

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

HELD IN PRETORIA

CASE NO: FOC2629/05 GP (1)

In the matter between:

MALCOLM ARNOLD BIRKIN

Complainant

and

FIDENTIA FINANCIAL ADVISERS CC

Respondent

**DETERMINATION IN TERMS OF SECTION 28(1) (a) of the FINANCIAL
ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS Act')**

Introduction

The Parties

[1] Complainant is Dr Malcolm Arnold Birken a retired adult male residing at Warterkloof, Pretoria.

[2] Respondent is Fidentia Financial Advisers CC, an authorised financial services provider and Close Corporation duly registered in terms of the Close Corporations Act (Act No 69 of 1984) and having its principal place of business at Boardwalk Business Park – Block D c/o Hans Strydom Drive & Haymeadow Crescent, Pretoria.

Background

[3] Complainant is a settlor to the Kanzen Trust, ('the trust'). In terms of this trust Complainant settled an amount of money, a portion of which he sought to invest through the agreements referred to below.

[4] An agreement headed Investment Advice Agreement ('the agreement') was entered into at Pretoria on 29th October 2004 between Complainant and Respondent. The agreement defines the contractual relationship between the parties and details the investment objective and benchmark.

[5] The following provisions of the agreement are relevant:

[5.1] 'The clients investment objective....Capital preservation which is to outperform inflation consistently over a minimum period of three years;'

- [5.2] ‘The benchmark in accordance with the investment objective is a targeted return of inflation plus 3% p.a. net of annual fees and net of tax;’
- [5.3] ‘a period of at least three years must be noted in order to achieve the benchmark. It is not possible to guarantee the investment capital, nor the targeted return.’
- [5.4] ‘The management is done by Efficient Frontiers’
- [6] The management of the investment was to be conducted by Efficient Frontiers and a mandate (‘mandate’) was entered into on 18th October 2004 between a director of the Guardian Trust Company on behalf of the trust and Efficient Frontiers (Pty) Ltd for the management of the investments.
- [7] The mandate was entered into based on Respondent’s recommendations and hence fell within their overall management in terms of the agreement.
- [8] The mandate sets out the investment objectives, as ‘long term capital growth’ and ‘long term growth’
- [9] In a supplementary contract entered into with Sanlam Personal Portfolios on 27th October 2004 the signatory on behalf of the trust was, again, apparently a director of the Guardian Trust Company.

[10] The source of the funds for the investment emanates from the trust. The trust was set up in October 2003 and is administered by Guardian Trust Company Limited, St Helier, Jersey.

[11] Complainant and his spouse, Maritha Birken, are also beneficiaries of the trust.

[12] The following provisions of the trust document are relevant:

[12.1] ‘Discretionary Trust – with all powers and discretions vested in the Trustees subject to the consent of the Settlor where required..’

[12.2] ‘Without fettering the Trustees discretions in any way I wish the Trustees to have regard to my wishes set out in my confidential Memorandum of Wishes..’

[12.3] ‘The Memorandum of Wishes is a single page letter addressed to the Trustees and expresses the manner in which you desire the Trustees to deal with the administration of the trust fund and distributions from your trust. However the memorandum is not binding on the Trustees and their discretion prevails.’

- [13] In short it is the trustees that make decisions and enter into contracts on behalf of the trust.
- [14] Pursuant to the agreement a gross investment of R 1 596 394.50, was made into the Money Market Portfolio with Sanlam Personal Portfolios on 10th December 2004. The net investment after costs had been deducted was R1 570 961.31.
- [15] Of the R1 570 961.31 an amount of R460 000 was retained in the RMB Money Market Fund in order that a monthly income of R13 000 could be drawn, and the balance of R1 110 961.31 was transferred to the Efficient Frontiers Flexible Fund of Funds to obtain capital growth.
- [16] Between the period 23 December 2004 to 23 August 2005, Complainant withdrew nine monthly amounts of R13 000 each, totalling R117 000. He also withdrew a further amount of R25 000. The combined total amounts to R142 000.
- [17] On 13 June 2005 Complainant sent an e-mail to Respondent advising as follows:-
‘I have no choice but to make a change with my (sic) investments’
- [18] Complainant further states in the said e-mail; ‘As you know from our earliest discussions, I was in urgent need of an income having lived from my capital for a long time. As this situation has not changed from a investment aspect, I have no option but to change the investments’

[19] In essence the return on investment could not provide the income required by Complainant without eating into his capital.

[20] The value of the investment as at the 23 August 2005 was R1 505 139.54.

The Complaint

[21] The Complainant in SECTION C of the Complaint registration form states:

[21.1] ‘I told him that I needed income rather than capital growth’;

[21.2] ‘I needed an investment that would provided (sic) a quick return, as my previous investments had given only very small returns for the past two years and I had been living off my capital for that period’;

[21.3] ‘I am 74 next birthday’

[22] When asked in SECTION D, as to how he would like the complaint resolved the Complainant stated; ‘all costs related to this investment’.

Determination

[23] In order to qualify for adjudication before this Office, a complaint must qualify as such. In terms of the FAIS Act, a complaint is defined as:-

‘....a specific complaint relating to a financial service rendered by a financial services provider or representative.....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;

[24] Section 20 (3) of the FAIS Act states:-

‘The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all circumstances, with due regard to-

(a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and

(b) the provisions of this Act’

[25] It is clear from Section 20 (3) (a) of the FAIS Act that due regard will be paid to ‘the contractual arrangement or other legal relationship between the complainant and any other party to the complaint’.

[26] The investment involved trust assets and hence the agreement entered into between Complainant in his personal capacity and Respondent purporting to deal with Trust assets would not normally be binding on the trust.

[27] The agreement was entered into with the Complainant personally and bears no reference to Complainant acting in a representative capacity. In addition the contract with Sanlam and the mandate were specifically concluded with the trust company.

[28] A Trust is a separate legal entity in Law and cannot be treated merely as an extension of Complainant’s personal assets. It is evident from the papers that the Complainant does not appreciate this distinction.

- [29] It is apparent that the drafter was also not aware of the separate legal identity of the trust. This Office gives notice that it will look very carefully at instances where disclosures have been made or contracts entered into with unauthorised parties without the necessary resolutions or written authority.
- [30] In a telephonic discussion with Mr Harry Boxall the Deputy Trust Manager of Guardian Trust Company Limited it became apparent that the trustees did not intend to raise the issue of authority and hence by their conduct effectively ratified the agreement.
- [31] It is clear that the financial service was rendered to the Trust and not Complainant personally. In the circumstances Complainant is not a complainant as defined in the FAIS Act. On this basis alone the complaint stands to be dismissed.
- [32] However a financial service has been rendered and this Office will give due consideration to what is equitable in all circumstances.
- [33] The manner in which the parties were cited in the agreement, may have led to some confusion on the part of Complainant and this cannot be discounted. This Office will therefore look at whether the complaint itself had any merit.

- [34] It is clear from Complainant's comments that he wanted a 'quick return'. This statement, when coupled with other evidence clearly confirms that the fundamental basis of this complaint relates to investment performance.
- [35] Consideration must be given to the provisions of the agreement, which set out the investment objective as Capital Preservation, with a targeted return of inflation plus 3%.
- [36] The agreement is clearly in line with the mandate which sets out the investment objectives of the client as long term capital growth.
- [37] Complainant's statement that he needed income rather than capital growth, and an investment that would provide a quick return is not substantiated by the papers. In fact, the opposite is evidenced. The documents refer to capital preservation, long term growth and a targeted return. It is self evident that capital preservation requires a more prudent investment strategy.
- [38] In order to achieve a quick return the Complainant would need to have taken on a much higher level of risk. Complainant's age -74yrs- and his circumstances; 'I have been living off my capital' would have made such a course of action imprudent. In short Complainant cannot have his cake and eat it.

[39] Complainant was invested for a relatively short period and hence any assessment of the investment performance against the objective is problematic. The agreement specifically states that ‘it is important that a period of at least three years must be noted in order to achieve the benchmark.’

[40] Rule 4 (f) of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers, 2003 to the FAIS Act as published in the Government Gazette on the 8th August 2003, states:-

‘The complaint must not relate to the investment performance of a financial product which is the subject of the complaint, unless such performance was guaranteed expressly or implicitly or such performance appears to the Ombud to be so deficient as to raise a prima facie presumption of misrepresentation, negligence or maladministration....’

[41] After careful consideration of all the facts I am unable to find any evidence that would support a finding as required in terms Rule 4 (f), either that; ‘performance was guaranteed expressly or implicitly or such performance appears to the Ombud to be so deficient as to raise a prima facie presumption of misrepresentation, negligence or maladministration’

[42] In closing I note that the educational level of Complainant is very relevant. Complainant holds a doctorate in economics and a Masters in Business

Administration. The various correspondences indicate that he entered into this matter with his eyes wide open. When he did not get the returns that he wanted he changed his mind and the mandate which he had provided to Respondent.

Order

The following order is made:

Complainant is dismissed in terms of Rule 7 (b) (i) of the Rules Proceedings of this Office.

DATED AT PRETORIA ON THIS THE 8th DAY OF DECEMBER 2006



CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS