

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

Case Numbers: FOC 3593/09-10 WC (1)

FOC 3594/09-10 WC (1)

In the matter between:-

LOUISE ELLEN DANIELZ

1st Complainant

In her capacity as executrix of Estate Late Roelof Charl Germishuys

**in terms of letters of Executorship No.10174/2010 issued by the Master
of the High Court dated 29 June 2010**

MARIA JEANNETTE GERMISHUYS

2nd Complainant

and

U C PRIVATE WEALTH T/A

1st Respondent

LIBERTY MOON INVESTMENTS (PTY) LTD

MOUNTAIN BROKERS CC

2nd Respondent

MOUNTAIN BROKERS TRUST

3rd Respondent

BERNARD MARC EDGCUMBE

4th 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] First complainant is Ms Louise Ellen Danielz of BOE Private Clients, in her capacity as executrix of estate late Roelof Charl Germishuys, (hereinafter referred to as RCG), in terms of letters of executorship issued by the Master of the High Court dated 29 June 2010.
- [2] Second complainant is Maria Jeanette Germishuys, an adult female, home maker and widow of RCG. Second complainant resides in Parow North, Cape Town, Western Cape Province.
- [3] First respondent is U C Private Wealth, Registration number 2001/016812/07, t/a Liberty Moon Investments (Pty) Ltd with registered address being 17 The Pavilion, Central Park, Esplanade Road, Century City, Western Cape Province. First respondent was licensed in terms of the FAIS Act with licence number 22015. According to the regulator's records, first respondent's licence lapsed on 6 April 2011.
- [4] Second respondent is Mountain Brokers CC, Registration number 1995/017669/23, a close corporation duly incorporated in terms of the company laws of South Africa with its registered address being 4th Floor, Long Street, Cape Town, Western Cape Province. According to the respondents' documents, Mountain Brokers CC was issued licence number 12248 as a financial services provider. However, the registrar's records indicate that this licence number was issued to an entity noted as Lucre The Financial Collective CC. The registrar's records indicate that this licence has since lapsed.

[5] Third respondent is Mountain Brokers Trust, (registration number IT1518/2004), a trust duly registered in terms of the Trust Property Laws of South Africa with its registered address being Lonpre House, Loerie Park, Paul Kruger Street, Durbanville, Western Cape Province. Third respondent was an authorised financial services provider with licence number 12906. The licence lapsed on 6 April 2011.

[6] Fourth respondent is Bernard Mark Edgcumbe, an adult male financial services provider of 10 Morea Street Vierlander, 7550, Western Cape. In the file handed to this Office by 4th respondent, 1st, 2nd and 3rd respondents feature. Communication between the parties mentions the first three respondents. His letter of introduction and that of authority refer to all three respondents. In addition, this Office sent a letter to the 4th respondent asking him to clarify which of the respondents was involved in the rendering of financial services to complainants. He did not respond. It must be assumed therefore that the first to the third were equally involved in the rendering of financial services to complainants. At all relevant times, 4th respondent was a key individual and authorised representative of 1st, 2nd and 3rd respondents. I refer to 1st to the 4th respondents as respondent. Where necessary, I specify.

B. BACKGROUND

[7] It is common cause that RCG, 2nd complainant and fourth respondents first met in 2004 when he assisted them with financial services. They met again in 2006. Fourth respondent had been recommended to the complainants by someone at Liberty Life. At the time RCG was sixty years old.

[8] RCG had taken early retirement due to ill health. As a result of his illness, RCG was wheelchair bound. He and the second complainant were advised by 4th respondent to invest their retirement capital into an entity known as Genesis, which was marketed as a safe, low risk investment secured by property. Genesis had about 22 affiliated entities at the time. The particular entity into which the complainants' capital went into was Fairhaven Estate.

[9] There is no dispute that the complainants relied heavily on their retirement capital. It is respondent's version that their investments were not performing well and were not generating sufficient income. On the basis of 4th respondent's advice, they invested their savings into Genesis.

About Genesis Property Holdings (Pty) Ltd

[10] In 2004, The Property Inter Action Group, founded by Marelize Lombard, changed its name to the Genesis Property Group (Pty) Ltd, (Genesis or The Genesis Group or the Group). Genesis, a Cape Town based company marketed itself as a company specialising in property '*as an opportunity and commodity*'. Several products were offered including :-

- Property with additional benefits (PAB) and tax benefits;
- **Investment packages which include Capital Growth @ 25 % per annum and Income @15 % per annum. Income was paid monthly;**
- **Monthly investments;**(own emphasis)
- Off-shore – available through Genesis Global

The group's leadership prided itself for not only running the day to day business of the company on what they called '*uncompromised ethics, but on sound Biblical business principles.*' In its mission, the group states that it wants to be a mature Christ company, set the trend in funding the Great Commission, help others to become financially free and influence others to operate on the same biblical principles.

[11] Genesis played a leading role in the founding of the South African Association of Property Syndicators.

[12] At the time of rendering financial services to the complainant, the directors of the Genesis group were:

Danie Lombard- Executive Officer;

Leon Jansen – Managing Director;

Dean Moldenhauer- Director, Group Ministry, Systems and HR;

Toit Malan – Director Sourcing;

Adriaan Janse van Rensburg – Director Group Marketing;

Andre van der Merwe – Director Operations, Logistics and Funding;

Johan Lourens – Director Sales;

Johan Meyer – Director Project Management;

Jan Davel – Regional Director Gauteng;

Jan Strydom – Non Executive Director;

Mark Visser – Non Executive Director, also described as the CEO of Prophetic Equipping Ministries, based in KZN.

[13] Genesis was nevertheless liquidated through the Cape High Court in 2009.

Records maintained by respondent

- [14] In terms of the FAIS Act, providers must when rendering financial services to clients, maintain a record of advice. Such record shall show the financial product or products considered, the financial product/s recommended and the basis for concluding that the recommended product was considered suitable for the client's circumstances¹.
- [15] From respondent's file of papers it is apparent that several of RCG's policies and savings had to be terminated to bring about the Genesis investment. Contracts with Old Mutual, Investec, Sanlam, PSG and Momentum were terminated. There is also no dispute that respondent assisted the complainants in cancelling the contracts.

Letter of Authority

- [16] In respondent's letter of introduction dated 21 November 2006, he states:-
- 'In complying with the FAIS legislation, I would like to bring about the following information to your attention....'* Respondent sets out his full name, his postal and physical address and contact details.
- The letter further states:
- 'The brokerage has written authority to market the products of the following Insurers and have been accredited to market their products: Old Mutual, Momentum, Liberty Life, Sanlam, PPS, Investec, Santam, Mutual and Federal; Discovery.....'*

¹ Section 9 of the General Code of Conduct

'In the event that you are dissatisfied with any aspects of my service, you should address your complaint in writing to us at the above address. A copy of our Complaints Policy is available on request. Alternatively, you may contact the Ombud at telephone number (021 674 0330)². The letter is signed on behalf of the client by RCG and on behalf of respondent by the managing director of Mountain Brokers (Pty) Ltd.

Client Authority

[17] In the client authority signed by RCG on 21st November 2006, he first acknowledges that,

'Sound and proper financial advice can only be provided with full disclosure of relevant information relating to appropriate personal, including private,.....' The letter goes further and states:

' I/ We accordingly confirm, for the purposes of providing the said sound and proper financial advice to me/us, that full permission and authority is granted to: Mark Edgcumbe of Mountain Brokers to obtain any and all such information via The Financial Services Exchange Ltd, trading as Astute.....'

Client Advice Record

Client's Objectives

[18] This document is dated 21 November 2006. It sets out client's objectives as:

² In fact, it is the Ombud for Financial Services Providers and its contact details that the client would refer to in the event he is unhappy with the provider's services.

'Maximise investment return above inflation as existing policies are not performing sufficiently to sustain income and capital is being reduced on a monthly basis.'

Assets

The document further sets out the assets of the complainants:

House in Parow – value - R900 000;

Makes reference to a schedule of policies;

A motor vehicle - value - R25 000

Income - R10 000 per month - generated by an investment with Investec.

Risk

In terms of the risk profiler, complainants are moderately conservative. They prefer stable returns, low capital risk and growth so that their investment keeps up with inflation. The document further states they would tolerate small losses. (own emphasis)

Motivation for the product

Respondent recommends that complainants invest in Genesis. The basis for this investment is, *'the investment is secured by underlying property. Genesis raises finance from private investors as initial funding with which to initiate property developments. Capital risk is low due to the underlying property value and the track record of Property Interaction now known as the Genesis Property Group.'*

C. THE COMPLAINT

- [19] The gist of the complaint is that fourth respondent inappropriately advised the complainants to invest in the Genesis Group. The complainants claim the high risk inherent in the investment recommended was not commensurate with their circumstances, thus, respondent acted in violation of the FAIS Act. Respondent knew that they were heavily reliant on their retirement capital. His own record of advice states they could only tolerate small losses and so, were moderately conservative. Respondent should have known that this type of investment was inappropriate for their risk tolerance.
- [20] On 19th December 2006 RCG invested an amount of R600 000 into Genesis. In terms of the investment agreement, the funds were invested for a period 'not exceeding 6-8 months'. Sometime in August 2007 RCG received news that an entity known as Bunker Capital was taking over Genesis and the process was in its final stages. He contacted 4th respondent who advised him that such move could only be beneficial to investors. Bunker allegedly had more money. During 2007, 2nd complainant invested an amount of R585 000. The amount was invested in two separate investment contracts of R485 000 and R100 000. According to the parties, the R600 000 together with growth was subsequently re-invested by RCG and so did the 2nd complainant of her original investment with growth.
- [21] Sometime in January 2008 RCG read from a Saturday edition of 'Die Burger' that Genesis had financial problems. The newspaper article further stated that Genesis was unable to pay investors. However, this was subsequently refuted by some people from Genesis who pointed a finger at the particular investor

around whom the story centred, calling the investor bombastic and impatient. According to respondent's version, that investor did not understand the maturity date of his investment.

[22] In February 2008, RCG requested payment of his investment but was advised by one Liezel, an employee of the respondent at the time, that Genesis was busy with a rescue package. She advised RCG to apply for preference shares in lieu of his investment.

[23] In March 2008, RCG contacted 4th respondent to organise a withdrawal of R100 000 from the investment. Fourth respondent allegedly informed him that he would be able to assist him to obtain the withdrawal of R100 000 but not the entire investment. The amount however, was not paid. Complainant subsequently learnt that Genesis had financial problems since August 2007.

[24] During August 2008, 4th respondent and one attorney Hoffman, called a meeting to inform investors that the preference shares package would not materialise and that investors could vote to have Genesis liquidated. In October 2008, 4th respondent met RCG at his home to explain that he could contact the directors of Genesis and the South African Police Services, (SAPS). At that point, RCG asked 4th respondent to pay his investment but fourth respondent bluntly refused.

[25] On 14 January 2009, RCG sent a registered letter to 4th respondent requesting him to repay his capital. On 25 August 2009 he referred his complaint to this Office.

[26] In his complaint, he mentioned he had specifically discussed the full extent of his health and retirement position and pertinently mentioned to 4th respondent that he could not afford to lose his retirement capital. He accused 4th respondent of failing to appropriately advise him and pointed to, amongst other things:-

- (i) Fourth respondent's failure to do due diligence on the firm, its management and the investment;
- (ii) Fourth respondent's lack of adequate property experience to concern himself with property syndication investments. In this regard, he states that 4th respondent believed that it was sufficient to physically identify each new property acquired by the group and not realising the importance of amongst other things, cash flows and basic matters of good corporate governance.

[27] Second complainant's complaint details are substantially similar to those of 1st complainant. She alleges that at the age of 59 she consulted with 4th respondent to obtain assistance with the investment of her savings, to provide a safe and sustainable income. Her savings were invested in the Genesis Fairhaven Estate following advice provided by 4th respondent. The first investment of R485 000. 00 was made on 4 April 2007. A further R100 000 was invested on 29 May 2007. The amounts were re-invested on 28 August and 16 November 2007 respectively.

[28] She alleged that 4th respondent assured her that the Genesis investment was completely safe; proffering that he had invested his mother's capital with the same entity and would not have done so if it was not.

[29] She accused 4th respondent of failing to appropriately advise her in recommending the high risk Genesis investment, which she subsequently found, was an unregulated and unlisted property syndication company. She states the risk involved in the investment was not disclosed to her and neither was any alternative investments discussed with her.

[30] The complainants claimed 4th respondent must have known that Genesis was paying investors' interest out of new investors' funds from affiliated entities, which makes the scheme nothing but a pyramid scheme.

[31] Complainants' complaint may be summarised as follows:

- (i) Following advice provided by 4th respondent, RCG and 2nd complainant invested their life savings in the amounts of R600 000 and R585000 into Genesis.
- (ii) Such advice was in violation of the FAIS Act in that the risk inherent in the investment was not disclosed to them.
- (iii) They further alleged that disclosures including material disclosures pertaining to the financial product were not made prior to investing in Genesis, prompting them to make uninformed decisions.
- (iv) They further states that 4th respondent's advice was inappropriate for their circumstances and not in their interests as the Code demands.
- (v) They hold respondents liable to compensate them for the damage they suffered.

D. RELIEF SOUGHT

[32] The complainants have requested the return of their capital in the total

amount of R1 185 000 together with interest thereon.

E. RESPONSE

[33] Respondent's response can be dealt with under the following heads:-

- a. He conducted due diligence, the results of which indicated that the Genesis was a financially fit company;
- b. Complainants are educated people in that they had years of experience with financial products. As such, they knew what they were signing for;
- c. No other financial product was able to meet their expectations;
- d. The FAIS Ombud lacks jurisdiction to entertain the complaint.

I deal with these in detail in the next few paragraphs.

Due diligence

[34] Respondent starts off by saying he had no knowledge of any problems with Genesis prior to 2008. He mentions that he had a lengthy history with Genesis and had seen developments being started and successfully completed.

[35] His view is that Genesis was a financially sound entity at the time in that its audited financial statements showed that the company had assets in excess of R80 million and positive cash flows.

[36] He had personally inspected the Fairhaven Estate project which involved a '*signature security estate*' and had viewed a comprehensive viability projection at the offices of Genesis.

- [37] He visited the area where the Fairhaven Estate was meant to be, in the heart of Helderberg Mountain, and spoke to local estate agents to obtain indication of the values of properties in the area.
- [38] He visited the offices of Genesis once a week for an update on the projects.
- [39] He met with the auditor of Genesis in August 2008 and learnt for the first time that his audit firm had sent four reports concerning irregularities pertaining to Genesis to IRBA in April of 2008, one full year after complainants' funds were placed. Respondent concludes by stating that from here, it can be seen that he conducted due diligence.
- [40] At the time of the investment, property in South Africa had for many years been a stable and secure form of asset. He blames the global crisis (global financial crisis) and the National Credit Act as causes for the depressed the property market. All these factors, so goes the argument, undermined what he regarded as a secured investment.
- [41] What respondent clearly missed here is the fact that complainants' investment was in the hands of the directors of the group and it is these people he needed more information about and their track record in handling other people's money. He needed information on the specialist skills that these people possessed which allowed them to deliver such extravagant returns in order to assess the validity of these. He needed to go much deeper than merely visiting physical sites and offices, to understand the nature of economic activity that delivered the high returns. All of the work he did is what lay people would ordinarily do, which does not assist in risk assessment.

[42] He needed appreciation of the regulation around this investment.

All of these critical steps are missing from his version. From his version, there is nothing to infer investor protection. The fact that the group had assets in excess of R80 million and large cash reserves simply does not answer matters of sound corporate governance, which go to the heart of how entities are run.

[43] Respondent then states that he suspects there was mismanagement and fraud, which ultimately brought down the company.

Complainants are educated people

[44] The complainants had come to him looking for alternative solutions. This, after they had done some calculations and came to the realisation that their capital and the type of investments they had at the time would not sustain them.

[45] Complainants were specifically looking for investments that would provide higher returns than their existing investments at the time.

[46] He went through the different types of products but RCG pointed out that his portfolio already consisted of bank deposits, shares property and endowments.

[47] Contrary to what RCG claimed in his complaint, his investments with Investec Opportunity and Active Quants Funds were moderate to high risk choices, which show he was not risk averse.

- [48] Respondent emphasises that RCG made it clear that he was looking for alternatives to the traditional investments he already had in order to provide a higher return.
- [49] The particulars of the loan were clearly explained to the complainants. These are set out in the agreement in large print, plain English, which after reading and discussing, the complainants accepted by signature.
- [50] He further stresses that he cautioned complainants that the loan was supported by fixed property and in the event that the value of the property declined so would the 'surety of the loan'. First complainant, by occupation was a property evaluator for the Cape Town City Council and therefore had the additional benefit of years of experience and unique insight into the workings of the property investment. He felt comfortable that this was not a real danger.
- [51] The complainants had over the years consulted with various intermediaries and also had many years of experience with a number of financial products, for example cash, unit trusts, endowments, and property and clearly understood the nature of the transactions.
- [52] The complainants had approached him looking for possible solutions that would provide higher returns than their existing portfolio in order to meet their future income needs. In response to their request, he introduced Genesis.

[53] The problem with respondent's assertions is that he never once disclosed the risk inherent in the Genesis investment to complainants. His advice record bears testimony to that effect.

[54] Further, the two investments are incomparable. Respondent's records show that complainant had only invested in regulated investments. Respondent is in a way justifying his conduct of investing complainants' retirement funds in an unregulated investment. He does this by pointing to two regulated funds, which he claims were high risk. This simply shows ignorance on his part.

No other financial product could meet the complainants' expectations

[55] Due to the fact that none of the existing investments were able to meet the complainants' needs, they wanted to look at other alternatives that would meet their expectations. It is at this point that he introduced Genesis. After familiarising themselves with all the facts, complainants made an informed decision, willingly and without haste in a transaction they felt was appropriate for their financial situation.

[56] It must be assumed that the assertions respondent is referring to is exactly what his own record of advice contains.

The FAIS Ombud lacks jurisdiction to entertain the complaint

[57] Respondent states that the complaint falls outside the ambit of the FAIS Ombud as the product sold is not a financial product. Various legal opinions including one from the Financial Services Board clearly indicate that the loan agreement in question is not a financial product as defined in the Act. In this

regard, 4th respondent included a copy of an opinion which he claimed emanated from the FSB.

[58] The FSB legal 'opinion' respondent is referring to is a page with the regulator's logo, written in poor English, with no author. In any event, enquiries were nevertheless made by this Office with the regulator regarding the so called opinion. The regulator had no knowledge of the 'opinion'. When respondent was asked where and when he obtained the 'opinion', he pointed to the directors of Genesis but could not remember the time. Clearly, any provider who would accept such a document as an opinion must be questioned as to his fitness to advise the public.

[59] An additional submission is that there are inaccurate and untrue statements which appear to favour complainants. The FAIS Ombud does not have the benefit of oral evidence and cross examination to establish the facts.

[60] Respondent further refers to what he calls a 'pre-condition' in the FAIS Act that the Ombud establishes whether the matter would not be appropriately dealt with by a court of law before a determination is made.

[61] In the alternative, in the event that the FAIS Ombud has jurisdiction to entertain the complaint, it should still decline because the resolution of this matter will require amongst other things, the understanding of how and why Genesis collapsed and the timing. Such facts are not within the knowledge of the complainants nor the 4th respondent. Unlike the courts the FAIS Ombud is not able to subpoena witnesses to the controlling minds of the Genesis Group. Expert evidence is also required in order to determine whether 4th

respondent acted negligently and the FAIS Ombud rules do not permit the possibility of calling expert witnesses. These are dealt with in the determination section.

Regarding the allegations made by complainants, 4th respondents states:

[62] The complainants approached him for possible solutions that would provide higher returns than their then existing portfolio in order to meet their anticipated future income needs.

[63] He went through the different types of products, namely, bank deposits, shares, property, and endowments and discussed the potential returns the yield of each product. RCG pointed out that his portfolio was made up of conventional products and made it clear that he was looking for alternatives that would provide higher return.

[64] He denies that RCG was risk averse, stating that he had a rather diverse portfolio.

[65] He recommended Genesis and discussed its track record pointing it was a relatively safe and conservative option to try and increase their capital. He mentioned that if the values of the property decreased 'so would the surety of the loan'. In his view capital risk was low due to the track record of Genesis Property Group and the underlying property value. At this stage it must be mentioned that there is no record indicating that respondent bothered to explain what he meant by 'surety of the loan' to complainants. One wonders if even respondent understood it.

[66] He went through the loan agreement paragraph by paragraph. In his view the agreement is a simple document consisting of few pages and written in bold.

[67] He denies that Genesis was a pyramid scheme. He also denies having knowledge of problems with Genesis prior to May 1998.

F. DETERMINATION AND REASONS

[68] The issues to be decided are:

- (i) Jurisdiction;
- (ii) Whether 4th respondent rendered financial services in compliance with the FAIS Act and or negligently;
- (iii) If it is indeed found that the 4th respondent's conduct was in violation of the Act and or negligent, whether such conduct caused the damage complaint of;
- (iv) The quantum of damage;

Point *in limine*: Jurisdiction

[69] The 4th respondent has advanced a point *in limine* regarding jurisdiction.

In support thereof, 4th respondent states:-

- (i) There are more than 40 material disputes of fact between the complainants' and respondents' version and the FAIS Ombud does not have the benefit of oral evidence or cross examination to establish the facts; In the alternative,

- (ii) The Ombud should decline to deal with the matter on the basis that the forty unsubstantiated and untrue allegations made by the complaint render the complaint materially flawed;
- (iii) The resolution of the matter will involve amongst other things an understanding of how and why the Genesis group of companies collapsed and the timing thereof. Those facts are not within the knowledge of the complainants or the 4th respondent. Unlike a court of law, the FAIS Ombud is not able to issue subpoenas to the controlling minds of the Genesis Group of companies to call them to give evidence;
- (iv) Expert evidence is required in order to determine whether or not the 4th respondent acted negligently and the FAIS Ombud will require the benefit of such evidence in order to establish the facts before making the necessary determination.
- (v) There is also a suggestion that the FAIS Ombud should decline to entertain the complaint on the basis that it would be more appropriate if a court of law deals with it. This, according to the respondent is a pre-condition of the FAIS Act before the Ombud makes a determination.

[70] It is necessary to at once revisit the essence of the complaints. At the heart of the complaints lies the allegation of inappropriate advice provided by respondents, which saw them (complainants) make the uninformed decision of investing in Genesis. The risk inherent in the product according to the complainants was not disclosed to them. It is the high risk nature of the investments that is not commensurate with their circumstances that was not disclosed to them. The complainants have alleged that the advice was

negligent and in violation of the FAIS Act. It is as a direct result of that advice that they lost their retirement savings.

[71] Thus, the issues here are about compliance with the Code which can be broken down into:-

- a) disclosure of material terms including risk and liquidity,
- b) and whether the advice was appropriate and in the clients' interest as the Code demands.

[72] The issues mentioned in paragraph 68 must be demonstrated by the records maintained by the respondent.

[73] There is no question whether the respondent rendered the financial services to complainants. Thus, respondent's maintenance of the record of advice, and other compliance documents was a direct response to the requirements of the FAIS Act.

[74] Questions about how the 'Christ company' was run and whether there was mismanagement or fraud are matters of corporate governance. These ought to have been attended to by the respondent before he pronounced to his clients that Genesis was a financially sound entity into which complainants could invest their life savings. In a word, there is no need to call expert evidence to answer the question whether risk was disclosed or whether the advice provided to complainants was suitable for their circumstances.

The product sold is not a financial product

[75] Fourth respondent has been so generous as to provide what I believe to be his entire file of papers to demonstrate his compliance with the FAIS Act. The Code is clear as to what providers must do in order to appropriately advise clients. The Code further compels providers to maintain such records for a period of five years from date of rendering the financial services. I have perused the entire record. There is no stage where the respondent informed his clients that he was selling anything other than a financial product to them.

[76] His record of advice and other compliance records confirm that he was selling a financial product that he had no licence to sell. His letter of authority states:

'In complying with the FAIS legislation, I would like to bring about the following information to your attention....'The letter further states:

'The brokerage has written authority to market the products of the following Insurers and have been accredited to market their products: Old Mutual, Momentum, Liberty Life, Sanlam, PPS, Investec, Santam, Mutual and Federal; Discovery.....'

'In the event that you are dissatisfied with any aspects of my service, you should address your complaint in writing to us at the above address. A copy of our Complaints Policy is available on request. Alternatively, you may contact the Ombud.....'

[77] In his letter of authority, respondent made RCG confirm that:-

'Sound and proper financial advice can only be provided with full disclosure of relevant information relating to appropriate personal, including private,.....'

The letter goes further and states:

' I/ We accordingly confirm, for the purposes of providing the said sound and proper financial advice to me/us, that full permission and authority is granted to: Mark Edgcumbe of Mountain Brokers to obtain any and all such information via The Financial Services Exchange Ltd, trading as Astute.....'

- [78] His entire presentation of the product to the complainants confirms he was providing financial advice. Respondent provided comfort to his clients by informing them there is a body to which they could report him in the event they are dissatisfied with his conduct whilst providing financial services. Now, when his clients are doing exactly what he told them, he cannot keep his word.
- [79] That he argues this is not a financial product to avoid the jurisdiction of this Office is disingenuous and unfair to his clients. He held himself as nothing but an expert (in rendering sound financial advice) who is licensed in terms of the FAIS Act.
- [80] Fourth respondent has submitted that there are more than forty material disputes of fact but fails to state how these impact on the question of whether Genesis was sold in compliance with the Code. Section 27 (3) (c) states that the Ombud may on reasonable grounds determine that it is more appropriate that the complaint be dealt with by a Court or through any other available dispute resolution process, and decline to entertain the complaint. Indeed, a material dispute of fact would be one such reasonable ground to refer the matter to a court or some other dispute resolution forum. The difficulty however, is there is no **material** dispute of fact in this case. The respondents so far have not pointed to any. I add that the recent High Court Judgment³

³DR Risk and D Risk Insurance Consultants vs the Ombud for Financial Services Providers and others Case no

dealt with the question of the Ombud's jurisdiction and section 27 (3) of the FAIS Act. The court delivered its judgement on 4 September 2012, dismissing the application with costs. Judge Selby Baqwa in his judgement stated:

“The effect of section 27(3)(c) (supra) is that first respondent retains jurisdiction over a complaint unless she, on reasonable grounds makes a determination that it should be dealt with by a court or any alternative dispute resolution process. It has been submitted and I accept that first respondent administers an institution, which in terms of FAIS demands efficiency and economy and that this may indeed justify the lack of a public hearing in circumstances, which may be resolved quickly and with minimal formality.”

The section confers neither a right on applicant to demand that the ombud declines her jurisdiction to deal with complaints, nor does it confer a duty for her to do so. The section clearly confers discretion on the first respondent. Any other interpretation would be tantamount to stripping her of her statutory powers in terms of [the] FAIS Act. Absent a decision by the first respondent to refer the matter to a court, she retains jurisdiction.⁴

[81] Nothing therefore disqualifies this Office from entertaining the complaints. The defence raised by respondents must fail.

38791/2011. Judgement handed down on 4 September 2012. The issues are summarised from paragraph 7 to 12 of the High Court's ruling.

⁴At paragraph 38 supra.

Whether respondent rendered financial services in compliance with the FAIS Act and or negligently?

Licence

- [82] Respondent's version is that he had neither the accreditation nor licence to render advice to members of the public in respect of the product sold to complainants. This marks a violation of the Act.

Risk

- [83] The respondent's version is that he described Genesis as an entity that was financially fit. He informed complainants their investment would be secure as the product is low risk. At that stage, he had no appreciation that such conclusion cannot simply be drawn on the basis of large cash reserves, casual conversations with management in respect of development and physical inspection of property.
- [84] On his version, it was only after the financial problems at the 'Christ company' manifested themselves that he rushed to request basic information, which was not forthcoming. Then he suspected something was amiss. He refers to a meeting held with a financial director of Genesis who, during a meeting and in response to one of his questions, was prepared to up the return payable to investors, without consulting his management team. In his view the move would have cost the company a huge amount of money. (This notwithstanding the large cash reserves that impressed him.) He immediately knew that there was a problem with the entire scheme.

[85] He does not make any statement about first contacting the regulator to check whether the entity he was referring his clients to was registered. He is comfortable to argue that RCG's portfolio shows he was not risk averse in response to complainants' claims that they told him they could not tolerate high risk investments. A move which shows his ignorance regarding the type of investments he sold to complainants. This was an unregulated investment where the investor is simply buying promises of the directors of the company. To this point, respondent cannot state what economic activity generated the 25 % return. He simply points to the short term duration of the contract. His response shows lack of understanding of investments in general. The high return alone should have sounded the alarm bells that this was a high risk investment.

[86] He had no clue what governance arrangements were in place in the group to hold those in power accountable.

[87] He makes no mention of what research he did to understand the legal nature of the scheme. He was so naïve to believe that a mere inspection of physical property, regular visits to offices of directors, large cash reserves and marketing brochures offered security to investors.

[88] On his version, respondent failed to appreciate the risk involved in the investment he recommended to his clients. He failed to disclose the risk and instead, took the shot gun approach of comforting his clients by advising them that the risk was low and the investment was secure. He misguided his clients by his own naivety and haste to close the sale so he could be paid his

commission. Respondent had no skill to provide advice in respect of this product.

Disclosures in terms of section 8 (1) (d) – replacements including commission

[89] The Code provides that where the financial product (the replacement product) is to replace an existing financial product wholly or partially (the terminated product) held by the client, the provider must 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.....
- (iii) Differences between tax implications of the replacement product and the terminated product;
- (iv) Material differences between the investment risk of the replacement product and the terminated product;
- (v) To what extent is the replacement product readily realisable or the relevant funds accessible, compared to the terminated product;
- (vi) Any incentive, remuneration, consideration, commission fee or brokerages received by the provider in respect of the terminated and/or replacement products.

According to respondent's version, there was no compliance with section 8 (1) (d) of the Code.

[90] I could not find any proof that the commission (which, no doubt is not subject to any claw back) was disclosed to complainants.

[91] I do not know how respondent could justify being paid such a huge amount (4.38% of the capital) as commission when all he did was to misinform complainants. On his version, he had no knowledge of what he recommended to complainants.

[92] He did not inform the complainants about the material differences in risk. He denies that the complainants were risk averse and refers to what he calls a diverse portfolio that RCG held prior to moving to Genesis. He can however point to no mismanagement, fraud, poor or lack of governance to any of the companies RCG had invested in prior to investing in Genesis. He is simply obfuscating the issue of the risk involved in Genesis.

[93] I have not seen anything on the record where the respondent dealt with material differences in the treatment of tax in relation to the terminated investment compared to the replacement investment.

[94] Most importantly, the fact that the complainants went along with his advice and failed to notice respondent's ignorance is testimony that they did not know what they were signing for. They relied on respondent's skills as an authorised financial services provider.

Was the advice appropriate for the complainants' circumstances?

[95] Section 8 enjoins providers to assess their clients in terms of risk and recommend a product that is commensurate with their circumstances. It is common cause that complainants could not tolerate high risk. Certainly, respondent's version is that RCG could tolerate small losses, hence the record of advice that shows him as a low to moderate risk type. Why respondent ignored his client's circumstances has not been explained.

[96] There is simply no justification for placing persons of RCG and second complainant's circumstances in such a high risk investment and not disclosing it. The advice was totally inappropriate. In his letter of complaint to this office RCG states:

'I do not understand how a licensed financial advisor can commit a handicapped risk – averse person like myself to a life of destitution when the government is presently battling to provide social security for every South African citizen. I saved money for 44 years in order to make myself and my wife financially independent in our retirement. It seems so unfair and unreasonable that he may keep all his assets while I have to walk around with a begging bowl. He has his business intact and is young enough to continue building wealth while I have no chance of working in my present predicament.' (copied as is from the complaint)

G. CAUSATION

[97] Complainants invested their life savings into Genesis following the advice of fourth respondent. They went to him specifically because they identified the

need to be guided by a person who possesses expertise in this particular area. Evidence provided by respondent shows that they always received guidance when it came to matters of financial planning and investments. It is as a result of the advice offered by respondent that they invested in Genesis. But for the respondent's conduct, complainants would not have put their life savings in Genesis.

H. QUANTUM OF DAMAGES

[98] Complainants invested the amounts of R600 000 (invested by RCG) and R585 000 invested by (second complainant) respectively. They have both asked for the repayment of their capital which they lost with the liquidation of Genesis. There is no dispute about whether they lost their retirement capital.

I. ACCOUNTABILITY

[99] I deem it appropriate that I deal with the issue of joint and several liabilities of the respondents herein. I have held that the fourth respondent failed to comply with the Code in the rendering of the financial service herein. Fourth respondent was a key individual of 1st, 2nd and 3rd respondents or was at the time. On the facts of this case, if I were to hold 1st, 2nd and 3rd respondents solely liable this would not be in line with what the legislature intended, as evidenced by the FAIS Act. I say so for the following reasons:-

1. In terms of section 8 (1) (c) of the FAIS Act in instances where a financial services provider is, amongst others a corporate body, the applicant for licensing must satisfy the registrar that any key individual in respect of such applicant complies with the requirements of 'personal character qualities of

honesty and integrity; and competence and operational ability'. It is only when the registrar is satisfied that an applicant meets these requirements that a license will be granted.

2. Additionally 'no such person may be permitted to take part in the conduct or management or oversight of a licensee's business in relation to the rendering of financial services unless such person has on application been approved by the registrar.'
3. Section 8 (5) (ii) additionally requires that upon the change in the personal circumstances of a key individual a registrar may impose new conditions on the licensee. From the obligations imposed on the key individual it is clear that it is the key individual himself that is personally responsible to satisfy the registrar that he is fit and proper. Authorisation of the entity is approved through the key individual himself.
4. The fact that where the key individual does not meet the legislative requirements of fit and proper, the corporate entity's license can be withdrawn, which means the intention of the legislature is to hold both persons accountable. The General Code of Conduct for Authorised Financial Services Providers and Representatives (the Code) clearly envisages that the general and specific duties of a provider of financial services are those that are performed by a natural person as opposed to an artificial persona. This is evident in:-
 - (i) the definition of provider includes a representative;
 - (ii) the general duty of a provider in Section 2 of the Code requires that financial services be rendered with due skill, care and diligence, in the interests of

clients and the integrity of the financial services industry. This can only be performed by a natural person;

(iii) the various specific duties regarding the rendering of a financial service set out in section 3 require human intervention. So too are all the requirements set out in Parts III, IV, V and VI;

J. ORDER

I make the following order:-

1. The complaints are upheld;
2. The 1st to 4th respondents are hereby ordered jointly and severally, the one paying the other to be absolved, to pay 1st complainant the amount of R600 000 and the second complainant R585 000; and
3. Interest at the rate of 15.5 % from a date seven days from date of this order

DATED AT PRETORIA THIS 27th DAY OF NOVEMBER 2012.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS