

APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

**Case FAB 2/2015**

In the matter between

JACOBUS JOHANNES VAN ZYL

APPELLANT

AND

SYDNEY PERUMAL NAIDOO

RESPONDENT

**Case FAB 8/2014**

In the matter between

HERMAN BESTER

1st APPELLANT

DURANDT VAN ZYL

2nd APPELLANT

AND

STEPHANUS LOURENS GERBER

RESPONDENT

**Case FAB9/2014**

In the matter between

JACOBUS JOHANNES VAN ZYL

APPELLANT

AND

STEPHANUS LOURENS GERBER

RESPONDENT

APPEAL PANEL: LTC HARMS (JUDGE), MR JUANITO DAMONS AND MR JAY PEMA

DATE: 29 OCTOBER 2015

## JUDGMENT

1. This judgment deals with three appeals because of the identity of the preliminary issue, namely whether the FAIS Ombud had the necessary jurisdiction to make determinations against the appellants.
2. The first appeal arose from a determination made by the Ombud in pursuance of a complaint lodged by Mr SD Naidoo against one Christian Johann Swanepoel, a financial service provider, who had advised the complainant to “invest” in a Blue Zone property syndication scheme. It will be noted that Swanepoel is not an appellant.
3. The second and third appeals are interrelated because the determination by the Ombud resulted from a single complaint lodged by the respondent, Mr SL Gerber, with the FAIS Ombud in connection with an investment made by him through one Gideon Johannes Smit, a financial service provider, in a similar Blue Zone property syndication scheme. Smit also did not appeal.

4. In all these matters the respondents elected not to take part in the appeal proceedings and decided to abide by the decision of the Appeal Board. The appellants, in turn, requested the Appeal Board to decide the appeals on the papers and with reference to their heads of argument only since they did not wish to incur further costs. They rely heavily on the judgment of this Board in the Sharemax matter, arguing that the facts in these appeals on the specific issue cannot be distinguished from those in Sharemax.
5. In what follows we refer to the matters by reference to the names of the complainants, the present respondents, namely Mr Naidoo and Mr Gerber respectively.
6. The jurisdiction of the Ombud derives from the FAIS Act and, in particular, her determination relating to a “complaint” as defined in the Act (sec 1):

“‘complaint’ means, subject to section 26 (1) (a) (iii), a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative—

  - (a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;
  - (b) has wilfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or
  - (c) has treated the complainant unfairly.”
7. In para [43] of the Sharemax case the definition was paraphrased: (i) there must be a ‘specific’ complaint (ii) relating to a financial service (iii) rendered to the complainant (iv)

by a provider or representative (as defined) and (v) the complaint must allege that act or omission of the mentioned provider or representative falls under paras (a) to (c). In what follows we consider whether the appellants were persons against whom complaints had be laid in terms of the Act.

#### THE NAIDOO APPEAL

8. The complainant, Mr Naidoo, laid a complaint with the Ombud against one Christian Johann Swanepoel, a financial service provider, who had advised the complainant to “invest” in Blue Zone Spitskop Village properties. See pp 36, 77, 117-122 and 355. We reproduce the complaint. In an email of 1 February 2010, the Case Administrator, writing to Naidoo, interpreted the complaint as one against “Blue Zone” (p 75). However, another case administrator wrote to Swanepoel on 26 March 2010, informing him of the complaint received from his client against him and asking him for his complete file and answers to questions (p 261). Swanepoel responded but the detail are not of

consequence for present purposes.

**Please tell us what your complaint is about:**

I made an investment with the above broker(Chris Swanepoel)  
Failure to disclose all facts regarding the investment I made with this broker in Bluezone(spitzkop village properties). The company was liquidated during August/September 2009. He did not give facts about the investment or professional advice.  
Did not inform me that payments would be from the capital that I invested!  
There was already a land claim on Spitzkop village properties and also that a valuation on the properties was incorrect.  
Mr Swanepoel failed to advise me of the current situation with regards to this investment.

**How would you like your complaint to be resolved? (Outcome expected)**

I feel that Chris Swanepoel is responsible for the invested money, he has not proved to be a true financial advisor and basically has not made any attempt to retrieve my money! He is totally responsible for this money! He also encouraged me to raise a bond on property for additional investment!  
Mr Swanepoel is liable for the full amount plus interest for three years!

9. On 9 December 2010 (p 269) the following letter was written on behalf of the Ombud to the appellant:

OUR REF: MA FOC 04214/09-10/ GP 3

Dear Mr. Van Zyl,

**Re: COMPLAINT BY MR. S.P. NAIDOO**  
**: NOTICE IN TERMS OF SECTION 27 (4) OF THE FAIS ACT**

We refer to the above matter.

Kindly note that after proper consideration of the complaint we have concluded that the matter appears to warrant investigation in terms of Rule 4 of the Rules on Proceedings of this office.

In the circumstances, we now advise you that in terms of Section 27 (4) of the Financial Advisory and Intermediary Services Act 37 of 2002 ('FAIS Act') the matter has been formally accepted for investigation.

Please note that the matter will soon be submitted to the Ombud for her determination. Should you wish to submit any further documentation in support of your case, you are advised to submit it no later than close of business on 23<sup>rd</sup> December 2010.

According to the Ombud's file, the letter did not contain any attachments.

10. The question can fairly be asked why the Ombud chose to write letters and request responses during the period 9 December to 23 December especially considering the preceding email and letter to Naidoo and the lack of urgency. This smack of unfair administrative action – even of an abuse of power.
11. The Ombud's file does not contain any response from the appellant.
12. The Ombud signed her determination on 7 March 2011 (p 74). She upheld the complaint against Swanepoel and ordered him to repay the amount of the investment with

interest. More need not be said about that because this appeal does not concern Swanepoel.

13. In addition, the Ombud in her determination also made the order for repayment against the appellant and one Lamprecht (both were directors of the Blue Zone group of companies) jointly and severally with Swanepoel on the ground that the property syndication schemes run by the companies were, in a number of respects, fraudulent and that the appellant, as director, may be held liable by piercing the corporate veil. In addition, she held that the directors are under the Act liable for the actions of the representative, in this case Swanepoel.

14. After her determination, on 1 April 2011, and under another case number, the office of the Ombud sent the following email to the appellant (p 351):

Dear Mr Van Zy!

With reference to the above, please find attached Mr Naidoo's complaint. Would you kindly look into the complaint.

As you would be aware, in terms of the *Rules on Proceedings* of this Office, you have a period of six weeks from the date a complaint has been lodged with you to resolve it with your client. In the event that this matter is not resolved by close of business on **13 May 2011**, you are required to advise us of same and to provide us with your comprehensive response to the complaint specifically addressing the allegations made by the Complainant and attaching any supporting documentation, which demonstrates your compliance with the Fais Act and General Code of Conduct for Authorised Financial Services Provider and Representatives, at the time the financial service was rendered.

Please note that after receiving the response, we may proceed to investigation in terms of section 27 of the FAIS Act, at which time you would be liable for a case handling fee of R1000,00 in terms of Rule 9(a) of the Rules. At the conclusion of our investigation, the matter will be referred to the Ombud for a final ruling in terms of section 28 of the FAIS Act

15. Attached to this email was the complaint of Naidoo which had been the subject of her determination some weeks earlier.

16. The appellant (who had been cited by the Ombud as second respondent in her determination) applied for leave to appeal from the Ombud but she dismissed his

application (pp 15-24). It does not appear from the record that Swanepoel and Lamprecht applied for leave.

17. Leave was subsequently granted to the appellant by the Deputy Chair on limited grounds (pp 334-5 read with pp 6-13). It is for present purposes only necessary to deal with two of these, namely that there was no “complaint” against the appellant which the Ombud could investigate and determine, and, secondly, that the appellant was not informed by the Ombud that he was in jeopardy or of the case against him.
18. The text of the complaint reproduced above makes it abundantly clear that there was no complaint against the appellant; it was not even suggested that he directly or indirectly had rendered a financial service to the complainant; and there was no suggestion that whatever he did fell under (a), (b) or (c).
19. Dealing with the second ground, the only notice of consequence is the one under sec 27(4) reproduced above. It did not forewarn the appellant of any complaint against him or of the factual findings the Ombud intended to make, especially those relating to fraud, piercing of the corporate veil, non-compliance with sec 13 etc.
20. However, in refusing leave to appeal the Ombud stated that the appellant had been “fully informed of the complaint” in the sec 27(4) letter (p 17) and that the respondent elected not to deal with the merits of the complaint “notwithstanding that he was given notice” (p 18). She also said that the appellant was given notice that he could be held personally liable (p 21). These statements are, to say the least, disingenuous and palpably wrong and it is difficult to understand why the Ombud would or could have made them.



21. As in Sharemax, this was a serious breach of the requirements of fair administrative action and any court would on review have set aside the determinations on this ground alone (*Motswai v Road Accident Fund* [2014] ZASCA 104; 2014 (6) SA 360 (SCA)).
22. The notice of 1 April 2011 – post the determination – is, to say the least, puzzling and, obviously, had no legal effect.
23. It follows that the appeal of the appellant against the determination must be upheld.

#### THE GERBER MATTERS

24. The Deputy FAIS Ombud, in a 74-page determination, purported to uphold the complaint of Mr Gerber and ordered the “respondents”, jointly and severally, to repay him the R500 000 invested with interest (pp 54-127). The said “respondents” included Smit and the three appellants in the two appeals under consideration and also one Lamprecht who did not lodge an appeal.
25. The appellant, Mr JJ van Zyl, was a director and key individual of companies in the Blue Zone group. The other appellants, Mr D van Zyl and Mr Bester, were also directors but, they said, they were salaried directors and that their involvement was limited to that of employees. This appeal is in terms of leave granted by the Deputy Chair (pp 727 and 915).
26. Mr Gerber’s complaint was this (p 131):

## SECTION C

Please tell us what your complaint is about:

First tell us in just a few words what your complaint is about and then give us the background.

On 11<sup>th</sup> March 2008 I was coaxed by Mr Smith to invest R500,000 in a property syndication scheme promoted by Bluezone Property Investments (Pty) Ltd.

Since then, Bluezone Property Investments (Pty) Ltd and related companies such as Spitskop Village Properties Limited have either been put into liquidation or been placed under Provisional Judicial Management due alleged breaches of a number of South African laws.

It is my understanding that neither Mr Smith nor his various guises such as Bluezone Property Investments (Pty) Ltd (FSP number 21227) and LSI Brokers CC (FSP number 31483) were properly licensed by the FSB under the FAIS Act to sell the type of investment product (defined under sub-category 10 of category 1 of the FAIS Act as "*Securities and instruments: Debentures and securitized debt*") to me on 11<sup>th</sup> March 2008.

Regardless of the above suspected breach of the FAIS Act, Mr Smith still sold me this investment, benefiting financially by receiving a 6% commission on the R500,000 which I had invested, of which I had no knowledge.

I have subsequently found out that my R500,000 investment is practically worthless.

I feel that Mr Smith has acted inappropriately by misleading me to think that he was properly licensed with the FSB to sell this type of product and that he has caused the loss of my R500,000 originally invested plus interest on this amount which I could have earned since.

Please see enclosed letter with enclosures for a more detailed explanation.

27. He also gave this information:

**Remember**

We do not know anything about your complaint so please give us all the details.

Please list in date order phone calls meetings, or letters you have received or exchanged with the person against whom you are complaining. If you have letters, please enclose them.

A letter of complaint sent by email to Mr Smith dated 12<sup>th</sup> July 2011 and exhibited at Appendix L of the enclosed letter.

A letter of complaint sent by email to Mr Smith dated 14<sup>th</sup> September 2011 and exhibited at Appendix N of the enclosed letter.

Email correspondence with Mr Smith's lawyers dated 27<sup>th</sup> September 2011 and exhibited at Appendix P of the enclosed letter.

Email correspondence with Mr Smith's lawyers dated 20<sup>th</sup> October 2011 and exhibited at Appendix Q of the enclosed letter.

Please see my attached letter with enclosures for a more detailed explanation.

28. The Office in consequence sent sec 27(4) notices to Smit and the appellants. The one to

Smit is not of consequence but those to the appellants were in these terms:

**COMPLAINT BY MR. S.L. GERBER**

We refer to above and enclose herewith complaint from your client.

As you are aware, in terms of the Rules of the Proceedings of this Office, in particular, Rule 6(b), you have a period of six weeks from the date a complaint has been lodged with you to resolve it with your client.

In the event that you have not resolved this matter by 5<sup>th</sup> March 2012, the provisions of Section 27 (4) (a) of the FAIS Act will apply and hence you are required to revert to this Office on or before the aforesaid date your full version of events as well as copies of your complete file of papers relating to this complaint.

The complainant has raised a number of pertinent points and these will naturally require attention.

In your response please provide us with a full statement as to how this transaction was concluded. In particular we require the following:

1. A statement by the advisor as to how the policy/investment was entered into with the complainant
2. Please provide documentation showing that a financial needs analysis was conducted for the complainant that lead to this product being recommended as a product that was appropriate to the needs and financial position.
3. A copy of any record of advice in terms of Section 9 of the General code of Conduct for Authorised Financial Services Providers and Representatives as well as other compliance documentation;
4. Please provide details of a risk analysis conducted for the complainant and that the complainant's risk profile corresponded with proposed product, and if not, please provide documentation showing that you disclosed the risks involved in investing outside the recommended risk profile,

29. A follow-up letter of 7 August 2012 said this (p 602):

We request that you:

- Send us your statement in terms of section 27(4) together with all documents supporting your case where after this matter may be referred to the Ombud for determination; alternatively
- Revert to us with suggestions on how you intend to settle/resolve this matter.

When responding to the complaint you should ensure that each allegation by the complainant is addressed (if not previously addressed).

30. Ten months later, on 10 June 2013, another letter from the Office was sent to the directors of Blue Zone Property Investments (Pty) Ltd “in their representative and personal capacity”:

**NOTICE IN TERMS OF SECTION 27(4) OF THE FAIS ACT – COMPLAINT BY SL GERBER**

1. Attached herewith find complaint in respect of investment in Blue Mystic Trading 511 (Pty) Ltd ('Blue Mystic')/Copper Sunset Trading 239 (Pty) Ltd (Copper Sunset) from your above mentioned client. To date the complaint remains unresolved.
2. Blue Mystic was promoted by Blue Zone Property Investments (Pty) Ltd. The latter acted as a licensed Financial Services Provider ('FSP') and provider of intermediary services.
3. This office informed Blue Zone of the complaint on 23 January 2012. In terms of the Rules of the Proceedings of this Office, in particular, Rule 6(b), Blue Zone had a period of six weeks from the date of referral of the complaint to them to resolve it with your client. In addition, a notice in term of section 27 (4) of the

FAIS Act was issued to Blue Zone. To date, the complaint remains unresolved and only responses from two directors have been received from Blue Zone.

4. You are required to revert to this office on the under mentioned date with your statement in terms of Section 27(4) of the FAIS Act together with documents that support your version.
5. In responding to the complaint you are required to address the office on the following:
  - 5.1 Advise as to why Blue Zone made an offer to the public for the subscription of shares in Copper Sunset whilst no prospectus has been registered with the Registrar of Companies<sup>1</sup>.

31. The Deputy Ombud summarised the complaint correctly as follows (p 65):

Complainant's complaint may be summarised as follows:

- i. Following first respondent's advice, complainant invested R500 000 of his retirement funds into a Bluezone property syndication scheme known as Sunset Trading. The investment was to provide a secure source of income for complainant and his wife's retirement;
- ii. Complainant alleges that first respondent's advice was in violation of the General Code of Conduct, (the Code) because the high risk Sunset Trading investment was not suitable for his circumstances;
- iii. First respondent failed to properly advise complainant in that he failed to disclose the risk inherent in the Sunset investment
- iv. First respondent failed to disclose costs attributed to the investment in violation of the provisions of the Code;
- v. First respondent violated the Code in that he failed to act in complainant's interests as the Code demands of all providers when rendering financial services to a client.
- vi. First respondent failed to act with due skill, care and diligence.

32. Elsewhere he also said that "the essence of the complaint is that [Smit] rendered financial services in violation of the Code in that he failed to appropriately advise [Gerber]" (p 93). However, he defined the issues for determination in terms quite unrelated to the complaint (pp 57-58):



[15] The issues arising in this determination are:

15.1 Whether as a representative of Bluezone, the first respondent, rendered financial services negligently, and/or in contravention of the FAIS Act and the General Code;

15.2 If the first respondent rendered financial services in violation of the FAIS Act and the General Code, whether such violation caused complainant the financial damage complained of;

15.3 What are the consequences for the roles played by the second to fifth respondents (as licensed financial services providers, product providers and principals) in terms of section 13 of the FAIS Act?

15.4 What are the consequences of any breach of the law by the second to fifth respondents?

33. The Deputy Ombud, realising that the complainant never dealt with Blue Zone because he did not know that he had to complain to them (p 95) eventually made a number of findings against the appellants scattered throughout the determination. They include that the directors knew that they were not licensed to sell the product but nevertheless went ahead and illegally appointed representatives in terms of sec 13 (p79-80); that they were the authors of the complainant's misfortune as they were directors of the companies (p 93); the respondents had issued a prospectus which had not been registered (p 109); and that they conducted the business of the group recklessly and

even fraudulently (p 122-123). In conclusion he made the following findings against them (p :

- (b) The conduct of the first respondent, as a "section 13 representative" of Bluezone is attributable to the second to fifth respondents,
- (c) The second to fifth respondents failed to exercise supervision over the first respondent as required in terms of section 13 of the FAIS Act,
- (d) The loss suffered by complainant was as a direct result of respondents' conduct;
- (e) All respondents violated the Code in not disclosing the material terms of the Bluezone investment;
- (f) All the respondents showed complete disregard of the law in rendering the financial services to complainant;
- (g) Second to fifth respondents violated the Companies Act and Notice 459 of the Gazette 28690.

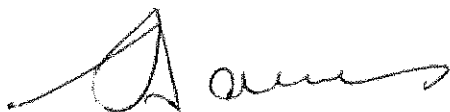
34. The Deputy Ombud's approach was that since Mr Gerber's complaint had been served on the appellants, it informed them of his complaint. And he said, the complaint itself was "directed at" the directors and sought "to hold them personally liable for the complainant's loss" (p 99). This, he said, was because the substance of the complaint "clearly" pointed to the conclusion that Lamprecht and JJ van Zyl (and not the other two appellants, Bester and D van Zyl) had to be involved in the complaint (p 97).

35. The Deputy Ombud is obviously correct when he says that substance is more important than form. However, there is a limit to the proposition because the Act prescribes some “form” as the basis of jurisdiction. It does not make the Ombud a super investigator or super judge. In any event, had it been so obvious that Lamprecht and JJ van Zyl were implicated in the sense set out, the question arises why did the Deputy Ombud not simply confront them with the implied allegations and asked their answers. Also, the complainant could have asked whether he wished to amend his “complaint” to cover the directors.

36. As in the Naidoo case, the text of the complaint reproduced above makes it amply clear that there was no complaint against the appellants; it was not even suggested that they directly or indirectly had rendered a financial service to the complainant; and there was no suggestion that whatever they did fell under (a), (b) or (c).

37. In the result these appeals also succeed and the orders made against the appellants are set aside.

Signed on behalf of the panel at Pretoria on 29 October 2015

A handwritten signature in black ink, appearing to read 'LTC Harms', with a stylized initial 'L' and a long horizontal stroke extending to the right.

LTC HARMS