

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

CASE NUMBER: FAIS 04425/13-14/ WC 1

In the matter between

JOHN ALEXANDER BARTLETT

Complainant

and

JAM FINANCIAL PLANNING CC

First Respondent

WILLEM JOHANNES ABRAHAM

Second Respondent

**DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY
AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')**

A. INTRODUCTION

[1] On 31 July 2013, complainant filed a complaint with the Office against first and second respondent.

[2] The complaint arises from an investment made by complainant following advice from respondent. Complainant invested an amount of R335 000 which he now lost. What follows is the determination.

B. THE PARTIES

- [3] Complainant is John Alexander Bartlett, an adult male pensioner residing in the Western Cape.
- [4] First respondent is Jam Financial Planning CC, a close corporation duly established in terms of South African laws with registration number 2007/229281/2, with its registered address as 46 Protea Park, Sandbaai, Hermanus, Western Cape.
- [5] Second respondent is Willem Johannes Abraham, an adult male representative of first respondent. Second respondent's last known address is the same as that of first respondent. At all material times, second respondent rendered financial services to complainant on behalf of first respondent.
- [6] Although second respondent dispensed advice and collected monies from clients, respondents were never licensed in terms of the FAIS Act.
- [7] I refer to both respondents simply as respondent. Where appropriate, I specify.

C. COMPLAINT'S VERSION

- [8] Complainant states that during November 2011, he invested an amount of R335 000 with first respondent, following his advice. The investment period was noted as 24 months, at an interest rate of 1.5% per month, alternatively, 18% per annum.

- [9] The money was deposited into respondent's bank account, who in return invested complainant's money with Fundco, a company highly recommended by respondent. More is said about Fundco later.
- [10] Complainant states that he regularly received his monthly income¹; that is until the end of November 2012 when he experienced a delay in payment. A call to respondent assured complainant that the delay was due to an administrative problem and that complainant had no reason to be concerned about his investment.
- [11] Complainant was not persuaded and instructed respondent to withdraw his entire investment. Respondent reminded complainant of a 90 days' notice period. Subsequently, complainant requested an immediate withdrawal of R40 000 and that the balance be paid as soon as possible thereafter. Following this instruction, only the two monthly payments for November and December 2012 were paid, and not the withdrawal as per his request.
- [12] Towards the end of January 2013 respondent visited complainant and tried to persuade him that his money was safe and that he should leave the investment with respondent. As will later become clear, this was at a time when the company into which complainant's money had been paid into, namely, Fundco, was facing financial difficulties. Complainant stood his ground, at which point respondent agreed to have the R40 000 and the interest paid to complainant by 8 February 2013.

¹ Approximately R5025 monthly as per the application form

[13] Despite the aforesaid agreement, no payment was received. Following various phone calls to respondent, complainant was finally informed that Fundco was liquidated on 3 June 2013 and that no further payments will be made. Complainant is of the view that he has lost his investment.

D. RELIEF SOUGHT

[14] Complainant seeks the return of his capital of R335 000.

E. DETERMINATION

[15] The issues for determination are:

15.1 Whether the respondents rendered financial services at all to complainant? In the event they did, whether respondents complied with the FAIS Act and the General Code;

15.2 Whether respondent's conduct caused complainant the loss complained of and the quantum of such loss.

About Fundco

[16] Fundco CC, a close corporation with registration number 2007/210471/23, purported to be a registered financial services provider within the micro lending space.

[17] Fundco operated on the basis that it funded its operations not only from its own capital, but also from wholesale borrowing from individuals and companies to ensure that sufficient capital is available to meet the demand for credit².

² See www.fundco/about.html for fund facts. NB: (page no longer exists)

[18] The company (as borrower) would conclude a loan agreement between itself and the lender, in this instance, respondent, where money from investors would be lent to Fundco at certain interest rate and repayable on agreed dates³. What respondent conveyed to its clients however is somewhat different, in that the impression was created that investors funds were going to be invested with established financial institutions.

[19] Following a failed business rescue intervention, Fundco was liquidated during 2013. In this regard, second respondent conveyed the message to complainant.

Whether respondents rendered financial services at all and if they did, whether the rendering was in compliance with the FAIS Act;

[20] During June 2014, the complaint was referred to respondent to resolve it with complainant in terms of Rule 6 (b) of the Rules on Proceedings of this Office. No response to this letter had been received.

[21] On 29 October 2014 and 15 March 2016 respectively, a notice in terms of Section 27 (4) was issued to respondent advising them that the Office had accepted the matter for investigation and further informing respondent to provide all documents and or recordings that would support their case in order for the office to begin with its investigation. The notice further indicated to respondents that in the event the complaint was upheld, they could face liability. No response was received to either of the letters. The letter dated 29 October 2014 sent via registered post was never collected.

³ As per "agreement of loan" on file with the office.

[22] The matter is therefore determined based on complainant's case with supporting documents.

[23] The only correspondence from respondent on file is an undated letter on the letterhead of first respondent stating the following:

"This is to confirm that Mr JA Bartlett was a capital provider to Jam Financial Planning who in turn provided the same to Fundco.

Attached is the loan application and the notification by the Business Rescue Practitioner. Furthermore, the court has granted the liquidation order on 3 June 2013.

No further income will be paid".

[24] Before I deal with the aforesaid letter, I first have to comment on the "application form" that was completed by complainant. Of importance is the following:

24.1 The amount is confirmed as R335 000, with interest noted as 1.5% per month, or 18% per annum. The income is noted as R5025 per month for a term of 24 months.

24.2 Under the section "agreed as follows", it is noted that:

- a. The **capital is secured by way of loan agreements** with a registered financial service provider and registered licensed credit provider; *(my emphasis)*
- b. The minimum term is 24 months;
- c. Allocation is noted as 100% with no additional fees;
- d. Notice of 90 days is required to release funds within the 2 year period

[25] It is evident from the letter referenced in paragraph 22 that respondent tried to down play the gravity of his conduct in that he refers to the transaction as a loan as opposed to an investment. There is nothing in the application form that supports the conclusion that complainant agreed to lend his money to respondent. What the application spells out is that complainant **invested** a defined amount to secure himself income for a period of 24 months. Complainant would not have understood the nature of the investment to be that of a loan. It was certainly not complainant's intention to loan his money, but rather to invest it.

[26] Furthermore, the reference to a 100% allocation is commonly found in investment application forms and would in fact be nonsensical, (if this was indeed a loan agreement). The term is commonly used to explain that complainant's full investment amount is allocated to the investment prior to deducting any costs.

[27] A copy of the deposit slip indicates that complainant deposited a cheque in the amount of R335 000 into an FNB account, belonging to Jam Financial Planning. Complainant had no interaction whatsoever with Fundco, and did not conclude any contract with this entity. This much is confirmed by the application form which was signed by second respondent. There can therefore be no question that complainant's understanding would have been that he was making an investment through first respondent whilst acting on the advice and recommendation of second respondent as his financial advisor.

[28] Respondent failed dismally as a so-called financial advisor and abused his position of trust to take advantage of complainant. As for the rendering of advice

which occurred in this instance, section 7 (1) of the FAIS Act requires that a person obtain a license before acting as a financial services providers. Notwithstanding the lack of such approval, subsection (2) ensures that respondent cannot escape the provisions of the FAIS Act in that transactions concluded even without the requisite authorisation are still enforceable.

[29] In recommending the investment to complainant, respondent breached a number of provisions of the General Code of Conduct ('the Code'):

29.1 Section 2 thereof requires that 'a provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry'. It is sufficient to say that second respondent only had his own interest at heart, and not that of the elderly pensioner who trusted him with his life savings;

29.2 Section 3 (1) (a) (iii) requires that representations to the client must be adequate and appropriate in the circumstances of the particular financial service taking into account the factually established or reasonably assumed knowledge of the client. It is self-evident that the representations made to complainant were anything but adequate. To assure complainant that the monies invested with respondent were safe, is nothing short of blatant dishonesty. Respondent knew from the onset what the nature of the business of Fundco was, but failed to disclose in detail how the investment with Fundco would affect complainant and what the related risks were. Had complainant been aware of this true state of affairs, he would not have agreed to such a risky investment.

29.3 Section 3 (1) (vii) requires proper disclosure of any fees, remuneration or monetary obligations yet all that is mentioned in the agreement is that there will be 100% allocation and no additional fees. It would be ridiculous to believe that respondent invested his time without expecting anything in return. In fact, if complainant only received 1.5% interest monthly and Fundco offered between 2-4%, the only rational deduction to be made is that respondent appropriated the difference for himself while he failed to make the mandatory disclosure to complainant.

29.4 Section 8 of the Code, which pertains to suitability of advice requires, *inter alia*, that the adviser identify the product or products that will be appropriate to the client's risk profile and financial needs. Since no record of advice was provided or kept (in contravention of section 9 of the Code), it could not be established what persuaded respondent to advise complainant to make this particular investment. Clearly complainant's circumstances were not considered in this case.

Whether respondent's conduct caused complainant the loss complained of and the quantum of such loss.

[30] Outside of complainant's version, there is sufficient evidence that respondent breached the law in the following respects:

30.1 Respondent failed to appropriately advise complainant in contravention of the General Code.

30.2 When the investment was recommended, respondent was not acting in the interest of complainant. In fact, the only interest that was being advanced here was that of respondent.

30.3 There is no evidence that complainants' needs were assessed, nor that the risks inherent to this investment were explained to complainant, in violation of section 7(1) (a) of the Code.

30.4 Respondent failed to maintain records of advice as required by Section 9 of the Code.

30.5 Respondent's failure to comply with the General Code was a direct cause of complainants' loss.

F. QUANTUM

[31] Complainant invested R335 000. There appears to be little or no likelihood of complainant's capital being recovered.

[32] I therefore intend to award complainant his original capital with reasonable interest.

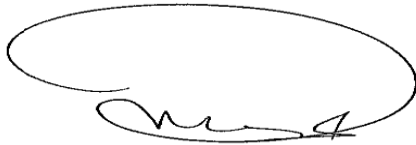
G. ORDER

[33] In the premises, the following order is made:

1. The complaint is upheld;
2. Respondents are hereby ordered to pay complainant, jointly and severally, the one paying the other to be absolved, the sum of R335 000;

3. Interest at the rate of 10.25% per annum, seven (7) days from date of this order to the date of final payment.

DATED AT PRETORIA ON THIS THE 29th DAY OF JULY 2016



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS