

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

CASE NUMBER: FAIS 09238/12-13/ GP 1

In the matter between:

ANNA MAGARETHA MARIA ENGELBRECHT

Complainant

(Complainant in her personal capacity, as well as her capacity as executrix of estate late EDUARD HERMANUS JACOBUS ENGELBRECHT, in terms of the letter of executorship issued by the Master of the High Court dated 10 September 2012)

and

INTROVEST 2000 CC

First Respondent

ALESIO MOGENTALE

Second Respondent

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

A. INTRODUCTION

- [1] During 2013, the complainant approached this Office for assistance following failed investments made by the complainant into BondCare Trust, on advice of the respondent.
- [2] The complainant stated that they were promised returns of 18% per annum on the investments. The application form further indicates that funds were to be maintained in an attorneys’ trust account, and protected by the Attorneys Fidelity Fund.
- [3] The complainant learned in 2012 that Bondcare has been liquidated, and fears that her money is now lost.

B. THE PARTIES

- [4] The complainant is Mrs Anna Magaretha Maria Engelbrecht, an adult female whose particulars are on file with the Office.
- [5] The complainant also acts in her capacity as the executrix of the estate of her late husband, Mr Eduard HJ Engelbrecht. The complainant was duly appointed by the Master of the High Court on 10 September 2012.
- [6] The first respondent is Introvest 2000 CC, registration number 1991/002857/23, a close corporation duly incorporated in terms of South African laws, with its last known address noted in the regulator's records as 604 Amandelboom Road, Doornpoort, Pretoria, Gauteng. The second respondent's license number 9564 was withdrawn on 12 May 2015.
- [7] The second respondent is Mr Alesio Mogentale, an adult male, key individual and representative of the first respondent whose address is the same as that of the first respondent
- [8] I refer to first and the second respondent as 'the respondent'. Where appropriate, I specify.

About BondCare Trust

- [9] BondCare was marketed to potential investors as an opportunity to lend funds to buyers of immovable property who was not in a financial position to pay transfer duties and fees. BondCare facilitated this process of advancing funds to potential buyers at an attractive interest rate; effectively using investors' money as bridging finance in conveyancing transactions.
- [10] According to documentation provided by BondCare Trust, the funds were supposedly transferred into an attorneys' trust account where it would be protected by the Attorneys' Fidelity Fund.

- [11] Funds could be withdrawn by way of giving 90 (ninety) days' notice, and the investment was said to generate interest of 18% per annum.
- [12] 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.
- [13] Following the aforesaid investigation, BondCare in 2010 introduced a new funding model. Two new entities were established known as BondCare Trust Association t/a BondCare Trust and BondCare Financing CC (BondCare CC).
- [14] The new model however was an attempt to circumvent legislation, since the underlying business model remained the same. The respondent and his colleague, Mr Smit¹ remained in charge of BondCare CC.
- [15] The new model was a replica of what the original BondCare Trust was doing. It allegedly advanced investor's money to conveyancing attorneys to provide bridging finance for immovable property. The only difference was that in advancing the money to the attorneys, BondCare CC acted as an agent of the investor, for a fee. Investors became members of the Association and were entitled to receive interest on their investments.
- [16] BondCare CC was marketed as a low risk investment, and claimed to be licensed as a Financial Services Provider with license number 9564. However, the entity had never been licensed. The second respondent, being a member of the first respondent, allowed its license to be used by BondCare.

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

C. THE COMPLAINT

[17] During September 2009, the complainant made her first investment of R51 000 into Bondcare. The deceased, Mr Engelbrecht also invested an amount of R50 000. Subsequently, from March to December 2011, various further investments totalling R82 000 were made. The combined total for the investments were R183 000². The interest on the investments were to be capitalised annually.

[18] The deceased passed away on 8 April 2012 at the age of 62. Prior to his death, he was still employed. The complainant however was unemployed owing to a disability. She was diagnosed with Multiple Sclerosis and therefore unable to work. She utilised funds from insurance policies that were cashed in to invest in Bondcare.

[19] The complainant stated that when her husband passed away, she wanted to withdraw the money from the investments, however, she then learned that Bondcare was in liquidation. The complainant did submit a claim to Bombani Liquidators & Trustees, however, the complainant has not received her money back.

[20] Information received from the liquidators indicated that the respondent and Mr Smit operated a Ponzi scheme. The liquidators further confirmed in correspondence to the Office dated 27 February 2017 that from a legal perspective, the matter is complicated and it is unlikely that it would be resolved anytime soon.

D. RELIEF SOUGHT

[21] The respondent failed to render financial services in line with the FAIS Act and the General Code of Conduct ('the Code'), which includes the respondents' failure to appropriately advise the complainants and disclose the risk involved in the BondCare investment, which ultimately resulted in the loss of the complainants' capital.

² Whilst the initial contracts concluded were R50 000 respectively for each investor. However, proof of payment for the various additional amounts paid are available on the file.

[22] The complainant seeks payment from the respondent for the capital amount of R183 000. Documentation on file suggests that withdrawals were made from the investments in the amount of R31 000³. The amount claimable is therefore R152 000.

E. RESPONDENT'S VERSION

[23] On 14 March 2013, the complaint was referred to the respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office, (the Rules), to resolve it with the complainant. To date, no response was received from the respondent.

[24] Further correspondence was addressed to the first respondent on 16 May 2014 in terms of Section 27 (4) of the FAIS Act, informing the respondent that the matter had been formally accepted for investigation. The respondent was invited to provide his records in order to demonstrate the appropriateness of the advice rendered, taking into account the risk involved in the investment and matching that with the complainant's circumstances. No reply was received.

[25] Further questions were addressed to the respondent on 5 September 2014, however, to date no response was received.

F. DETERMINATION

[26] Having received no comprehensive response from the respondent addressing the allegation against him, nor any supporting documentation (including a record of advice), the matter is determined on the basis of the complainant's version.

[27] The issues for determination are:

³ Statements received from Bondcare confirms three withdrawals of R5000, R6000 and R20 000. The complainant was unable to verify this information.

27.1 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.

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

27.3 Quantum.

G. FINDINGS

The FAIS Act and the Code

[28] It is not in dispute that the respondent provided financial services to the complainant. The specific form of financial service that this complaint is concerned with, is advice. Advice in terms of section 1 of the Act, includes any recommendation, guidance or proposal of a financial nature furnished to a client. The advice has to meet the standard prescribed in the Code.

[29] Section 2 of the Code provides 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.

[30] Section 3 (1) of the Code further states that when a provider renders financial service, representations and information provided to the client must be factually correct, in plain language and must not lead to confusion or be misleading. It must further be adequate and appropriate in the circumstances, taking into account the reasonably assumed level of knowledge of the client. The client must also be placed in a position to make an informed decision.

[31] Section 3 (1) (b) also 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*” which can influence the objective performance of his obligations towards his client, or prevent a provider or representative from rendering an unbiased and fair financial service to his client. This includes a financial or ownership interest.

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

32.1 seek appropriate and available information regarding the complainant’s financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;

32.2 conduct an analysis for the purpose of the advice, based on the information obtained; and

32.3 identify the financial product or products that would be appropriate to the client’s risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any other contractual arrangement.

[33] Section 8 (1) (d) of the Code provides that where a financial product is to replace an existing financial product, wholly or partially, that the FSP has to fully disclose to the client the actual and potential financial implications, cost and consequences of such a replacement. The respondent has not provided any evidence that he complied with this section of the Code, taking into account that the complainant utilised insurance policies to fund the investments.

- [34] No evidence was presented that the respondent complied with the Code and assessed the risk capacity, profile or circumstances of the complainant prior to recommending the respective investments. The Code provides in section 8 (1) that a provider takes into account necessary and available information for the purpose of conducting an analysis. There is no suggestion that the respondent ensured that the investment is in fact suitable for the complainant and her late husband. What is evident from the facts is that the respondent sold the complainant the BondCare investment outside of any analysis of their needs or risk profile, in violation of section 8 (1) (c) of the Code.
- [35] The complainant was under the impression that they were making legitimate investments into a sound financial institution and that their funds were protected by the Attorneys Fidelity Fund. There were no credible means of verifying what happened to investors' funds after it reached the BondCare account.
- [36] The second respondent was approached by Mr 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 CC in 2010, the vehicle that was ultimately used to market to investors the bridging finance concept as an investment. I refer in this regard to earlier findings and determinations made by this Office in respect of the conduct of the second respondent and his partner, Mr Smit⁴.
- [37] The respondent was aware of the lack of governance within the entity and that no measures existed to protect investors from embezzlement of their funds by the trustees who were meant to safeguard the interest of investors.
- [38] It is clear from the aforesaid that the respondent could not be objective and treat the complainant fairly whilst rendering financial services to them. The respondent failed to

⁴ Determination FAIS 03914/12-13/ GP (1) JW Van Breda vs Alesio Mogentale and Introvest 2000 CC paragraphs 1 – 15; 43 – 57.

disclose his financial interest to the complainant, and therefore contravened sections 3 (1) (b) and 4 (1) (d) of the Code. This section provides 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.

[39] The respondent failed to disclose the commission her earned on the investment, in contravention of section 3 (1) (a) (iv) of the Code. The respondent also deceived the complainant into believing that BondCare was a licensed financial services provider.

[40] The respondent did not disclose all material aspects of the investment to his client, in violation of Section 7 (1) of the Code. The risk inherent in BondCare was not suitable for the complainant's circumstances, being an unemployed disabled individual who could not afford to lose any money. Had the complainant been aware of the true state of affairs within BondCare, they would not have risk their life savings to make the investments.

H. CAUSATION

[41] The questions that must be answered is whether the respondent's materially flawed advice and actions caused the complainant's loss, and secondly, whether the non-compliance of a provision of the Code can give rise to legal liability, whether in contract or delict.

[42] I refer to the decision of the former Appeals Board in the matter of *J&G Financial Service Assurance Brokers (Pty) Ltd and another v RL Prigge*⁵. The Board stated that:

"The liability of a provider to a client is usually based on a breach of contract. The contract requires of a provider to give advice with the appropriate degree of skill and care, i.e., not negligently. Failure to do so, i.e., giving negligent investment advice, gives rise to liability if the advice was accepted and acted upon, that it was bad advice, and that it caused loss.

⁵ FAB 8/2016, paragraphs 41 – 44

And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.

In the case of a provider under the Act more is required namely compliance with the provisions of the Code. Failure to comply with the code can be seen in two ways. The Code may be regarded as being impliedly part of the agreement between the provider and the client and its breach a breach of contract. The other approach is that failure of the statutory duty gives rise to delictual liability.

In both instances the breach must be the cause of the loss.....”

[43] There is sufficient information to suggest that the respondent had not been honest with the complainant about the nature of the investments, or his involvement in the entity. The second respondent being aware of what occurred inside BondCare, still persuaded clients that the investments in BondCare were safe, that BondCare was a licensed institution and that funds were protected by the Attorneys Fidelity Fund.

[44] The respondent was at all times aware that they were putting investors' funds into jeopardy. The harm that could materialised from these actions was therefore foreseeable. I conclude that the complainant's money had been misappropriated. The respondent's actions therefore caused the complainant's loss.

I. ORDER

[45] 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 R152 000.

3. Interest at a rate of 10% from date of demand, to date of final payment.

[46] Should any party be aggrieved with the decision, leave to appeal is granted in terms of section 28 (5) (b) (i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 28th DAY OF MARCH 2019



NARESH S TULSIE
OMBUD FOR FINANCIAL SERVICES PROVIDERS