

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS
PRETORIA

Case Number: FOC1291/07-08/EC (1)

In the matter between:-

ELIZABETH SEPTEMBER

Complainant

and

SANLAM LIFE INSURANCE LIMITED

Respondent

**DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY
AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')**

Parties

[1] The Complainant is Ms Elizabeth September, a pensioner of Buffalo Flats, 23 Pascoe Road, EAST LONDON.

[2] The Respondent is Sanlam Life Insurance Limited, a public company duly registered in accordance with the laws of South Africa. It is also a registered Financial Services Provider. Its registered office, alternatively its principal place of business is at 2 Strand Road, BELVILLE, Western Cape.

The Background

[3] On her retirement from her job, the complainant received a lump sum from a pension fund of which she decided to invest an amount of R254 000.00 and live off the income generated by the investment. (She had by then already been a widow for some fifteen years.) She says Mr Willie Jordaan, an employee of the respondent, motivated her to invest with Fidentia Asset Management ('Fidentia'). He, Jordaan, was instrumental in making the necessary arrangements with a Mr Heydenrych of Antheru Investment Trust ('Antheru'), which in turn placed the investment amount with Fidentia. According to a so-called investment certificate issued to the complainant by Antheru the latter is a private investment club of which F H Hydenrych is a trustee. According to the complainant, the investment was made in November, 2004. It is confirmed in a letter dated 17 November 2004 by Antheru to the complainant.

[4] Complainant says Jordaan had promised her that she would get a return of 20% interest per month on the investment. (It appears this is incorrect as the documents from Antheru she has provided to this Office mention 20 per cent per annum.) She received monthly 'profit' (as it is referred to in the Antheru investment papers) until February 2007 whereafter it ceased. She heard in the media that Fidentia had been placed under curatorship. She approached the respondent ('Sanlam Life') to enquire about the fate of her investment. In a letter dated 1 June 2007, Sanlam Life informed complainant that her *"investment was with Antheru Investment Trust...and with Fidentia Investment Managers...both of which are in no way connected to Sanlam Life..."* and denied liability for any loss she may have suffered. She was further

advised that she should approach Fidentia and/or Antheru and if she was not satisfied with the outcome, to approach this Office.

- [5] On 22 June 2007 complainant wrote to the Curator of 'Fidentia/Antheru' Investments to enquire about the fate of her investment. On the same day she also wrote to this Office complaining that *"As a direct result of a consultant, then in the employ of Sanlam, I invested my pension with Fidentia."* She sought some assurance from this Office that she was *"not going to be left destitute"* and was extremely anxious in this regard.

The relief sought by Complainant

- [6] Complainant would like to have her investment of R254 000.00 refunded to her.

Investigation by this Office

- [7] In her complaint registration form the complainant states that her complaint is against Fidentia Asset Managers (Pty) Ltd. In answer to the question who she dealt with she said *"Mr Willie Jordaan"*. The complaint was therefore referred to the respondent - the employer of Jordaan.
- [8] A detailed response was received from the respondent and this Office would like to express its grateful acknowledgment of the co-operation received from respondent in an attempt to resolve the matter and at least two other similar complaints I have received.

[9] Respondent says:

9.1 Jordaan was a financial advisor with it until his contract was terminated following disciplinary proceedings in May 2007 as a result of the investment advice he gave to clients regarding Fidentia. It also debarred him.

9.2 Jordaan placed investments “for clients at Fidentia...*“[c]ontrary to Sanlam Life’s explicit instructions as to where investments may be placed...”*”

9.3 He had placed investments for 19 clients with Fidentia. Of these, 17 clients (with a total investment value of R2.19 million) were still invested with Fidentia at the time the order for judicial management was granted. Respondent goes on to acknowledge that the clients will in all likelihood lose their full investments or most of them.

9.4 As part of its investigations the respondent’s senior manager of forensic investigations interviewed a number of its clients.

9.5 The investigations revealed that *“most of these clients were retired, were older than 55 years and their knowledge of investments and financial markets were not very sophisticated. In many cases the money invested with Fidentia was their only (or the main source of their) funds available from which to provide an income for themselves.”*

9.6 Respondent expresses the view that Jordaan was dishonest or at the very best grossly negligent in placing the investments for these clients with Fidentia.

9.7 Respondent says it advised its clients that it does not appear that Sanlam Life is involved in the matter and recommended that they submit their complaints to the curators of Fidentia or the FAIS Ombud.

The Issues

[10] The crisp question then is whether respondent may be held liable for the conduct of its employee Jordaan, who, according to respondent, has more than 23 years experience in the financial services sector. In other words whether Jordaan acted within the course or scope of his employment or did he embark on a 'frolic of his own' as contended for by respondent.

Determination and Reasons Therefore

Was Jordaan an employee of the respondent?

[11] Respondent acknowledges that Jordaan was its 'representative'. He was therefore its employee¹. He was dismissed after a disciplinary inquiry.

Did Jordaan act within the course or scope of his employment?

[12] It is trite that an employer is not liable to third parties for all delicts committed by his or her employee². The delict must also have been committed by the employee in the

¹ Section 1 of the FAIS Act defines a 'representative' as '*any person who renders a financial service to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandatory agreements...*'. Certain exclusions are then listed which are not relevant for present purposes. See also the definition of 'representative' in the Short Term Insurance Act 53 of 1998 and in the Regulations framed under the Long Term Insurance Act 52 of 1998.

course of the performance of his duties³. This is a question of fact. Some nexus must be established between the conduct of the employee complained about and the employment relationship. The reported cases show that it is often difficult to determine from the facts where liability should rest in any given circumstance⁴. Each case is therefore determined on its own merits.

[13] As mentioned above, a number of the respondent's clients were adversely affected by Jordaan's advice to invest in Fidentia. Many of them clearly appear to have based their decision to invest in Fidentia on the fact that Jordaan was an employee of the respondent.

[14] This is apparent from the various complaints to the respondent by some of its affected clients:

14.1 The complainant asks *'Am I to be left destitute as a result of the trust that I placed with (sic) the consultant who at the time was in the employ of Messrs Sanlam.'* In her letter⁵ to the forensic investigator of the respondent she says *'Mr Willie Jordaan from Sanlam came to see me, and I invested this money through him.'* And further, importantly, *'I had investments with Sanlam in the past and never experience (sic) any problems.'*

² Fouchè *Legal Principles of Contracts and Commercial Law*; (1990) 6ed (2004) 191.

³ *Ibid* 191 at para 2.10.2 where the author gives various examples from case law of actions falling within the course and scope of employment.

⁴ Para 16 to 18 below.

⁵ Dated 18 April 2007.

14.2 A client of respondent says its advisor, Mr Jordaan, never mentioned Fidentia to her and that she was shocked and misled by Sanlam's employee. (*'Sanlam se adviseur, Mnr Willie Jordaan het nog nooit die naam van Fedentia (sic) aan my genoem nie. Ek is geskok en mislei deur Sanlam se werknemer....'*)

14.3 Another says she invested a lump sum in *'Antheru Investments, which was advised to me (sic) by my Sanlam advisor...Willie Jordaan.'*

14.4 Yet another says *'I was advised by another person to contact Mr Jordaan with a view to invest an amount (sic) of R200,000. It was indicated to me that Mr Jordaan is a "SANLAM Advisor"....As a layperson, I was put under the clear impression that the product was marketed by him as an "employee" of SANLAM....I was misled by an employee of SANLAM.'*

[15] The common thread running through these complaints is that the complainant and the other investors mentioned above based their decision to follow Jordaan's advice to invest in Fidentia because they met him at his office in Sanlam or that he was from Sanlam and most importantly, as its employee. As mentioned above, in the case of the complainant she had previously invested with the respondent as well.

[16] Respondent says Jordaan's investing of client funds with Fidentia was contrary to its explicit instructions as to where investments may be placed. Where the employee is promoting partially the interest of the employer and partially his own, the employer will be liable⁶. In *Feldman v Mall*⁷ the employee had to deliver goods and return

⁶ Fouchè at 192.

⁷ 1945 AD 743

immediately to his place of work. On the way back he deviated from the route to partake of drink with his friends. Later, on his way back to his place of work, he knocked down and killed someone. The Court held that he had left his work only partially to promote his own interests. He was, however, still promoting the interests of the employer because he retained control of the vehicle and took it back to work later. The employer was held liable. The same viewpoint was held in *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport*⁸ and *Roux v Evkom*.⁹

[17] In *Ess Kay Electronics Pty Ltd v First National Bank of Southern Africa Ltd*¹⁰ it was held that the test was whether or not the actions of the employee had been authorised.

[18] In this matter before me the employee was promoting both his and his employer's interest. Furthermore, he was empowered to invest client funds but, was restricted as to where such investments were to be made. Respondent says Jordaan invested in an institution not authorised by it. The problem however, is that it could not be reasonably expected of the investors to know of this restriction.

[19] Respondent is no doubt a major role player in the financial services industry, hence the investors appear to have been lulled into a false sense of security because Jordaan was its employee. Complainant acted on Jordaan's advice because he was employed by the respondent.

[20] Given these facts and the equity jurisdiction conferred on me, I am of the view that respondent ought to be liable for the loss suffered by the complainant.

⁸ 2000 4 SA 21 (SCA).

⁹ [2002] 2 All SA 462 (T).

¹⁰ [2001] 1 All SA 315 (A)

Equity Jurisdiction

[21] The FAIS Act provides for disposal of complaints, *inter alia*, by reference to what is equitable in the circumstances.¹¹

[22] When this Office adjudicates complaints involving providers who have professional indemnity (PI) insurance, often the PI insurer will brief attorneys to represent the provider concerned. The FAIS Act does not allow legal representation as of right, it being within the Ombud's discretion. Where legal representation has been allowed the respondent's attorneys invariably adopt a rigid legalistic approach. This is also the case when an application for leave to appeal the Ombud's decision is made. I deem it appropriate therefore, to briefly elaborate on the concept of equity jurisdiction.

The concept of equity jurisdiction

[23] The concept of equity, while it may not be capable of precise definition, embraces notions of even-handedness, fairness and impartiality. It is a system of jurisprudence that supplements common and statutory law, when those bodies of law are inadequate in the attainment of justice.

[24] The notion of equity is not new. In our Labour Law, equity jurisprudence is part and parcel of the dispute resolution process between employer and employee. It is

¹¹ Section 20(3) *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 the 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.*

based, *inter alia*, on the idea of legitimate expectation. The Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) also refers to what is 'just and equitable' in a given circumstance. The preamble to the Act reflects its strong constitutional roots in the Bill of Rights (Chapter 2 of the Constitution of the Republic of South Africa Act, 1996).

[25] In a motor vehicle insurance case namely, *Labuschagne v Fedgen Insurance Ltd*¹² the year of manufacture of the car was falsely represented to be three years later than it actually was (1989 instead of 1986) by the motor vehicle seller. Unaware of the true situation, plaintiff insured it accordingly. When he claimed for the theft of the vehicle defendant sought to avoid liability on the grounds of the wrong information pertaining to the model having been provided by plaintiff. Marais J, not having equity jurisdiction, held, *'The Plaintiff has been the innocent victim of circumstances.'* He went on to suggest, *'In my view fairness (as opposed to law) would dictate that the defendant should pay the plaintiff the true value of his car when it was stolen. This is a matter to which the defendant will, I hope, give earnest consideration.'* The defendant accepted the suggestion by the learned Judge. However, this Office, as mentioned above, is enjoined (like the PIE Act in respect of land issues) by the FAIS Act to take into account what is equitable in the circumstances of the case.

[26] In *Port Elizabeth Municipality v Various Occupiers*¹³ Sachs J, in expounding on the concept of "just and equitable" in the context of land law said-

¹² 1994 2 SA 228 (WLD) at 239.

¹³ 2005 1 SA 217 (CC) at para 35.

‘The phrase ‘just and equitable’ makes it plain that the criteria to be applied are not purely of the technical kind that flow ordinarily from the provisions of...law.’

In other words, while one attempts to find solutions according to the law, its strict application may not always produce just results. I am mindful though, that the concept of equity must not be taken too far. As the FAIS Act says, it must be with reference to all the circumstances of the case, the contractual or other legal relationships between the parties and the provisions of the FAIS Act. Equity is an adjunct to the law, not its substitute.

[27] In *R(on the application of IFG Financial Services Limited) v FOS [2005] All ER (D) 301* a decision of the United Kingdom Financial Ombudsman Service was taken on review to the High Court. The firm was a financial advisor which wrongly recommended investments as being medium risk when, in fact, they were high risk. The investors suffered losses due to the fraud of a manager of one of the investment funds into which they had been advised to invest. The firm argued that as the losses were caused not by the unsuitable advice but by the fraud they were not liable to compensate the complainants. The fraud was unforeseeable and outside the firm’s duty of care. The ombudsman agreed that the fraud was not foreseeable but he did consider it fair and reasonable in all the circumstances that the firm should be required to compensate the investors. He decided it was neither fair nor reasonable to expect the investors to absorb the losses as the investment was not suitable for them and if the firm chose to make an unsuitable recommendation then it did so at its own risk.

The firm applied for Judicial Review of the ombudsman's decision on the basis that the ombudsman had failed to take account of the legal position in relation to causation and had wrongly concluded that the firm be held liable for unforeseeable losses.

The court found that whilst the ombudsman had to take account of the law, he was not required to decide a case in accordance with the law, as would a court, provided that his decision was fair and reasonable in all the circumstances. Only in cases where the ombudsman's decision of what was fair and reasonable was perverse or irrational would his decision be liable to be set aside by the court.¹⁴

[28] It is, in my view, equitable in the circumstances of this case before me that the respondent compensates the complainant for her loss.

[29] Respondent requested me, if I should find it liable to compensate the complainant, to make an order that it may recoup the amount of compensation from the pension proceeds due to Jordaan as its former employee. I am reluctant to accede to the request. This Office has had no submissions from Jordaan on this aspect as its focus was on the respondent as his employer. In any event respondent's request does not fall within the definition of a 'complaint' as defined in the FAIS Act. This office may only adjudicate a complaint as defined. I therefore deem it prudent that respondent, if it is so advised, approach an appropriate forum where Jordaan may have the opportunity to be heard, for the required relief.

¹⁴ From a paper titled 'DUE PROCESS and JUDICIAL REVIEW – The experience of the UK Financial Ombudsman Service,' delivered by Walter Merricks, Chief Ombudsman, at the International Financial Ombudsman Conference, Toronto, September, 2005. Mr Merricks also said: 'Interestingly the proprietor of the firm commented afterwards that he was a great supporter of the ombudsman scheme and that the case had only been fought at the insistence of his professional indemnity insurers.'

I make the following order:

- 1. Respondent is ordered to pay the complainant an amount of R254 000.00 within 14 days of date of this order.**
- 2. Respondent is to pay interest on the said sum at the rate of 15.5 per cent from 1 March, 2007 to date of payment.**
- 3. Complainant is to reimburse respondent by the amount of any refund she receives, if any, from the curators of Fidentia up to the capital amount.**
- 4. Respondent is to pay the case fee of R1 000.00 to this Office.**

Dated at PRETORIA this 31st day of March, 2008.



NOLUNTU N BAM

DEPUTY OMBUD FOR FINANCIAL SERVICES PROVIDERS