

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

CASE NUMBER: FAIS 03094/12-13/ GP 1

In the matter between:

JOHANNES HENDRIK DE BEER

First Complainant

JOHANNA ALETTA DE BEER

Second 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 22 August 2011, on the advice of first respondent, complainant invested an amount of R200 000 (two hundred thousand rand) into BondCare Trust, following advice offered by first respondent. The interest on this investment was to be paid monthly.

[2] 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.

- [3] 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. Funds could be withdrawn by way of giving 90 (ninety) days' notice. The investment was to generate an income of 18% interest per year.
- [4] During November 2009 the Registrar of Banks appointed an investigator to establish whether BondCare or any of its associated entities are conducting the business of a bank.
- [5] As a result of the aforesaid investigation, BondCare introduced a new funding model in 2010. Two new entities were established known as BondCare Trust Association, t/a BondCare Trust and BondCare Financing CC, referred to as BondCare CC. The new models however were nothing more than a smoke screen, since the underlying business model remained the same. The respondent and his colleague, Mr Smit¹ remained at the helm of BondCare CC as its only member.
- [6] The new model which replicated what the original BondCare Trust was doing, allegedly advanced investor's money to conveyancing attorneys to provide bridging finance for immovable property. The only difference now was that 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.
- [7] BondCare CC was marketed as a low risk investment and was said to be licensed as a Financial Services Provider with license number 9564. However, no entity in

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

the BondCare stable had ever been licensed. The second respondent, of which the first respondent was a member, allowed its license number to be used by BondCare.

B. THE PARTIES

[8] First complainant is Mr Johannes H de Beer, an adult male pensioner aged 80. The second complainant is Mrs Johanna A de Beer, an adult female aged 74 and married to the first complainant. They reside in Gauteng.

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

[10] 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 number 9564 was withdrawn on 12 May 2015.

[11] I refer to first and second complainants as complainant and to first and second respondents as respondent. Where appropriate I specify.

C. THE COMPLAINT

[12] From the foregoing factual background, the crux of the complainant's complaint is that following the misrepresentation and false information by respondent, complainant was persuaded to invest their funds in BondCare Trust during August 2011. They claim because they did not know anything about property investments, they accepted it when respondent assured that it was a safe investment and invested R200 000 into BondCare.

[13] Complainants argue that respondent's failure to render financial services in line with the FAIS Act and the General Code of Conduct, which includes respondent's failure to appropriately advise complainant and disclose the risk involved in the BondCare investment, resulted in the loss of complainants' money.

[14] Complainant indicates that on or about June 2012, the monthly interest payments ceased². Various attempts to contact respondent for his help were all unsuccessful. First respondent's wife and son, both covering for him, stated that he was supposedly on holiday, and at the same time, in hospital. It was only when complainant suggested he wanted to make a further investment that respondent availed himself for a meeting with complainant. During the meeting, complainant was advised of the Reserve Bank's investigation into BondCare's practices along with the report that its bank accounts had been frozen.

D. RELIEF SOUGHT

[15] Complainants seek payment of the capital amount of R200 000.

E. RESPONDENT'S VERSION

[16] During July 2012 the complaint was referred to respondent in terms of Rule 6(b) of the Rules on Proceedings of this Office to resolve it with complainant. The aforesaid correspondence was resent to the first respondent on 4 December 2012 and 4 June 2013 respectively.

² Refer in this regard to the information in *De Beer obo Beukes v Introvest 2000 May 2016* where the second complainant submitted a complaint on behalf of her disabled daughter

[17] A reply was received on 5 June 2013 from first respondent's wife, Mrs Tina Mogentale which included a so-called sworn affidavit made by first respondent (now her ex-husband) which provided details of his involvement with BondCare Trust and Mr Smit. I will deal with the affidavit later in the determination.

[18] On 1 August 2013 and 26 February 2016 respectively, the FAIS Ombud addressed correspondence to the respondents in terms of Section 27(4) of the FAIS Act informing them that the complaint has not been resolved and that the office was proceeding towards an investigation.

[19] Despite the FAIS Ombud's best efforts, no response to the aforesaid letters has been received. The respondents were furthermore afforded ample opportunity to give its response to the complaint. The only submission that was made, was an attempt to justify its conduct as far as it relates to the business dealings with Mr Smit. Despite being advised that said response has not answered the complaint, a proper response was not received, nor was any of the required documentation presented to the office. The absence of a response is certainly indicative of the respondents' attitude towards its former client.

F. DETERMINATION

[20] Having received no further response or any supporting documentation, the matter is determined on the basis of the complainant's version.

[21] The issues for determination therefore are:

21.1 Whether the respondent, in rendering financial services to the complainant, violated the Code and the FAIS Act in any way. In specific terms, the

question is whether the complainant was appropriately advised, as the Code demands?

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

21.3 Quantum.

G. LEGISLATIVE FRAMEWORK

[22] 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.

[23] 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

[24] 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.”

[25] 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.*

[26] 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:.....”

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

[28] There is no evidence whatsoever that the respondent assessed the risk capacity and profile of the complainant prior to recommending the said investment. Likewise, no evidence that relevant and available information pertaining to complainant’s circumstances was collected and analysed. How the respondent was able to

appreciate the complainant's capacity for risk is a mystery. Thus it can be concluded that respondent failed to comply with section 8 (1) (a) (b) and (c).

[29] Complainant was under the impression that they were making a legitimate investment into a safe product. Evidence provided indicates that this is not the case. BondCare solicited investments from members of the public under the auspice that these funds are protected in the trust account of an attorney, 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.

[30] 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.

[31] 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 investor's funds. I note from the affidavit³ provided to this office that first respondent estimated the value of his investment book to be R11 554 407.70. First respondent further confirms that he earned commission of 6% on each investment, which would bring the estimated amount he made as commission to R693 264. Given the disregard for the FAIS Act, it is not

³ Signed and dated 25 September 2012

clear whether such commission respondent earned was ever disclosed to complainant.

[32] Complainant was misled by respondent and respondent failed to place complainant in a position where they could make an informed decision about the BondCare investment, thereby contravening Section 3(1) (a) (iv) of the Code.

[33] The information provided during the course of the investigation indicates that the respondent was not merely providing a financial service with regard to a product provider; that is at arms-length. By its own admission, 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, he subsequently resigned and started his own brokerage⁴ from where he would invest money in BondCare on behalf of his clients.

[34] First respondent states that he was approached by Smit to be 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.

[35] 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' interests. Hiding behind an undisclosed conflict of

⁴ Introvest2000 CC, FSP 9564

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.

[36] Based on the aforesaid, it is not clear how respondent could possibly perform his duties objectively when respondent had an undisclosed financial interest in the recommended product. Respondent failed to disclose this financial interest to complainant in contravention of sections 3(1)(b) and 4(1)(d) of the Code. 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.

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

[38] Respondent further 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).*

[39] The risk inherent in the BondCare was by no means suitable to complainant's circumstances. There is little doubt that complainant would not have risked their retirement savings had they been properly informed about the lack of governance to

protect the investors' interests in BondCare. This includes the falsification of BondCare's license status.

[40] For the record, respondent was asked to produce any record of advice reflecting the nature and process followed in advising the complainant. Respondent failed to produce same.

I. FINDINGS

[41] In light of the evidence provided by complainants, the investment in BondCare Trust was made a result of respondents' advice. Respondent failed to place complainant in a position where they could make an informed decision about the BondCare investment.

[42] Respondent failed to appropriately advise complainant in contravention of the General Code.

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

[44] 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.

[45] There is no evidence that complainants' needs were assessed, nor was the risk inherent to this investment properly explained to complainant, in violation of Section 7(1) (a) of the Code.

[46] 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.

[47] 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.

[48] Respondent failed to maintain his records of advice as required by Section 9 of the Code.

J. QUANTUM

[49] Complainants invested an amount of R200 000.

[50] 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 2014⁵, 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 paid. Complainant is one of the many concurrent creditors. To date, complainant has not seen a cent of her capital.

⁵ 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.

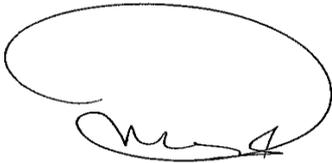
[51] It is fair to conclude that complainant has lost her investment.

K. THE ORDER

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

1. The complaint is upheld;
2. The Respondents are ordered to pay the complainants, jointly and severally, the one paying the other to absolved, the amount of R200 000.
3. Interest at a rate of 10.25% from a date SEVEN days from date of this determination to date of final payment.

DATED AT PRETORIA ON THIS THE 6th DAY OF JUNE 2016



**NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS**