

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

CASE NUMBER: FAIS 03090/12-13/ GP 1

In the matter between:

JOHANNA ALETTA DE BEER

Complainant

and

ALESIO MOGENTALE

First Respondent

INTROVEST 2000 CC

Second Respondent

**DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL ADVISORY
AND INTERMEDIARY SERVICES ACT, (ACT 37 OF 2002), (the Act)**

A. INTRODUCTION AND FACTUAL BACKGROUND

[1] On or about 23 August 2010, on the advice of first respondent, complainant invested an amount of R400 000 (four hundred thousand rand) into BondCare Trust.

[2] The interest on this investment was to be paid monthly.

[3] On the 22nd of August 2011, complainant made a further investment in the amount of R115 000 (one hundred and fifteen thousand rand).

About BondCare Trust

[4] BondCare was marketed to potential investors as an answer to buyers of immovable property, who often did not have the necessary funds to pay the transfer duty and transfer fees. Thus BondCare presented an opportunity for investors to advance their money to these potential buyers at an attractive interest rate, thereby using the money as bridging finance in conveyancing transactions.

[5] According to documentation provided by BondCare Trust, the funds were allegedly transferred into an attorneys' trust account where it would be protected by the Attorneys' Fidelity Fund.

[6] Funds could be withdrawn by way of giving 90 (ninety) days' notice and the investment was said to generate interest of 18 % per annum.

[7] During November 2009 the Registrar of Banks appointed an investigator to establish whether BondCare or any of its associated entities were conducting the business of a bank.

[8] Following the aforesaid investigation, BondCare introduced a new funding model in 2010. As such, two new entities were established known as BondCare Trust Association, t/a BondCare Trust and BondCare Financing CC, (BondCare CC).

[9] The new model however, was nothing more than a smoke screen, since the underlying business model remained the same. Respondent and his colleague, Mr Smit¹ remained at the helm of BondCare CC.

[10] The new model replicated what the original BondCare Trust was doing. For one, it allegedly advanced investor's money to conveyancing attorneys to provide bridging finance for immovable property. The only difference being that in advancing the money to the attorneys, BondCare CC acted as an agent of the investor, for a fee. Investors further became members of the Association and were entitled to receive interest on their investments.

[11] BondCare CC was marketed as a low risk investment and was said to be licensed as a Financial Services Provider with license number 9564. The truth however, is that no entity in the BondCare stable had ever been licensed. Second respondent, being member of first respondent, allowed its license to be used by BondCare.

B. THE PARTIES

[12] Complainant is Mrs Johanna A de Beer, an adult female aged 74, residing in Gauteng. The complaint was submitted on behalf of her disabled daughter, Ms Tersia Beukes in whose name the investment was made. The complainant is the legal guardian of Ms Beukes and financially responsible for her.

[13] First respondent is Mr Alesio Mogentale, an adult male and key individual of the second respondent.

¹ Louis Jeremia Cornelius Smit was at all material times either a director or member of BondCare, BondCare Financing and BondCare Trust.

[14] Second respondent is Introvest 2000 CC, registration number 1991/002857/23, a close corporation duly incorporated in terms of South African Laws, with its business address noted in the regulator's records as 604 Amandelboom Road, Doornpoort, Pretoria, Gauteng. Respondent's license was withdrawn on 12 May 2015.

[15] I refer to first and second respondents as respondent. Where appropriate I specify.

C. THE COMPLAINT

[16] From the foregoing factual background, the crux of complainant's complaint is that following the misrepresentation and false information by respondent, complainant was persuaded to invest her funds in BondCare Trust. Not knowing anything about "property investments", she was assured that it was a safe investment.

[17] As a result of the respondents' advice, complainant invested a substantial amount of R515 000 (five hundred and fifteen thousand rand) of her daughter's funds into BondCare Trust. Complainant stated in her complaint letter that the purpose of the investment was to ensure that her daughter is taken care of when she and her husband are no longer around.

[18] Complainant indicates that on or about June 2012, the monthly interest payments ceased. The complainant notes that various attempts were made to contact respondent. First respondent's wife and son, both covering for him, stated that first respondent was supposedly on holiday, while at the same time, also in hospital. The only manner in which complainant could succeed in meeting with respondent again, was to pretend that they wanted to make another investment. It was only at

this meeting that complainant was advised of the Reserve Bank's investigation into BondCare practices along with the revelation that the money had been frozen.

D. RELIEF SOUGHT

[19] Complainants seeks repayment of the full capital amount of R515 000.

E. RESPONDENT'S VERSION

[20] During July 2012, the complaint was, referred to respondent in terms of Rule 6(b) of the Rules on Proceedings of this Office, (Rules) to resolve it with complainant. A response was received from second respondent on the same day. The response merely directed the office to Mr Jaco Spies², however, none of the questions raised in the original letter had been responded to. On the 1st of August 2012, the complaint was again referred to respondent who again directed the office to Mr Spies.

[21] Subsequently on the 6th of August 2012 a further letter was addressed to the respondent, this time pointing to the General Codes and the possible contravention thereof; at the same time requesting respondent's response to same. To date no reply had been received to the said letter.

[22] On 7 February 2014 and 26 February 2016 respectively, the FAIS Ombud addressed correspondence to respondents in terms of Section 27(4) of the FAIS Act informing them that the complaint has not been resolved and that the office intended to investigate the complaint. Respondents were requested to provide certain information for the office's investigation to commence and further warned

² The investigator duly appointed by the SA Reserve Bank to investigate the conduct of Bondcare.

that in the event the respondent failed to provide the required information, the complaint would be determined on the basis of the information before this office.

[23] Despite the FAIS Ombud's best efforts, no response to the aforesaid letters have been received. Respondents were furthermore afforded ample opportunity to give their response to the complaint.

[24] The only submission that made was a request that this office contact Mr Jaco Spies for further information along with an insinuation that this office, (with reference to the Sharemax Property Syndication), is doing nothing about similar matters, thereby allowing the people responsible to get away with it.

[25] The absence of respondent's response on the other hand, along with his sweeping statements about the conduct of this office are indicative of his nonchalant attitude towards complainant and the devastation he has caused in her life.

F. DETERMINATION

[26] Having received neither the requested response nor the supporting documentation, the matter is determined on the basis of complainant's version.

[27] The issues for determination therefore are:

27.1 Whether respondent, in rendering financial services to complainant, violated the Code and the FAIS Act in any way. In specific terms, the question is whether complainant was appropriately advised, as the Code demands;

27.2 In the event it is found that respondent breached the Code and the FAIS Act, whether such breach caused the loss complained of:

27.3 Quantum.

G. LEGISLATIVE FRAMEWORK

[28] It is appropriate at this stage to set out the applicable provisions of the FAIS Act and General Code of Conduct, (the Code) which are relevant in the present matter.

[29] Section 16 (1) of the FAIS Act provides:

‘A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions, that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied and that for those purposes authorised financial services providers, and their representatives, are obliged by the provisions of such code to-

(a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;

(b) have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities;

(c) seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;”

Section 16(2) further provides that:

“A code of conduct must in particular contain provisions relating to-

(a) the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;

(b) adequate and appropriate record-keeping;

H. GENERAL CODE OF CONDUCT

[30] Section 2, of Part II of the General Code provides:

“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.”

[31] Section 3(1) provides that:

(1) When a provider renders a financial service –

(a) Representations made and information provided to the client by the provider –

(i) Must be factually correct;

(ii) Must be provided in plain language, avoid uncertainty or confusion and not be misleading;

(iii) Must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client.

(iv) Must be provided timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction.

[32] Section 3(1)(b) notes that a provider and a representative must avoid or mitigate any conflict of interest between the provider and the client or the representative of a client. In this instance “conflict of interest” is defined as “.....*any situation in which a provider or representative has an actual or potential interest that may, in rendering a financial service to a client –*

(a) Influence the objective performance of his, her or its obligations to that client; or

(b) Prevent a provider or representative from rendering an unbiased and fair financial service to that client, or from acting in the interests of that client, including, but not limited to –

- (i) A financial interest;*
- (ii) An ownership interest:.....”*

[33] Section 8(1) of the General Code of Conduct provides that a provider must, prior to providing a client with advice:

(a) Take reasonable steps to seek from the client appropriate and available information regarding the client’s financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;

(b) Conduct an analysis, for purpose of the advice, based on information obtained;

(c) Identify the financial product or products that will be appropriate to the client’s risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangement; and....”

Did respondent comply with the FAIS Act and the General Code when rendering the financial services to complainant?

[34] There is no evidence whatsoever that respondent assessed the risk capacity and profile of complainant prior to recommending the said investment. There is no relevant information relating to complainant’s circumstances and in this instance, her daughter in whose name the investment was made. How t respondent was therefore able to appreciate complainant’s capacity for risk is a mystery. It is

evident that respondent did not comply with the provision of Section 8(1)(c) of the Code.

[35] Complainant was under the impression that she was making a legitimate investment into a safe product. Evidence provided indicates that this is not the case. BondCare solicited investments from members under the guise that the funds were protected by the Attorneys Fidelity Fund. There was however no evidence to support this. No investor knew what happened to their money after paying it into BondCare. Not one set of audited financial statements were provided to demonstrate the financial wellbeing of BondCare. In addition, there was no credible process of verifying what happened to the funds after they were paid to BondCare.

[36] There were simply no visible means of holding first respondent and Smit, the two dominant individuals in BondCare to account. Thus, the claims made by first respondent about the alleged safety of the BondCare investment were nothing more than lies to lure unsuspecting investors.

[37] Predictably, as soon as the money was paid into BondCare, first respondent and Smit, hiding behind an undisclosed conflict of interest, started paying themselves undisclosed amounts of money from investors' funds.

[38] Complainant was misled by respondent. Not only that, respondent failed to place complainant in a position where she could make an informed decision about the BondCare investment, thereby contravening Section 3(1)(a)(iv) of the Code.

[39] The information uncovered during the course of the investigation indicates that respondent was not merely providing a financial service with regard to a product provider; that is at arms-length. On his own version, first respondent stated that whilst he was still in the employment of ABSA, he referred clients to Smit to invest money in BondCare Trust in light of the returns the product was providing. Because of a policy at Absa, respondent subsequently resigned and started his own brokerage³ from where he would invest money in BondCare on behalf of his clients. He would earn a 6% commission on every investment.

[40] First respondent states that he was approached by Smit to become a trustee of BondCare, a position which he accepted and maintained for approximately two years. Due to internal conflict with other trustees, he resigned and started BondCare Financing in 2010, the vehicle that was ultimately used to finance the bridging transactions. First respondent is noted as the sole member of BondCare Financing, registration number 2010/027207/23. All indications are that the funds were paid into the account of BondCare Trust.

[41] Respondent as an insider knew there were no governance arrangements and no measures to protect investors from embezzlement by the very trustees who were meant to safeguard investors' interest. Hiding behind an undisclosed conflict of interest, respondent corralled complainant and other investors to the BondCare stable, where respondent and his colleagues had unbridled control of investors' funds. BondCare was by no means an investment but a cesspit.

³ Introvest2000 CC, FSP 9564

[42] Based on the aforesaid, it is clear that respondent could not be objective and treat complainants fairly while rendering financial services to them. Respondent failed to disclose his financial interest to complainant and his actions are a contravention not only of Section 3(1)(b) of the Code, but also of Section 4(1)(d). The latter states that a client should be informed if a provider directly or indirectly holds more than 10% of the relevant product supplier's shares, or has any equivalent substantial financial interest in the product supplier.

[43] Respondent also deceived complainant into believing that BondCare was a licensed financial services provider. This was part of respondent's designs to win investors' trust.

[44] Respondent failed to disclose the risk involved in the investment, in violation of Section 7(1). The section calls upon providers other than direct marketers to provide (a) '*reasonable and appropriate general explanation of **the nature and material terms of the relevant contract** or transaction to a client, **and generally make full and frank disclosure** of any information **that would reasonably be expected to enable the client to make an informed decision.** (my emphasis).*

[45] The risk inherent in the BondCare was by no means suitable to complainant's circumstances. There is little doubt that complainant would have risked her savings had she been properly informed about the lack of governance to protect the investors' interests in BondCare. This includes the falsification of BondCare's license status.

[46] For the record, respondent was asked to produce any record of advice reflecting the nature and process followed in advising complainant. Respondent failed to produce same. It is therefore not known what informed respondent that the investment was suitable to complainant's circumstances. See in this regard section 8(1)(a) to (c) of the Code.

I. FINDINGS

[47] In light of the evidence provided by complainants', the investment in BondCare Trust was made a result of respondents' advice.

[48] Respondent failed to place complainant in a position where she could make an informed decision about the BondCare investment.

[49] Outside of the complainant's version, there is no evidence pointing to respondent's adherence to the law. The information at this office's disposal points to the following conclusions:

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

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

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

- 49.4 There is no evidence that complainants' needs were assessed, nor that the risks inherent to this investment were properly explained to complainant, in violation of Section 7(1)(a) of the Code.
- 49.5 Respondent failed to render financial service honestly, fairly with due skill, care and diligence and in the interest of the client and the integrity of the financial services industry, thereby contravening Section 2 of Part II of the General Code of Conduct;
- 49.6 Complainant wanted a safe investment which required respondent to apply his mind and recommend a financial product that would suit those needs. BondCare simply did not fit that description.
- 49.7 Respondent failed to maintain his records of advice as required by Section 9 of the Code.

J. QUANTUM

[50] Complainants invested an amount of R515 000.

[51] It needs to be mentioned that this Office communicated with the liquidator, ML Stewart of Bombani Liquidators. According to his report which was submitted at the second meeting of creditors on 16 September 2014⁴, there was already a shortfall of about R23 million. Add to this the claim by the South African Revenue Services, (SARS) which had not been taken into account at the time the report was compiled and the prospects of a dividend towards the complainant becomes bleak as SARS' claim must be paid in full before any concurrent creditor can be

⁴ Report in the matter of the Consolidated Insolvent Estate of Louis Jeremia Cornelius Smit – Master's Reference number T3989/12 BC Trust Association – Master's Reference number T4352/12 BondCare Financing CC (In Liquidation) – Master's Reference number T3976/12 – Pretoria 16 September 2014.

paid. Complainant is one of the many concurrent creditors. To date, complainant has not seen a cent of her capital.

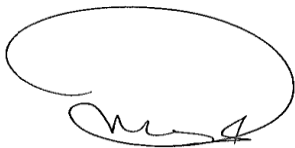
[52] It is fair to conclude that complainant has lost her investment.

K. THE ORDER

[53] In the premises, I make the following order:

1. The complaint is upheld.
2. The Respondents are ordered to pay the complainant, jointly and severally, the one paying the other to absolved, the amount of R515 000.
3. Interest at a rate of 10,25% from date of determination to date of final payment.

DATED AT PRETORIA ON THIS THE 18th DAY OF MAY 2016



NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS