

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 09947/10-11/GP1

In the matter between:-

JOHANNES PETRUS SNYMAN

Complainant

and

SOUVENIR FINANSIËLE DIENSTE

1st Respondent

JAN PIETER ANDRIES SWANEPOEL

2nd Respondent

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

A. PARTIES

[1] The complainant is Johannes Petrus Snyman, an adult male, residing in Pretoria Tuine, Gauteng.

[2] First respondent is Souvenir Finansiële Dienste; a close corporation, Registration no. 2008/179764/23, duly incorporated in terms of South African law, with its principal place of business at 80 Karel Street, Schoemansville,

Hartbeespoort, 0216. First respondent was an authorised financial services provider in terms of the FAIS Act, with license number 37186. The license lapsed on 11 February 2011.

- [3] The 2nd respondent is Jan Pieter Andries Swanepoel, an adult male, who was at all material times hereto a key individual and authorised representative of the 1st respondent. For the purposes of convenience, and where appropriate, I refer to 1st and 2nd respondents collectively as respondent.

B. BACKGROUND

- [4] The complainant met the respondent approximately 9 years ago. At the time, the respondent was working as a financial advisor for a well-known bank. Shortly after they met, the complainant appointed the respondent as his financial advisor. The respondent left the employ of the bank a few years later and started to render financial services from his residence as Souvenir Finansiële Dienste. Since his appointment as the complainant's financial advisor, the respondent reviewed the complainant's investments and policies once or twice per year.

- [5] In 2009 the complainant suffered a heart attack and was assisted by respondent in preparing and submitting the claim with complainant's insurer. Not long after the proceeds of the complainant's claim were paid, the respondent informed him about an investment opportunity that could double his money in a matter of weeks. The respondent invited the complainant to his residence to meet a certain Attie van Deventer ('van Deventer'). The meeting ultimately led to the complainant entering into an agreement with van

Deventer to invest R300 000 in a 'Bank Guaranteed' investment. The complainant asserts that he made the investment as he trusted the respondent who assured him that the investment was safe. When the complainant did not receive his capital and interest at the maturity date of the investment, he sought answers from the respondent. According to the complainant the respondent reassured him that his money was safe. However, it is now three years since the date of the investment and complainant has not received any payment.

C. COMPLAINT

[6] The complainant's complaint is drafted in Afrikaans. What follows is a summarised translation thereof:

6.1 According to the complainant, at the end of 2009, his advisor of the past 5 years recommended that he invest in what he called a 'Bank Guaranteed' investment through a gentleman who purchased offshore guarantees in capital projects. The respondent allegedly assured the complainant that it was a good investment.

6.2 The complainant asserts that he asked the respondent whether the investments posed any tax implications and whether it was a safe investment. The respondent advised that tax was indeed payable on profits. He explained that the investment was safe and that he had to date received two payments from the same investment. The respondent also advised that brokers received payments every 6 weeks whereas investors would receive payments every 12 weeks.

However, due to bill discounting by banks the period would increase to 14 weeks.

6.3 After the first transaction the respondent informed the complainant that there were problems with the investment. The complainant was introduced to a certain Gerrie Nel ('Nel') who was according to the respondent taking over van Deventer's investments and would provide guarantees to investors.

6.4 According to the complainant, during the 13 weeks since making the investments he was continuously assured by the respondent that the investment was safe. However, at the end of July 2010 the respondent informed him that he appointed a person at the Hawks to ensure everything was in order and monies could be paid out. Complainant has since received the following text messages from the respondent¹:

- 6 August 2010 – *'Bank monies not cleared yet. Sorry this also very frustrating for me. Andre confirmed everything is under control.'*
- 10 August 2010 – *'Heard nothing yet. Andre available tomorrow. Know that I'm doing **everything** from my side'²*
- 13 August 2010 – *'Sorry for not getting back to you yesterday. Going to speak with Andre today and will ask him to arrange a meeting with you. He told me in the beginning that he works in his own way so I hope he agrees. According to him he is in total control and is sure about money.'*

¹Translated from Afrikaans.

² According to the complainant the respondent appointed Andre to recover investors' capital.

I know my money and NAME is also involved and that is why I am doing everything. I am more frustrated than you are. I will let you know'

6.5 Shortly after sending the text messages the respondent visited the complainant at his residence. He reassured the complainant that his money was safe. According to the complainant the respondent told him that van Deventer paid the full R600 000 owing to the complainant to one Nel. Nel in turn would pay the investors. This made the complainant very suspicious.

6.6 Subsequent to the events described above, the respondent informed the complainant that he has proof that van Deventer paid over investors' money to Nel and that payment of investors was imminent. As the complainant was now convinced he had lost his capital, he lodged a complaint with this Office.

D. THE RELIEF SOUGHT

[7] The complainant wants to be paid amount of R300 000 together with interest which he claims he lost as a result of respondent's advice.

E. RESPONDENT'S RESPONSE

[8] In terms of the Rules on Proceedings of the Office, the complaint was referred to respondent to resolve. What follows is a summary of his response:

8.1 The respondent states that during a conversation with the complainant, he mentioned to the complainant that he had entered into a favourable investment opportunity that he (respondent) was happy with.

- 8.2 According to the respondent, the complainant expressed interest in the investment opportunity. The respondent asserts that he did not have the relevant knowledge, skills and experience necessary to advise the complainant appropriately on any matters relating to the specific structure of the investment. Consequently, the respondent referred the complainant to the persons that were able to execute and advise on the transactions, namely van Deventer of DTME and Nel of Phoenix Global Finance ('Phoenix'). According to the respondent van Deventer was in the business of investing funds on behalf of clients in bank guaranteed structures.
- 8.3 Following the meeting with van Deventer the complainant deposited R300 000 into the bank account of the respondent's employee, Mr Frik van Rensburg. The R300 000 was transferred to DTME's bank account on 07 December 2009. The respondent states that the agreement that they had with van Deventer was that *'the money will be doubled in three months.'*
- 8.4 At the end of the three month term, van Deventer failed to pay out the returns as agreed upon. His excuse was that the South African Revenue Services ('SARS') was holding back the money. During this time the respondent was approached by Nel who informed him that he was going to take over the complainant's investment. Nel was expecting additional funds from another trader and could assist the complainant.
- 8.5 The respondent made an appointment with the complainant to meet with Nel. The complainant subsequently entered into an

agreement with Phoenix represented by Nel. In terms of the agreement the complainant invested R600 000 into Phoenix. This amount was made up of the original R300 000 invested with DTME plus the expected returns of R300 000. It was agreed that the complainant would double his investment in three months. Nel however failed to honour the agreement.

8.6 The respondent contends that the agreement entered into between the complainant and Phoenix was based on Nel's advice. He states that he did not render any advice or intermediary services to the complainant and did not in any way persuade the complainant to make the investment.

8.7 The respondent asserts that he personally has to date not received his own investment returns which he made in Phoenix. The respondent argues that the complainant entered into the agreement with Phoenix of his own free will and cannot hold him liable for the transaction. Based on these grounds, he requests the Office to dismiss the complaint.

F. ISSUES

[9] The issues to be decided are:

9.1 Whether the respondent gave advice or rendered intermediary services to the complainant;

9.2 Whether the respondent acted in a manner which is not in compliance with the FAIS Act and the General Code of Conduct ('the Code') and / or negligently; If it is found that the respondent's conduct did not comply with the provisions of the Act and/or was negligent, whether it caused the complainant to suffer damage or financial prejudice;

9.3 The amount of such damage or financial prejudice.

Whether the Respondent gave advice or rendered intermediary services to the complainant

[10] The respondent is adamant that he neither gave advice nor rendered any intermediary service to the complainant.³

The law

[11] Advice is defined as follows in section 1 of the FAIS Act.

'advice' means, subject to subsection (3) –

(a) any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients-....

(b).....

(c)....irrespective of whether or not such advice-

³ In terms of Section 1 of the Act, Financial Services include advise and/or intermediary services

(i) is furnished in the course of or is incidental to financial planning in connection with the affairs of the client;'

[12] It is clear from the section that the legislature had intended a wide meaning of the term 'advice'. The reason for this is to cast the net of consumer protection as widely as possible. Financial products are complex and sophisticated, which is why consumers expect guidance from advisors before entering into transactions. In order to determine whether advice was in fact given, the factual situation between the client and 'advisor' should be analysed.⁴

Undisputed facts

[13] The complainant appointed the respondent as his financial advisor approximately 9 years ago. In 2009 the complainant suffered a heart attack and was assisted by respondent in preparing and submitting a successful claim with his insurer.

[14] Shortly after the proceeds of his dread decease claim were paid to the complainant, the respondent informed him about an investment opportunity where he could double his money in a matter of weeks. A meeting was arranged at the respondent's residence where he met van Deventer and Nel - the persons behind the bank guaranteed investment structure. On 01 December 2009, the complainant deposited R300 000 into the bank account of respondent's employee, i.e. Frik van Rensburg. According to the respondent '*The agreement we had with Mr. Van Deventer is that the money*

⁴Hattingh W and Millard D, The FAIS Act Explained, 1st Edition (Lexis Nexis, 2010) at pp. 43

will be doubled within three months.' Subsequent to the investment, the complainant received the following e-mail from the respondent:⁵

'Hi Marinda⁶

I kindly confirm with this e-mail that on 01 July 2009 you paid us an amount of R300 000 for a "Bank Guarantee" investment. We received the money and an amount of R300 000 was paid to DTME on 07 December 2009'

[15] Frik van Rensburg's bank statements reflect that the following two amounts were transferred to another account on 07 December 2009:

-DTME loan - R300 000

-DTME loan - R550 000

[16] The respondent at all material times knew that the complainant had just received payment from a dread decease claim. The complainant was not aware of DTME prior to being informed thereof by the respondent. The R300 000 invested was paid into the bank account of the respondent's employee. Other DTME investors also deposited monies into the same bank account. This suggests that the complainant's investment in DTME was more than just coincidental. On his own admission, the respondent had an agreement with van Deventer that the complainant's capital would be doubled in three months.

[17] Given the undisputed facts, I am persuaded that the respondent did more than passively mention an investment that he was satisfied with to

⁵ Translated from Afrikaans

⁶ Complainant's wife

complainant. Respondent actively persuaded complainant by furnishing him information that sought to recommend the product to him. In one word, respondent advised the complainant to invest in DTME. Moreover, by collecting investors' monies and paying it to the product supplier (DTME) the respondent rendered intermediary services as defined in Section 1 of the Act. Therefore, the respondent's defence that he did not render financial services to the complainant is dismissed.

Whether the Respondent acted in a manner which is not in compliance with the FAIS Act and the General Code of Conduct ('the Code') and / or negligently;

[18] Having established that the respondent rendered financial services to the complainant, I now deal with compliance with the Code.

[19] On the respondent's own admission, he did not have the relevant knowledge, skills and experience necessary to advise the complainant appropriately on the bank guaranteed investment. The respondent described the investment to the complainant as a favourable investment opportunity that was good for him at the time. This notwithstanding that he had not received any return on his own investment and that he lacked knowledge of the product. The agreement that the respondent had with van Deventer is that the capital invested would be doubled in three months. The Office requested the respondent to explain what exactly the 'bank guarantee investment structures' were, who DTME was and how it was possible for van Deventer to generate such astronomical returns. He failed to do so.

[20] The bank guaranteed investment was not regulated, which means it offered investors no protection. The guarantee the investment supposedly offered appears to have been nothing more than an empty promise to lure unsuspected investors to part with their money. The mere suggestion that capital invested could be doubled in a matter of weeks should have dissuaded the respondent to invest the complainant's money with van Deventer. At the time the respondent recommended the investment in question, he had known van Deventer for a mere three months. There is no indication that the respondent conducted a due diligence on DTME to establish in which assets the company invests, the financial fitness of the company and the viability of the product offered. The respondent was not only reckless when he invested the complainant's funds in a product he knew little or nothing about, he also violated of the Code which requires an FSP to act with due skill, care and diligence and in the interest of clients.

[21] The respondent failed to provide the Office with records of the advice given to the complainant. As such there is no proof that the respondent:

1. Provided a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to the complainant;⁷
2. Provided the complainant with concise details of the manner in which the value of the investment is determined, including concise details of any underlying assets or other financial instruments⁸.

⁷ See Section 7(1)(a) of the Code

3. Disclosed to the complainant any material investment or other risks associated with the product;⁹

G. CAUSATION

[22] The respondent contends that he cannot be held liable for the investment agreement the complainant entered into with Phoenix. This agreement he says, was based on Nel's advice who took over the initial DTME investment.

The respondent's defence is dismissed for the following reasons:

1. It is common cause that the complaint is that the complainant's funds were invested in DTME.
2. The Phoenix agreement was entered into after van Deventer failed to honour the agreement entered into with the complainant.
3. There is no proof that funds¹⁰ changed hands when the complainant entered into the investment agreement with Phoenix. I am convinced that by this time the complainant already had lost the capital he invested in DTME on the advice of the respondent.

[23] The respondent displayed lack of competency when he invested the complainant's funds in an unregulated investment that he knew very little or nothing about. When the complainant's returns were not paid out as promised, the respondent conveniently blamed van Deventer and Nel to escape liability. It is now more than three years since the investment was

⁸ See Section 7(1)(c)(iii)

⁹ See Section 7(1)(c)(xiii)

¹⁰ According to the agreement an amount of R600 000 was invested in Phoenix, i.e. R300 000 invested in DTME and the promised return of R300 000.

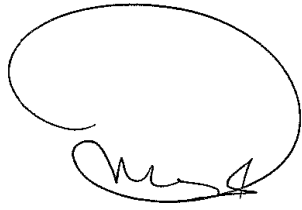
made. It is unlikely that the complainant's capital would be recovered. Had it not been for the advice of the respondent, the complainant would not have invested in DTME. The respondent's conduct is the direct cause of the complainant's loss. I therefore intend to make an order in the amount of R300 000.

H. ORDER

In the premises, the following order is made:

1. The complaint is upheld;
2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay the amount of R300 000 to complainant;
3. Complainant is to hand over, upon full payment, all documents and securities, forgo any rights or interest pertaining to the investment in favour of respondents;
4. Interest at the rate of 15.5 %, per annum, from 1 December 2009 to date of final payment.

DATED AT PRETORIA ON THIS 18th DAY OF MARCH 2013.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS