

IN THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

In the consolidated matters between:

OPTIMUM CONSULTANTS (PTY) LTD

FIRST APPELLANT

JANNIE R VAN DER MERWE

SECOND APPELLANT

AND

MARGARETHA E LAMBRECHTS N.O.

FIRST RESPONDENT

(In her capacity as Executrix of the Estate late
Hester L Zandberg in terms of letters of
Executorship issued by Master of the High Court
dated 5 August 2013)

and

ELSA J ZANDBERG

SECOND RESPONDENT

**THE OMBUD FOR FINANCIAL SERVICES
PROVIDERS**

THIRD RESPONDENT

DECISION

A. INTRODUCTION

1. This is a consolidated appeal against the determinations of the Ombud for Financial Services Providers (“Ombud”) made on 5 December 2016 and 22 November 2016 (“Determinations”) in pursuance of section 28(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 (“the Act”).
2. The first appellant is Optimum Consultants (Pty) Ltd (Registration Number 1998/02028/07) t/a Optimum Financial Services Group, a licensed financial services provider with license number 9413.
3. The second appellant is Jannie R van der Merwe, a key individual and representative of the first appellant. He dealt with the first and second respondents through this company. For convenience, the first and second appellants have been referred to as the appellant. We have indicated where there was a need to differentiate between them.
4. The first respondent is M E Lambrechts N.O (in her capacity as the Executrix of the Estate late Hester L Zandberg). The second respondent is Elsa J Zandberg. The third respondent, referred to here as the Ombud, heard complaints in respect of both the first and second respondents that were submitted jointly on the basis that they related to the appellant and the same investment. The

Ombud therefore dealt with these matters under the same case number FAIS 05497/11-12/NC1.

5. The first and second respondents are jointly referred to hereinafter as the respondents and will be referred to as Hester or Elsa where the need to differentiate between them arises.
6. Pursuant to the Ombud's Determinations in the Hester matter on 5 December 2016 and in the Elsa matter on 22 November 2016 upholding their complaints, the appellant appealed the Determinations to the Ombud who dismissed the appeal on 5 October 2017.
7. On 3 November 2017 the appellant sought leave to appeal from this board on a number of grounds. On 7 November 2017, the Deputy Chair of the Appeal Board granted leave to appeal. However, leave to appeal was granted only in respect of the issue of negligent breach of contract.
8. The appeal was accordingly noted, within the confines of the issue upon which the appellant was granted leave to appeal, against the Determinations and orders issued in terms thereof.
9. When the matter came before us on 10 April 2018, only the appellant had legal representation. Although not legally represented at the hearing, the respondents had filed heads of argument (a few days before the hearing) that were prepared on a pro bono basis. On request, the appellant was granted indulgence to respond to these heads of arguments by 24 April 2018, which was duly done.

10. The decision therefore incorporates relevant matters that were dealt with in both sets of papers subsequently filed.

B BACKGROUND FACTS

11. During 2006 Hester Zandberg invested R335 000.00 in the Highveld 18 Property Syndication while Elsa Zandberg invested R100 000.00 into the Highveld 19 Property Syndication. PIC Syndication (PTY) LTD (PIC) promoted both these property syndications. For convenience these are referred to as property syndications.
12. The appellant, JR van der Merwe, a key individual of Optimum Consultants (Pty) Ltd t/a Optimum Financial Services Group ("Optimum") was the contracted financial services advisor who dealt with both respondents. He gave them advice to invest in PIC.
13. It is common cause that the investment was placed in property syndications that guaranteed both capital and income through "hoofhuur ooreenkoms Plus terugkoop ooreenkoms" - the Headlease and Buyback agreements (Agreements).¹

Complaint

14. Phillipus Zandberg, (Phillipus) the son of the late Hester and husband of Elsa lodged a complaint with the Ombud in respect of both his mother and wife. He recorded, among other things, that:

¹ See Record 116.

"1. My mother and my wife invested the money in PIC on the basis that they will get a year to year interest increase.

2. After five years they will get their capital back.

3. Capital is 100% guarantee (sic) without any risk at all.

4. In 2011 suddenly the interest was cut and the contract expired in Oct 2011, and we cannot get money back..."²

15. Phillipus further stated that the appellant, "assured my mother as well as my wife several times the capital is guaranteed".³

Appellant's Response

16. The appellant's response to the complaint has been confined to the issue of whether or not the appellant negligently breached the terms of his contract with the respondents.

17. In that regard the appellant's argument, inter alia, is that his contractual mandate was to:

17.1. ascertain and recommend the most appropriate financial product within the series of service categories within the ambit of the agreements between himself and the respondents.

17.2. assist with applications to the financial product provider elected by respondent conditional upon:

² See Record page 6.

³ See Record 354.

- 17.2.1. the accuracy and completeness of all answers, declarations and other information supplied by or on behalf of respondents which would be their own responsibility;
 - 17.2.2. the respondents being satisfied with the accuracy and completeness of the details depicted on any application form submitted and/or completed by Optimum on their behalf;
 - 17.3. liaise with PIC on respondents' behalf and to assist them in respect of any proposed amendments or changes to the products they hold.
 - 17.4. to convey any communication concerning PIC and to assist respondents in consequential reactive conduct;
 - 17.5. terminate the agreement between respondents and PIC on the respondents' behalf, upon request;
 - 17.6. comply with the Act and any other legislation determined by the Financial Services Board;
 - 17.7. annually review respondents' investment profile.
18. The appellant argued further that in his quest to fulfil his mandate particularly with respect to Hester, he conducted a single needs analysis that was primarily focussed on ascertaining the most appropriate investment scheme commensurate to her needs at that point in time.
19. Therefore, appellant's argument continued, the precise factual basis, ambit and terms of the instruction that Hester gave him were consequently confined. However, he offered no explanation as to the precise nature of the impediment

to obtaining further information and whether or not he deemed it necessary to have more details to expand the needs analysis beyond a single need.

20. Ultimately the appellant's argument in this regard was that he could not perform a complete needs analysis in respect of Hester given the fact that her need at the time was confined. The appellant emphasised therefore, the fact that he was not provided with the necessary particularity required to perform a complete needs analysis.
21. The results of the risk profile assessment in respect of Hester showed her to be a moderately conservative investor⁴ while Elsa's assessment revealed her as a moderate investor. The significance of these assessments becomes more apparent below when we evaluate the type of investment the appellant suggested to the respondents in light of the other options presented to them.
22. With respect to Hester's needs and requirements, the appellant presented the following financial products as options for her to consider. These appear on the Advice Record⁵ and the Needs Analysis⁶ both dated 12 August 2006 as follows:
 - 22.1. Fixed bank deposits (1 to 5 year investment term);
 - 22.2. Guaranteed income and allocation products underwritten by an insurance company (term annuities);
 - 22.3. Syndications (in which income and capital are guaranteed);
 - 22.4. Retail bonds; and

⁴ See Record 278.

⁵ See Record 76 where it is referred to as the "ADVIESREKORD"

⁶ See Record 78 where it is referred to as the "FINANSIELE BEHOEFTE ONTLEDING"

- 22.5. Any other option that would achieve income and capital guarantees as would be found in the Money Markets and which will satisfy Hester's needs.⁷
23. Comparisons between the above various options have been given in the Needs Analysis (under the heading "Voorstelle")⁸ where we note their compatibility characteristics in relation to Hester's requirements. They are as follows:
- 23.1.1. Fixed deposits offered no guarantees;
 - 23.1.2. Insurance Annuities would not yield the desired income;
 - 23.1.3. Retail bonds, although very safe, yielded a constant rate of interest (no annual escalation).
24. The option that the appellant recommended from what he had presented to Hester Zandberg was the property syndication. He stated (we paraphrase) at paragraph 3 of the Needs Analysis that - property syndication is a type of investment not normally suitable (given Hester Zandberg's needs and requirements⁹) because they are risky and difficult to handle, nevertheless there is a syndication that will give guarantee [in respect of] – income and capital, and in which also income will grow yearly.¹⁰ Appellant further records that - this option is worth considering (I will come and explain the product at our next appointment).
25. With respect to Elsa Zandberg, the appellant, bearing in mind her needs, presented certain financial products as options for consideration. These appear on the Advice Record¹¹ and the Needs Analysis¹² both dated 22 November 2006.

⁷ Refer to the original Afrikaans text at Record 77 and 80. See also Appellant's Grounds of Appeal Record 435 at pages 8 to 9.

⁸ Record 80.

⁹ See also Transcript page 12 Line 9.

¹⁰ See Record 81.

¹¹ See Record 59 at 62 and Record 202 at 205.

¹² See Record 45 where it is referred to as the "FINANSIELE BEHOEFTE ONTLEDING".

26. The options are set out in much the same way as in the case of Hester above. Paragraph 3 of the Needs Analysis likewise states that the full capital will be guaranteed after five years through the “Buy-Back Agreement” and that income will also be guaranteed through the “Head Lease Agreement”.¹³
27. Similarly, the appellant pointed out that syndicates are a type of investment that would not normally be considered appropriate given the respondents’ need for a guaranteed investment. The syndicate he was recommending was therefore not like the ordinary syndicates in that it guaranteed both the income and capital over the full term of five year.¹⁴
28. During argument the appellant submitted that his advice to the respondents took their requirements into consideration hence the options of financial products he made available to them at the time. His advice, he argued further, was given with reference to the nature of the investment, the inherent risk in the investment and whether income/or capital would be guaranteed.¹⁵ However, he emphasised the fact that the products election was entirely for the respondents to make.¹⁶
29. The appellant further argued that he explained the risks associated with property syndication investments and that the respondents signed a declaration confirming that they understood the risks on the selected products. In light of the signed declarations, the appellant submitted that there was nothing to suggest that the products offered were not fully understood.

¹³ See Record 47.

¹⁴ See Record 47.

¹⁵ Refer to Transcript page 9 Line 6.

¹⁶ Ibid page 62 Line 13.

30. In that regard, the argument continued, the respondents were bound by the terms of the documents they signed. Accordingly the respondents having bound themselves to the terms of the documents could not later be heard to complain that they did not understand what the documents contained bearing in mind the *caveat subscripto* principle.¹⁷
31. The appellant asked for an order setting aside the Ombud's Determinations and for the appeal to be upheld.

C. ANALYSIS

32. The appellant's obligation was to ensure that the respondents were fully apprised of all the facts that would enable them to make a meaningful decision regarding which investment to take from the options presented..
33. In evaluating the advice that was given, one needs to consider whether or not the advice was appropriate, that is, if the recommendation that was made was in fact suitable. The enquiry looks at whether the appellant's conduct in the circumstances met the standard expected of a reasonable financial services adviser.
34. Bearing the above in mind, the respondents' case remains rather simple; they were told that the invested capital and income was guaranteed. Several times the appellant gave the respondents assurance that that "Kapitaal gewaarborgd" [was].

¹⁷ Ibid, page 63 Line 7 read with paragraph 101 of Appellant's Supplementary Heads of Arguments (and footnote 30).

35. The need for this guarantee was not fortuitous. In respect of Elsa, the ‘summary of the information on which the advice is based’ shows clearly that “Kaapital moet gewaarborg wees asook die inkomste”.¹⁸ Equally, the terms of investment according to the needs and goals of Hester were that “...die kaapital asook inkomste moet gewaarborg wees.”¹⁹
36. Therefore the above instructions regarding guarantees formed a material term of the appellant’s contractual mandate, which if not observed when giving advice, would amount to breach of contract. It follows that options that were put before the respondents that did not provide these guarantees would not be suitable.
37. In this regard, appellant’s counsel argued that the guarantee given was a very specific guarantee. Further, the respondents should not have regarded the term “guarantee” in absolute terms. Furthermore, he continued, it must be borne in mind that the content of the guarantee is informed by the contract and the fact that its value is inherently found in the corresponding value of the agreement and of the person that issues the guarantee.²⁰
38. We do not agree with counsel. On the facts there is no room to argue that the respondents ought to have understood the advice given regarding the guarantees to mean anything else other than what was said. The respondents made it clear that capital, in particular must be guaranteed. In other words, the respondents’ goal was to secure capital and to derive income.

¹⁸ See Record 69 AFDELING 4.

¹⁹ See Record 76.

²⁰ See Transcript pages 12-14.

39. There is no suggestion that the appellant did at any stage explain to the respondents that the guarantee was “specific”. If the appellant did he would have had to explain what was specific about the guarantee to differentiate it from how the term guarantee is ordinarily understood. It does not appear from the evidence what was “specific” about the guarantee and if that warranted a deviation from the ordinary use of the word.
40. In any event, all facts surrounding the contractual arrangement must be examined and in this case the context in which financial advice was given must be considered in the endeavour to determine what the parties intended “guarantee” to mean. Otherwise “guarantee”, without the context in which it was applied, would have no meaning. This was the principle in the matter of **North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd 2013 (5) SA (SCA)** where the court also pointed out the need, when interpreting words used in a contract, to place such words in context and to consider their purpose.
41. In the same vein, the court in **Bothma –Bothma Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk**²¹ held that context including the circumstances in which the document came into being must be taken into consideration.
42. Further, looking at the evidence, the term “waarborg” which appears in the Needs Analysis and the Advice Record (which undergirds the appellant’s mandate) must be considered in the light of the ordinary rules of grammar and syntax. That was the approach of the court per Wallis JA in **Natal Joint Municipal and Pension Fund case. v Endumeni Municipality**.²² The case expanded the view expressed in BP Southern Africa (Pty) Ltd v Mahmood

²¹ 2014 (2) SA 494 (SCA).

²² 2012 (4) SA 593 (SCA).

Investments (Pty) Ltd²³ that regard must be given to the relevant circumstances known to the parties at the time of entering into the contract.

43. In the light of the above authorities, the context of the contractual mandate that the appellant was given, which was to invest monies in a guaranteed investment, indicates that parties intended the monies to be placed in an investment portfolio (so to speak) that would ensure capital was secure; that it would not be lost in the investment.
44. Appellant argued that once he had explained the options, the respondents then had to pick their choice from the bouquet. Our view in that regard is that the advice entailed an element of segregation. The appellant had to dissociate investments that were appropriate for the respondents from those that were not. It is clear from the evidence that the advice given by appellant, that the investment guaranteed capital, formed the basis on which the respondents made the choice to invest in PIC. In other words, if the appellant had advised that the investment was not guaranteed, the respondents would probably have invested their monies elsewhere.
45. Further, the appellant himself stated that he would not have advised the respondents to invest in PIC had it not been for the guarantees provided under the “Buy Back” and the “Head Lease” agreements. The respondents were entitled to rely on the appellant’s advice (as they did) that the investment was guaranteed. Consequently, the appellant’s advice that the investment was guaranteed lured the respondents’ to invest in the property syndications. Therefore the appellant’s advice was the factual cause of the respondents’ loss.

²³ 2010 (2) All SA 295 (SCA).

46. We now turn to whether the appellant advice was sufficiently closely linked to the respondent's loss, in other words, whether appellant could have foreseen the loss.
47. It is pertinent to reiterate that the appellant admits that it would have been inappropriate for him to advise that the respondents should invest in property syndication because of the high risk involved in these types of investments. This was borne out of the fact that the respondents profile revealed they did not have the appetite for risky investments. They sought to secure their capital and to earn interest on such capital over time.
48. What led the appellant to recommend PIC was that all the risks normally associated with property syndications were not applicable to the investment he recommended because there were legally binding Agreements in place that guaranteed the investment.²⁴ The appellant emphasised this point. In doing so he went further to state "all the risks, without such guarantees, were pointed out to the complainant, but because of the guarantees, were in fact no longer applicable".²⁵
49. In short, the appellant believed that the existence of the Agreements provided a safety net to save the respondents capital in the event that the bottom of the syndication property investment fell off. The fact is, the bottom did fall off but the Agreements did not save the investment. The question is therefore whether it was reasonable for appellant to believe that the Agreements would save the respondents capital.

²⁴ See Record 483.

²⁵ Ibid.

50. In this regard, counsel argued that the appellant's duty was to disclose the nature of the guarantee. The appellant carried out this duty when he disclosed to the respondents that the guarantee lay in the contract of sale – the Agreements. Furthermore, counsel continued, the appellant did not have to guarantee the guarantee.²⁶
51. First we note that, the so-called “Buy Back” agreement²⁷ was the source of capital guarantee in which the purchaser, Zelpy 2095 (Pty) (Ltd) (Zelpy) undertook to buy the property syndication. Therefore, Zelpy's capacity to buy the properties was the strength of the guarantee.
52. In the “Buy Back” agreement one Nicolaas Georgiou (Georgiou) represented the purchaser and one Jan Jonathan Durand Botha (Botha) represented the seller.
53. Second, we observe that the so called “Head Lease” agreement operated as a basis on which income in the syndication properties would be guaranteed. This “lease agreement” does not disclose who the lessor and lessee are, what is let, the period of such letting or rental payment. It does not contain any other clauses specifically relating to a lease agreement. It is not clear why it is called a lease agreement.
54. Again, Botha represented the property syndication interests in the “Head Lease” agreement while Georgiou represented himself in his personal capacity and also represented five other parties including Zelpy and a trust entity in his name.

²⁶ Refer to Transcript pages 32 to 33.

²⁷ See Record 8.

55. From the evidence it appears to us, particularly regarding how the guarantees worked, that the appellant's main source of information regarding the operation of the Agreements was Georgiou as the mouthpiece of all the parties who undertook to provide the guarantees.
56. There is no evidence that appellant enquired or sought assistance to enquire or in anyway verified Zelpy's ability to purchase the property syndications that the "Buy Back" agreement purported to be capable of doing. We could not find anything to suggest that the appellant made any effort to ensure that Zelpy's trading record was good and that the guarantee would stand beyond what Georgiou's represented to him.
57. Further, with respect to income guarantees, there was no evidence that the appellant troubled himself to verify the property values stated in respect of the properties that would secure the respondents' income. It also does not appear he took steps to ensure the "Head Lease" agreement would guarantee such income. He relied on what he was told was the value of the properties and what the percentage yields would be. He made light the need to conduct an enquiry to ascertain the facts that informed the basis of his advice.
58. Furthermore, no evidence was adduced to show that appellant explained the workings of the investment he was recommending. He could not show, having being requested to do so, that he gave the respondents the prospectus relating to the syndication. Although the Agreements were made available, no evidence was shown that the appellant explained how these Agreements worked in particular that the Agreements did not amount to a guarantee. The appellant seems to have relied on the fact that previous syndication involving the same Georgiou had been successful in the past.

59. Therefore the advice that the appellant gave the respondents, namely, that both capital and income was guaranteed (on the basis appellant referred to as the “synergetic operation” of the “Head Lease” agreement and “Buy-back” agreement) was formulated on unverified facts.

D. CONCLUSION

60. In view of the above evidence we are of the view that the appellant acted negligently when advising the respondents that the investment was guaranteed. Therefore he breached his mandate.

E. ORDER

In light of the above, the Order is as follows:

61. The appeal is dismissed.
62. No order as to costs.

DATED AT PRETORIA ON THIS 22 DAY OF MAY 2018.

L Dlamini

SIGNED:

LANGA DLAMINI (CHAIRPERSON)

NEO PHAKAMA DONGWANA (MEMBER)

ADV. WILLIAM NDINISA (MEMBER)