

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

**CASE NUMBER: FAIS 02684/14-15/ GP 1**

**In the matter between**

**BHEKUYISE INNOCENT MTSHALI**

**Complainant**

and

**LUCKY MOTSOLO**

**First Respondent**

**ZANELE ELSIE MOTSOLO**

**Second Respondent**

**DOLLY MOTSOLO**

**Third Respondent**

**MOTSOLO'S TRADING AND INVESTMENT (Pty) Ltd**

**Fourth 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] The complaint arises out of an agreement to invest in shares, following advice from the respondent. Complainant was advised that the Motso's were in the business of 'buying and selling JSE shares under high gearing securities (CFDs and Currencies) to make profit in a short period'.

- [2] Utilizing savings he had accumulated, complainant transferred funds into a Standard Bank account ostensibly controlled by the first and second respondents jointly as CEO and Executive manager, respectively.
- [3] Complainant received a copy of the 'Investment Club Agreement Application Form' which he completed. This was duly signed by him and the third respondent.
- [4] It is an established fact that notwithstanding the respondents' claim that they were licensed financial services providers, with license number 44542 printed on their firm's stationery, none of the four were ever licensed according to the regulator's records.

## **B. THE PARTIES**

- [5] Complainant is Bhekuyise Innocent Mtshali, an adult male residing in Gauteng.
- [6] First respondent is Lucky Motsoto, an adult male, identity number 770205 5223 089, residing at 62 Duncan Street, Brenthurst, Brakpan, Gauteng.
- [7] Second respondent is Zanele Elsie Motsoto, an adult female, whose full and further details are unknown to this office. Second respondent's last known address is 62 Duncan Street, Brenthurst, Brakpan, Gauteng.
- [8] Third respondent is Dolly Motsoto, an adult female and employee of respondent, whose full and further details are unknown to this office. Third respondent's known address is 62 Duncan Street, Brenthurst, Brakpan, Gauteng.

[9] Fourth respondent is Motsoto's Trading and Investment (Pty) Ltd, a private company with registration number 2012/092047/07 duly incorporated in terms of the laws of South Africa, with its registered address being 62 Duncan Street, Brenthurst, Brakpan, Gauteng.

[10] I refer to all respondents simply as respondent. Where appropriate, I specify.

### **C. COMPLAINT**

[11] According to the complainant, he concluded an investment agreement with the respondents on 28 January 2013. In terms of the application form completed by complainant, an amount of R50 000 was to be paid to the respondents on the basis that same would be invested in the JSE. Within 75 working days a 100% profit pay out would be made to complainant. The contract term was for 15 weeks (75 working days) unless terminated earlier, in which case a 25% penalty would be levied against the invested amount.

[12] Complainant has presented proof to this Office that he indeed paid the amount of R50 000 into an account known as Motsoto's Trading and Investment Pty (Ltd) on 28 January 2013.

[13] Complainant also submitted a contract, noted as the 'letter of agreement' which indicates the investment as R100 000. The complainant indicated that he was requested to add a further R50 000 to the initial investment and also required to sign a further contract for the additional investment amount, which he signed on 23 May 2013. Complainant however confirmed that he could not afford the additional R50 000 respondent wanted him to pay and the investment was thus only for R50 000.

[14] Complainant, after expiry of the contract, contacted respondent about payment of his capital and interest, however, he was advised that respondent's bank account was closed and respondent did not have access to the funds.

[15] At the time of lodging the complaint, complainant had not received anything from the investment. Complainant states that prior to lodging his complaint he had made several enquiries in vain. Calls to respondent went unanswered. To date, complainant's capital and interest have still not been paid.

#### **D. RELIEF SOUGHT**

[16] Complainant seeks the return of his capital of R50 000.

#### **E. DETERMINATION AND REASONS**

[17] The issues for determination are:

17.1 Whether the respondents rendered financial services at all? If they did, whether the rendering was in compliance with the FAIS Act?

17.2 Whether respondent's conduct caused complainant the loss complained of?

17.3 Quantum of such loss.

***Whether the respondents rendered financial services at all? If they did, whether the rendering was in compliance with the FAIS Act?***

[18] During July 2014, 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. No response to this letter has been received.

[19] On 8 February 2016 and 10 February 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. The notice further indicated to respondents that in the event the complaint was upheld, they could face liability. Again, respondent failed to submit any response. The complaint is therefore decided based on the facts at hand.

[20] The regulator's records indicate that the Motsoto's had never been granted a license in terms of the FAIS Act. The representation that the respondents had an FSB license number 44542 must have been calculated to mislead investors to believe they are dealing with an authorised provider. It is reasonable to conclude that respondent knew that members of the public would have been induced by their false representation to invest their money with them.

[21] The application form briefly introduces the nature of the alleged investment activity. It reads:

*'Our service: We are buying and selling JSE shares under high gearing securities (CFDs and Currencies) to make profit in a short period of time mainly up to three months....Our contract shall continue for 15 weeks which is 75 working days unless earlier termination is required and one week (5 working days) notice should be given and 25 % early termination would be charged from deposited money. Our bank details .....*

[22] Out of what is set out in the application form, one can at least conclude that respondents represented that they were in the business of trading in high risk

securities, such as, contracts for difference, (CFDs) and currencies. Based on what is in the complainant's papers, it is not difficult to conclude that complainant in all probability did not understand what is meant and what risks are inherent in the activity claimed by respondents. A CFD is *'as an arrangement made in a futures contract whereby differences in settlement are made through cash payments, rather than the delivery of physical goods or securities. This is generally an easier method of settlement because losses and gains are paid in cash. CFDs provide investors with all the benefits and risks of owning a security without actually owning it'*<sup>1</sup>.

[23] Futures are more eloquently described in the unreported judgment of *Absa Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd*<sup>2</sup> where it is stated:

*'Futures and commodity options trading is among humanity's more impenetrable concepts. It involves selling what one does not own, and as a rule buying what one does not want. It is deeply shrouded in terminology that conceals its meaning. It operates in an arena where opinion is everything, where supply and demand are hard to distinguish from supposition and doctrine, and where inherent uncertainty has spawned an endless holy war between two religious—sounding antagonists, the fundamentalists and the chartists, not to mention the new breed of computer dependent faithful. Into this world comes the general public, eager to enjoy its riches and often unprepared to become its poor.'*

[24] There are a number of issues which raise suspicion about respondents' conduct. The first is the claim to have been awarded licence by the regulator

---

<sup>1</sup> Definition from Investopedia  
<sup>2</sup> case number 2009/354146 56 HC at para 1

when respondent knew fully well that they had never been licensed. I have already concluded this was deliberately calculated to mislead unsuspecting members of the public into believing they were dealing with a legitimate entity. The second refers to the two conflicting<sup>3</sup> documents, both purporting to be a true record of the agreement between the parties. The third is the undisputed version of the complainant regarding the advice that led to this investment. All of these, when looked in totality, lead one to conclude that complainant did not lose his money in an investment through normal market movements. There is no information to conclude that respondents were conducting a business in the true economic sense. I therefore conclude that complainant's money was stolen through fraudulent means with no chance of recovering it.

[25] It is worth noting some of the terms of the purported contract:

25.1 Paragraph 1.3 seems to be a futile attempt by respondent to contract out of any negligence. It states that:

*"...neither of the parties shall be held liable by and to the other for any injury, whether direct or indirect, specific or general, economic or moral, or any loss of income, without any limitation, regardless of whether the other party has or has not been informed of the probability of such injury or loss, until such time when the dictates of said agreement are expressly stated and known to the 'the parties'".*

---

<sup>3</sup> The conflict referred to relates to a material term, namely, the amount invested. One agreement evidences complainant having invested R50 000 and the other, R100 000.

I note this particular term is wide enough to allow a party to avoid liability for fraudulent acts. A party cannot contract out of liability for deliberate dishonest acts<sup>4</sup>.

25.2 Paragraph 1.5 deals with due compliance with the relevant legal requirements as dictated by the Collective Investment Schemes Control Act<sup>5</sup>. It is however, a pity that respondent did not bother to read the Act prior to quoting it. Of significance is section 2 (1) which states that “*A manager must administer a collective investment scheme honestly and fairly, with skill, care and diligence and in the interest of investors and the collective investment scheme industry*”. It is not clear how respondent saw this provision being applied in his operations.

25.3 Paragraph 1.6 stipulates that complainant shall, upon receiving cash returns in their trading account make good on their part by paying 60% commission in accordance with the agreement.

25.4 Paragraph 3.1 (c) deals with fees payable. Complainant is required to pay a 60% retainer which is to be maintained monthly throughout the contract.

The conduct of the respondents can only be described as criminal. Not only were these fees not justifiable, there is no doubt in my mind that complainant would not have agreed to pay more than half of his investment returns in fees to respondent.

---

<sup>4</sup> Wells v SA Alumenite Co 1927 AD 69 at 72; First National Bank of Southern Africa Ltd v Rosenblum H.  
<sup>5</sup> Act 45 of 2002



[26] The remainder of the “contract” should be dismissed for the nonsensical jargon it contains. It is unlikely that respondent even understood the bulk of the statements made in this document and could therefore not have expected complainant to understand, let alone comply with it.

[27] Complainant made the investment following the advice offered by respondent, which advice was in violation of the FAIS Act. What respondent did was entice complainant to invest in a scheme which had all the signs of a pyramid scheme. Respondent had no intention of complying with the so-called agreement he signed with complainant.

#### **F. QUANTUM**

[28] Complainant invested R50 000 and never received anything thereafter. There is no evidence that any economic activity was taking place to justify the excessively high returns promised to complainant.

[29] Complainant lost his capital and any interest which he might have earned had his funds been placed in a legitimate entity. I therefore intend to award complainant his original capital with reasonable interest.

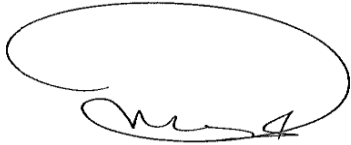
#### **G. ORDER**

[30] 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 R50 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 20<sup>th</sup> DAY OF JUNE 2016**



---

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