

[2] The investment failed and complainant lost her capital. She filed a complaint against the respondents and requested that her money be paid back to her.

B. THE PARTIES

[3] Complainant is currently 58 years old and is unemployed. She resides at 73 Rigoletto, Aster Avenue, Doringkloof.

[4] The first respondent is Investiplan (Pty) Ltd a company duly incorporated with registration number 2007/018718/07. First respondent was registered with the Financial Services Board (FSB) under number FSP 38614.

[5] The Second respondent is Herman Wilhelm Waschefort a businessman and a broker of Corporate Place Block B Ground Floor, Unit 1 39 Selati Street, Ashlea Gardens. Second respondent, according to the records of the FSB, is the key individual and representative of the first respondent.

[6] Second respondent appears to have registered a number of companies using the "Investiplan" name. This includes Investiplan Private Equity Fund (Pty) Ltd, registration number 2010/016798/06. I point out that at the time of making this determination all of the companies registered by second respondent were either de-registered or for some other reason no longer exist.

C. FACTUAL BACKGROUND

- [7] In February 2011 complainant sold her house and received R500 000 from the proceeds of the sale. She then contacted second respondent to invest her money, she told the second respondent that she was no longer in full time employment and needed a monthly income to cover her living expenses. Second respondent informed complainant that he can invest the money in a fund that will pay more than R4000 per month in interest. Complainant told second respondent that she required only R4000 per month and wanted the rest of the interest to go back into her capital.
- [8] Of importance is complainant's statement that she trusted second respondent and did not check on exactly what fund was involved in the investment.
- [9] It is not in dispute that complainant had no access to any other financial arrangement and was relying on this investment for an income. She wanted R4000 per month and expected capital growth. What is clear from complainant's financial profile is that she had no tolerance for high risk.
- [10] Respondents invested complainant's funds in "Investiplan Private Equity Fund". According to documentation received by the complainant, she invested in a "property investment fund" by subscribing to ordinary par-value shares of R0.01 each in Investiplan Private Equity Fund Ltd, which shares were linked to a compulsory shareholders loan of R999.99 per share. The combined investment amounted to R1000 per share. Complainant thus subscribed for 500 share units. The investment deposit date is recorded as 10th February 2011.

- [11] A letter from Investiplan Private Equity Fund records that the object of the investment was to obtain an income and to have capital growth. The promised interest rate for the first year was 9.6% per annum. This letter further promised monthly interest as an initial amount of R4000 per month.
- [12] Of importance is that this letter confirms that the broker, who placed the investment, is the second respondent. This is, however, not disputed by the respondents. The letter concludes by promising complainant quarterly statements reflecting the value of the investment.
- [13] Unfortunately none of the promised returns materialized and, to add insult to injury, complainant's capital was lost.
- [14] In October 2011 complainant contacted second respondent and requested a withdrawal of R20 000 in order to repair her car. Second respondent informed complainant she could withdraw the amount as her monthly interest and capital growth exceeded the requested amount. Second respondent promised to pay the amount into complainant's bank account by the end of October 2011. This promise was never kept and complainant was forced to borrow money from her family.
- [15] In March 2012 and again in May 2012 complainant attempted to withdraw her money, she was again met with unfulfilled promises. After the 28th May 2012, complainant stopped receiving her monthly interest payments from the investment.
- [16] On the 20th June 2012 complainant met with second respondent and told the latter that she needed funds to buy another car as her car had broken down. Second

respondent promised to pay about R30 000 into complainant's account at the end of the month; he pointed out that the money was from interest earned on the capital. On the 10th July 2012 complainant made another call to respondents demanding return of her money. On this occasion second respondent paid an amount of R20 000 to complainant. Second respondent promised to contact complainant within a week regarding the rest of her funds. This promise never materialized. Complainant has since not received any funds from the respondents. In fact second respondent began avoiding complainant. Complainant did not receive any statements of her investment from the respondents, nor from Investiplan Private Equity Fund Ltd.

[17] On the 23rd July 2012 complainant wrote a letter to second respondent demanding payment of her capital and interest. She demanded payment by the 23rd August 2012. The letter was hand delivered to respondents' office. This letter went unanswered. Complainant then proceeded to file a complaint at this Office.

D. THE COMPLAINT

[18] Complaint states that she does not believe that respondents acted in her interests. She wants return of her capital and interest.

E. THE ISSUES

[19] The issues can be stated as follows:

19.1 Whether the respondents rendered the financial service herein negligently and/or in a manner which is not compliant with the Act and Code; and

19.2 If it is found that respondents did render the financial service negligently and/or failed to comply with the Act and Code, whether it was such conduct that caused the complainant loss.

F. LACK OF RESPONSE

[20] On the 6th September 2012 this Office wrote a letter to respondents and directed it for the attention of second respondent; the letter was referring the complaint to respondents and inviting them to resolve the matter as contemplated in rule 6 (b) of the Rules on Proceedings of this Office. There was no response to this letter, nor did complainant receive any response from the second respondent.

[21] As a consequence, this Office delivered notices to the respondents in terms of section 27(4) of the FAIS Act. In addition section 27 (4) notices were also sent to Investiplan Private Equity Fund Ltd and the latter's directors being Bruce Myburgh, Andre Burger, Johannes Huisamen, Johannes Van Zyl and Marciel Meyer.

[22] Investiplan Private Equity Fund Ltd was deregistered according to the company records and absolutely no response was received from its directors. Nor did this Office receive any response to the notices from the respondents.

[23] On the 25th May 2015 this Office wrote to the respondents, informing them, *inter alia*, as follows:

23.1 Where a party fails to respond within a reasonable time, this Office may proceed to dispose of the matter on the available facts and information;

- 23.2 That the respondents were obliged to give this Office their fullest co-operation in assisting this Office to dispose of the matter;
- 23.3 Failure to respond will result in the Ombud making a final ruling in the form of a determination;
- 23.4 That since this Office had received no response, this Office was in the process of finalising the matter in the form of a determination;
- 23.5 That potentially a finding can be made against second respondent in the latter's personal capacity; and
- 23.6 Noted that there was no evidence before this Office that respondents complied with the provisions of the FAIS Act at the time of rendering of the financial service.

[24] The letter concluded by inviting the respondents to furnish documentation evidencing compliance with the FAIS Act.

There was equally no response to this letter.

[25] On the 25th May 2015 this Office managed to contact second respondent on the telephone. He was informed of the complaint and he agreed to respond. This Office undertook to email all the correspondence and notices to him. Second respondent provided a new email address. He also informed this Office that all the other directors of Investiplan were dismissed from the company after they "were found to be not credible". Second respondent was running the company on his own.

[26] On the same day, the complaint including all correspondence and the section 27(4) notice were e-mailed to second respondent. The transmission was complete and this Office has proof that delivery was complete. Second respondent failed to honour his undertaking to respond.

[27] The matter then proceeded to determination in the absence of any response from respondents. The above chronology confirms that this Office took all reasonable steps to inform the respondents of the complaint and urged them to respond. All this office's efforts fell on deaf ears.

G. DETERMINATION

[28] Complainant's version of the material facts can be summarised as follows:

- 28.1 She approached second respondent, in his capacity as a licensed financial services provider, to seek advice on how to invest the proceeds of the sale of her house in the amount of R500 000;
- 28.2 Second respondent advised her to invest all the money in Investiplan Private Equity Fund;
- 28.3 She knew nothing about this investment but trusted second respondent to act in her interests;
- 28.4 She wanted an income of R4000 per month and expected capital growth;
- 28.5 No needs analysis was carried by the second respondent;
- 28.6 No risk analysis or assessment was carried out by second respondent;
- 28.7 The financial product itself was not explained to complainant nor was she informed of any risks associated with this product;

- 28.8 No other products were offered;
- 28.9 Complainant was not placed in a position where she could have made an informed decision; and
- 28.10 Second respondent promised a return in excess of R4000 per month as well as capital growth.

[29] Complainant made the investment in the belief that second respondent can be trusted to act in her interests bearing in mind her financial needs and status. This is not in dispute.

Indeed even this Office could find no information about the product offered to the complainant.

[30] As for the respondents, notwithstanding the efforts of this Office, they chose not to file a response. They were certainly aware of the complaint as well as the allegations that they failed to act in the best interests of their client and further failed to comply with the provisions of the FAIS Act and Code of Conduct.

[31] This Office is left with no choice but to determine this matter on the complainant's version. The respondents elected not to dispute the complainant's version and on the probabilities this Office accepts the complainant's version as true.

H. COMPLIANCE

[32] Respondents, as licensed FSPs, were aware of their obligations in terms of the FAIS Act and Code. They are obliged to comply and retain proof of compliance. Respondents, despite repeated requests over a lengthy period of time, refused to

provide any proof of compliance. The only reasonable conclusion to be drawn is that they neglected or failed to comply in providing the financial services to the complainant.

[33] In the premises, and insofar as it concerns compliance, I make the following findings:

33.1 Respondents failed to comply with any of the specific duties as provided in Section 3 (1) (a) of the Code;

33.2 Respondents failed to keep records as required in Section 3 (2) of the Code;

33.3 Respondents failed to provide complainant with information on product suppliers in terms of Section 4 of the Code;

33.4 Respondents did not explain the product to complainant as contemplated in Section 7 of the Code;

33.5 Respondents did not carry out any analysis to ensure that the proposed product was suitable for the client, bearing in mind the latter's needs and financial risk profile. Respondents were in breach of Section 8 of the Code;

33.6 Respondents failed to keep any record of advice as provided in Section 9 the Code;

33.7 Respondents breached Section 10 of the Code by failing to account for complainant's funds.

[34] I find that respondents failed to comply with their general duties as FSPs as contemplated in Section 2 of the Code; which provides as follows:

“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.”

I. COMPLAINANT’S LOSS

[35] This Office, having found that the respondents were in breach of the act and code in rendering the financial service, must now decide if such conduct resulted in loss to the complainant.

[36] It is not in dispute that complainant invested in Investiplan on the advice of the second respondent. Therefore but for this advice complainant would not have lost her capital. Factual causation is established on the undisputed facts.

[37] Complainant is unaware of the cause of the investment’s failure. This Office has no information as to why the investment scheme failed and what became of investor funds. There was a duty on the respondents to assist this Office with such information. They deliberately refrained from doing so choosing not to make any disclosure at all. This is in itself a breach of the FAIS Act and Code and also amounts to unethical and dishonourable conduct.

[38] From the little information available to this Office it appears that second respondent was in control of the whole scheme and was effectively both broker and product supplier. Only second respondent is able to shed light on why the scheme collapsed and what became of complainant’s funds. No disclosure was forthcoming and respondents cannot expect this Office to speculate in their favour.

This Office finds that on the probabilities; the respondents were conducting an illegal scheme or were negligent in failing to disclose to investors that the scheme was not sustainable and there was a risk of losing all the capital. The respondents ought reasonably to have foreseen that the investment was at a substantial risk of collapse and that investor funds will be lost. The requirement of legal causation is satisfied.

[39] I therefore come to the conclusion that respondents were the direct cause of complainant's loss.

J. QUANTUM

[40] As I have stated above, respondents failed to disclose what happened to the Investiplan investment. In particular no disclosure was made as to what became of the companies concerned and what happened to investors' funds.

[41] The only reasonable conclusion to be drawn is that complainant's investment is lost and there is no prospect of recovering the funds or any part thereof.

[42] Complainant is entitled to claim the full capital invested. The payments she did receive were in respect of interest only and did not represent any part of the capital.

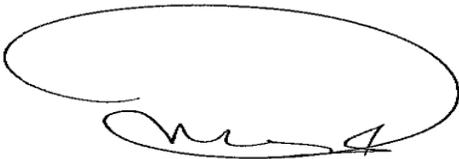
K. THE ORDER

[43] In the premises the following order is made:

1. The complaint is upheld;

2. First and second respondents are ordered to pay the complainant, jointly and severally the one paying the other to be absolved, the amount of R500 000 – 00;
3. Interest on the said amount at the rate of 9% per annum from the 28th May 2012 to date of payment.

DATED AT PRETORIA THIS THE 21st DAY OF JANUARY 2016.

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a cursive name, all enclosed within a large, hand-drawn oval.

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