principal place of business at 71 van Wyk Street, Nelspruit, Mpumalanga. The complainant is represented by Frank Jules Maria Verbruggen ('Verbruggen'), a member and authorised representative of the complainant.

[2] First respondent is Suzette Brickhill ('Brickhill'), an adult female who rendered financial services to the public on behalf of Marais 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. VERBRUGGEN'S VERSION

[4] Verbruggen's version may be summarised as follows:

4.1 According to Verbruggen, in May 2011, he mentioned to a friend that he needed personal short-term insurance and business insurance. Verbruggen's friend recommended that he contact Brickhill who was his short-term insurance broker.

4.2 Shortly after Verbruggen made contact with Brickhill, she visited him at Auberge's offices. Verbruggen asserts that Brickhill proposed that he insure Auberge with Santam and further persuaded him to pay upfront the annual premium on the business insurance in order to take advantage of a discount of R4 110.

4.3 On 25 May 2011, Verbruggen made an electronic funds transfer ('EFT') of R12 088.11 to the bank account provided to him by Brickhill. The effective date of the insurance policy was said to be 01 June 2011.

4.4 At the end of June 2011, to his surprise, Verbruggen received a policy schedule relating to his private residence¹, but not for the business insurance policy. Upon enquiries, Brickhill promised to provide

¹ Verbruggen paid monthly premiums on this personal lines policy, which was obtained through Brickhill.

Verbruggen with the business insurance policy documents in the coming week. After the period of one week, Verbruggen had still not received the policy, so he contacted Santam only to learn that the policy that purportedly covered Auberge did not exist. Verbruggen also learnt of Santam's investigation into the affairs of Brickhill and the allegations of fraud and theft. I expand on this investigation later in this determination.

4.5 According to the Verbruggen, Brickhill misappropriated the R12 088.11 which he transferred to her bank account. Marais' and Brickhill's refusal to refund the R12 088.11, triggered the complaint to this Office.

C. RELIEF SOUGHT

[5] The complainant seeks payment of the amount of R12 088.11, which he 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. The respondent failed to adhere to the request. Further requests for her response were ignored.

[7] Despite being given due notice of the complaint, it is apparent that the 1st respondent has no intention to file a response to the complaint. I therefore proceed to make a determination insofar it concerns 1st respondent on the

available facts and information.² The information available consists essentially of the version of the complainant, documentary evidence provided by the complainant,³ e-mails exchanged between the complainant and respondents, information provided by Santam and the Regulator.

E. SECOND RESPONDENT'S RESPONSE

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

8.1 According to Marais, he employed Brickhill as a representative at Protea on 1 May 2001. Before her appointment, Brickhill had eight years' experience working as broker at a well-known bank. Marais asserts that he provided Brickhill with in-service training during 2001 and visited her office, which is situated at her office on a monthly basis from 2002 to 2004. Marais conducted quarterly audits on Brickhill's client files until 2005 when he switched to annual audits. Marais further states that during his visits to Brickhill'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

²As is provided for by Rule 8(c) of the Rules on Proceedings of the Office.

³ Bank statements and a tax invoice.

created on Protea letterheads using Santam's VAT number and her own banking details. Unbeknownst to the clients they paid monies into Brickhill's personal bank account. Marais asserts that the files of 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, but according to him 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 the any losses suffered as Protea never had any intention to deceive clients and did not benefit from Brickhills actions.

Investigation by the Office

Enquires made with Santam

[9] Upon request, Santam provided the Office with a copy of their report following an investigation of theft by Brickhill. 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 of various other acts of dishonesty that might have been committed by Brickhill. Santam opened a fraud case against her and reported the matter to the Registrar.

Enquiries made with the Registrar

[11] The Registrar confirmed that following receipt of Santam's report it entered into a settlement agreement⁴ with Marais. In terms of the agreement, Marais was ordered to pay 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)⁵, and to take responsibility for liaison with the Registrar.
- iii. Section 2 of the Code⁶ - Failure to act with due skill, care and diligence, and in the interest of clients and the integrity of the financial services industry.

⁴ As contemplated in Section 6B(7)(A) of the Financial Institutions (Protection of Funds) Act, No 28, of 2001.

⁵ 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.

⁶ 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 to support the allegation that Brickhill misappropriated monies paid to her by Verbruggen, which caused him to suffer financial loss;
- ii. If it is indeed found that Brickhill's conduct caused Verbruggen's financial loss, whether both respondents should be held liable for the loss.

Documentary evidence

[13] Verbruggen provided the Office with one tax invoice in support of his complaint. The invoice was sent to him by Brickhill after he agreed to pay an annual premium to effect the business insurance policy to cover Auberge. The invoice contain *inter alia* the following information⁷:

PROTEA INSURANCE BROKERS

TAX INVOICE

SANTAM VAT NUMBER - 4440102095

⁷ Translated from Afrikaans.

Auberge Guest Lodge

INSURER – SANTAM

POLICY NUMBER - 533644

ANNUAL PREMIUM – R12 088.11

[14] In his response to the complaint, Marais made it clear that the invoices issued to Verbruggen and other clients are fictitious. Santam confirmed that they have never issued a policy with number 533644. 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 Verbruggen show that the following amount was electronically transferred to Brickhills' personal bank account held at FNB⁸:

25 May 2011 – R12 088.11

⁸ FNB confirmed that the bank account into which the monies were transferred is Brickhill's personal bank account.

Cause of Loss

[16] Brickhill failed to provide the Office with a response to the complainant's complaint. In my view, Brickhill's failure to address the allegations as set out in the complaint is borne out by the fact that she does not have a valid defence to allegations made against her. Having regard to the allegations in the complaint, Brickhill's failure to tender a response to the allegations, evidence uncovered by Santam's investigation, findings made by the Registrar against Protea Brokers relating to this complaint and the documentary evidence, I am persuaded that Brickhill not only made misrepresentations to Verbruggen to influence him to part with his money, but also misappropriated the money paid to her resulting in Verbruggen suffering financial loss.

Vicarious Liability

[17] Having found that Brickhill caused Verbruggen 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 representative⁹ 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 have the requisite qualifications to render financial services without

⁹ Brickhill was employed by Marais and rendered financial services to Verbruggen. 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'

supervision.¹⁰ On Marais' own admission, since 2005, he conducted audits on Brickhill's client files only once a year and visited her every six to eight weeks to discuss pending and finalised claims. Marais was obliged to enter into a supervisory agreement with Brickhill that detailed the procedures regarding the rendering of services under supervision.¹¹ 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 given by her.¹²

[18] Apart from his obligation to have properly supervised Brickhill¹³, Marais was also required to have taken reasonable steps to ensure that she complied with the Code¹⁴ 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.¹⁵ Marais failed to discharge these obligations. Marais basically left Brickhill to her own devices to do what she pleased to the detriment of the public.

[19] When Brickhill rendered financial services to the public she did so for and on behalf of Marais. Brickhill's was employed to *inter alia* sell short-term insurance

¹⁰ Board Notice 104, Government Gazette 15 October 2008.

¹¹ Section 9 (b) of Board Notice 104, Government Gazette 15 October 2008.

¹² Section 9 (c) of Board Notice 104, Government Gazette 15 October 2008.

¹³ Ibid.

¹⁴ As required by Section 13(2)(b) of the FAIS Act.

¹⁵ As required by of Section 11 of the Code.

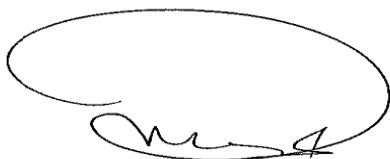
on behalf of her employer (Marais). Whilst acting in the course and scope of her employment, Brickhill misappropriated insurance premiums paid to her by Verbruggen. For all of these reasons, I am compelled to not only hold 1st respondent, but also the 2nd respondent liable for the losses suffered by the complainant.

G. ORDER

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 R12 088.11;
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 17th DAY OF DECEMBER 2013.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS