

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

CASE NO: FAIS 05446/13-14/ WC 1

In the matter between:

Melany Deborah Anne Koekemoer

Complainant

and

JAM Financial Planning CC

First Respondent

Willem Johannes Abraham

Second Respondent

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

A. PARTIES

- [1] Complainant is Melany Deborah Anne Koekemoer, an adult female whose details are on file in this Office.
- [2] First Respondent is JAM Financial Planning CC, a close corporation duly incorporated in terms of South African laws, with registration number 2007/229281/2, with its principal place of business situated at No.46 Protea Park, Sandbaai, Hermanus, Western Cape.
- [3] Second Respondent is Willem Johannes Abraham, an adult male representative and key individual of first respondent. Second respondents last

known address is the same as that of first respondent. At all material times, second respondent rendered financial services to the complainant on behalf of first respondent.

- [4] The regulator's records indicate that although second respondent had dispensed advice and collected monies from clients, respondents were never licenced¹ in terms of the FAIS Act².
- [5] At all material times hereto, complainant dealt with second respondent in purchasing this investment.
- [6] For ease of reading I shall refer to both respondents simply as respondent. Where appropriate I specify which respondent.

B. COMPLAINT

- [7] Complainant, who was 61 years old at the time, states that respondent had approached her during January 2012, with a proposal that he was starting his own financial planning business, and that he could invest her funds and generate a higher rate of return.
- [8] Complainant subsequently invested an amount of R760 000 with respondent following advice from the latter that complainant's funds invested would be safe. The objective was to generate monthly interest.

¹ Respondent had been allocated licence number FSP 33731, which was subsequently cancelled after respondent failed to provide an application.

² Financial Advisory and Intermediary Services Act No. 37 of 2002.

- [9] The funds, which had been donated to complainant by her mother from the proceeds of the sale of her farm, had prior to the investment with respondent, been in complainant's Nedbank Money Market Investment Account.
- [10] The Application form signed by complainant on 26 January 2012, recorded that the investment provided for a minimum term of 24 months at an interest rate of 1.5% per month, alternatively 18% per annum, which translated into a monthly interest income of R11 400.
- [11] The application form further reflected that the capital would be secured by way of loan agreement with a registered licenced financial service provider and licenced credit provider, and that 100% of the funds invested would be allocated to the investment at no additional cost to complainant.
- [12] Subsequent to complainant having deposited the funds directly into respondent's bank account, she had received an income from respondent for almost a year until the monthly payments ceased during February 2013.
- [13] It was only when the income had ceased that complainant became aware that the funds had been invested with FUNDCO, and that this entity had been placed under liquidation. (more about FUNDCO later in this determination)
- [14] Complainant had on numerous occasions attempted to contact respondent, however, with no answers as to the possibility of restoring the income payments, or returning her capital, complainant concluded that she had lost her investment and lodged the present complaint against respondent.

C. RELIEF SOUGHT

[15] Complainant seeks payment of her capital in the amount of R120 000. She bases her complaint against respondent on the latter's failure to provide her with suitable advice, in violation of the General Code of Conduct, (the Code).

D. RESPONDENT'S VERSION

[16] The complaint was first directed to respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office, (the Rules) on 6 November 2013 with the response due on 18 December 2013. There is no evidence that respondent ever provided a response to this letter.

[17] On 15 May 2014, a notice in terms of section 27 (4) was sent to respondent. The notice, *inter alia*, invited respondent to provide this Office with his case, including supporting documents. The notice further warned respondent that he is viewed as a respondent and could be held liable in the event the complaint is upheld. This was followed by further correspondence to respondent on 20 July 2016 directing his attention various sections of the General Code of Conduct³, and informing him that the matter would be formally concluded. There is no evidence that respondent replied to the notice or the subsequent correspondence.

E. DETERMINATION

[18] Having received neither the requested response nor the supporting documents, the matter is determined on the basis of complainant's version and her supporting documents.

[19] Issues for determination are:

³ General Code of Conduct for Authorised Financial Services Providers and Representatives

19.1 Whether respondents rendered financial services at all to complainant?

In the event they did, whether respondent complied with the FAIS Act and the Code;

19.2. Whether the respondent's conduct caused complainant the loss complained of, and;

19.3 Quantum.

About FUNDCO

[20] FUNDCO CC, a close corporation with registration number 2007/210471/23, purported to be a registered financial services provider within the micro lending space.

[21] FUNCO operated on the basis that it funded its operations not only from its own capital, but also from wholesale borrowing from individuals and companies to ensure that sufficient capital is available to meet the demand for credit⁴.

[22] FUNDCO (As borrower) would conclude a loan agreement between itself and the lender, in this instance, respondent, where money from investors would be lent to FUNDCO at a certain interest rate and repayable on agreed dates. What respondent conveyed to its clients was somewhat different, in that the impression was created that investors were going to be invested with established financial institutions.

⁴ See www.fundco/about.html for fund facts. NB: (Page no longer exists)

[23] Following a failed business rescue intervention, FUNDSCO was liquidated during 2013.

Whether respondents rendered financial services at all and if they did whether the rendering was in compliance with the FAIS Act and the General Code

[24] One must first comment on the “application form” that was completed by complainant. Of importance is the following:

24.1 The investment amount is confirmed as R760 000, with interest noted as 1.5% per month, alternatively 18% per annum. The income is noted as R11 400 per month for a period of 24 months.

24.2 Under the section “agreed as follows”, it is noted that:

- a. The capital is secured by way of loan agreements with a registered financial services provider and registered licenced credit provider;
- b. The minimum term is 24 months;
- c. Allocation is noted as 100% with no additional fees;
- d. Notice of 90 days is required to release the funds within the 2-year period.

[25] There is nothing in the application form that suggests that complainant had agreed to lend her money to respondent, or FUNDSCO. What the application spells out is that complainant invested a defined amount to secure herself income for a period of 24 month with a recognised financial services provider. Complainant would therefore not have understood the nature of the investment to be that of a loan. It was not complainant’s intention to loan the money, but to rather invest it.

- [26] Furthermore, the reference to 100% allocation is terminology commonly found in investment application forms. The term is used to explain that a client's full investment amount is allocated to an investment prior to any costs having been deducted.
- [27] A copy of complainant's bank statement, dated 3 February 2012, indicates that complainant transferred R760 000, 00 into the account of JAM Financial Planning. Complainant had no interaction whatsoever with FUNDCO and did not conclude any contract with this entity. This is confirmed by the application form with FUNDCO, which is signed by second respondent. There can therefore be no question that complainant's understanding would have been that she was making an investment with a financial institution, through first respondent whilst acting on the advice and recommendation of second respondent.
- [28] Respondent failed dismally as a so called financial advisor and abused his position of trust to take advantage of complainant. This much is supported by the complainant's original complaint to this Office where she emphasised that second respondent had previously been with Nedbank and was, in her own words "...a member of the FSB and insured against eventualities".
- [29] As for the rendering of advice which occurred in this instance, section 7(1) of the FAIS Act requires that a person obtain a licence before acting as a financial services provider. Notwithstanding the lack of approval, subsection 2 ensures that respondent cannot escape the provisions of the FAIS Act in that, transactions concluded without the requisite authorisation are still enforceable.

[30] In recommending the investment to complainant, respondent breached a number of provisions of the Code:

30.1 Section 2 thereof requires 'that a provider must at all times render financial services, honestly, fairly, with due skill, care and diligence, and in the interests of the client and the integrity of the financial services industry'. Not only is there no information regarding complainant's risk profile, there appears to be no investigation carried out by respondent into FUNDCO's financial standing and credit worthiness. There is no information about the persons behind the FUNDCO. Respondent appears to have kept information regarding FUNDCO to himself to the exclusion of his clients. I could not find a set of audited financial statements nor details about the entity's attitude towards corporate governance. It is thus fair to say respondent had no idea who he was dealing with at FUNCO. I hasten to say the evidence is overwhelming that second respondent could not have acted in complainant's interests when he recommended this investment to complainant.

30.2 Section 3(1)(a)(iii) requires that that representations to the client must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed knowledge of the client. It is evident that the representations made by respondent were not adequate. Not only did complainant have no knowledge about FUNDCO, but respondent had also assured complainant that the investment was safe, despite respondent having from the onset known what the business of FUNDCO was and the risky nature of their activities. Respondent had failed to disclose in detail how

the investment with FUNDCO would affect complainant and the risks involved. Had complainant been made aware of the true state of affairs she would not have agreed to the investment.

30.3 Section 3(1) (vii) requires proper disclosure of fees, remuneration or monetary obligations, yet all that is mentioned in the agreement is that there will be 100% allocation and no additional fees. The outcome of this Office's investigation however, reveals that FUNDO paid between 2 and 4% interest per month while respondent offered complainant 1.5%. The only rational deduction to be made is that respondent appropriated the difference for himself. All the while having failed to make the mandatory disclosure to complainant.

30.4 Given the risk involved in money lending, respondent has provided no reasons for concluding that this type of investment was suitable for complainant's needs as required by section 8 (1) (a) to (c) of the Code. It is evident that the complainant's needs had not been considered in this transaction.

30.5 I am persuaded that had respondent properly disclosed what this investment was all about and the risks attendant thereto, complainant would in all likelihood chosen to keep her funds in the money market fund at a recognised financial institution.

Whether respondent's conduct caused complainant the loss complained of and the quantum of such loss

[31] Respondent advised complainant about the opportunity to invest with the so called financial institution. In so doing, respondent withheld information about his lack of licence from complainant.

[32] I must now consider whether respondent's conduct was the proximate cause of complainant's loss. When considering legal causation, the primary question is whether the loss was foreseeable when respondent made the recommendation to complainant. There is sufficient information to demonstrate that respondent had not been candid with complainant about the nature of the investment and where the funds were invested. Respondent has not provided a single detail to demonstrate he had conducted due diligence on the entity or entities involved in the transaction. There is certainly no evidence that respondent had even seen a set of audited financial statements prior to investing complainant's funds into FUNDCO. The answer must be that it was foreseeable that the risk could materialise. The precise nature of the cause of the collapse did not have to be foreseeable. Respondent's failure to comply with Code was a direct cause of complainant's loss.

F. QUANTUM

[33] Complainant invested R760 000, 00. There appears to be little or no likelihood of complainant's capital being recovered.

[34] I therefore intend to award complainant her original capital amount plus interest.

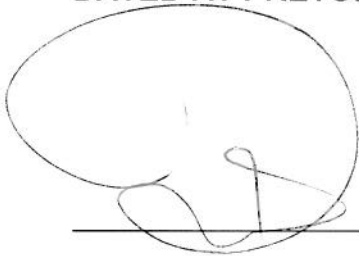
G. ORDER

[35] In the premises, the following order is made:

1. The complaint is upheld.

2. Respondents are ordered to pay complainant, jointly and severally, the one paying the other to be absolved, the amount of R760 000, 00.
3. Interest at a rate of 10, 25 %, from a date seven (7) days from date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 5th DAY OF MAY 2017

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a smaller 'B' and 'M', all contained within a large, hand-drawn oval.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS