

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

CASE NO: FAIS 05080/13-14/ WC 1

In the matter between:

Tielman Dreyer Odendaal

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 Tielman Dreyer Odendaal, an adult male 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, a 40 year old financial clerk at the time, had an existing relationship with second respondent while the latter was employed with Nedbank. He had on the advice of second respondent invested funds with Old Mutual during March 2011.

[8] Complainant states that second respondent had approached him during July 2011, with a proposal that he was resigning from Nedbank to start his own financial planning business. Second respondent had recommended that complainant should withdraw his funds from Old Mutual and invest in his new business where he could generate a higher rate of return by reinvesting the funds.

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] Based on respondent's recommendation, complainant completed the required withdrawal documentation which saw R2 000 000 transferred from Old Mutual to complainants bank account. The sum of R2 000 000 was then transferred into respondents FNB bank account on 21 July 2011.
- [10] The Application form signed by complainant recorded that the investment was 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 income of R30 000.
- [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. Complainant claims to have had no knowledge of respondent's loan agreement with FUNDCO. The details pertaining to FUNDCO shall be dealt with later.
- [12] During October 2011 complainant had requested that respondent withdraw R200 000 from the investment. The instruction was executed by respondent and R200 000 was deposited into complainant's bank account on 18 October 2011, which ultimately saw complainant's monthly income reduced to R27 000.
- [13] During April 2012 complainant was in the process of purchasing a property and required an amount of R305 000 from the investment. Complainant subsequently entered into an agreement with respondent that the sum of R310 000 be paid over a period of three months with R305 000 being paid into complainant's attorney's trust account and R5 000 directly to the complainant.

Accordingly, payment was effected with the result that complainant's monthly had reduced to R22 350 by August 2012.

[14] Complainant received the last income instalment on 21 December 2012. Despite attending a meeting of investors in Kleinmond on 19 February 2013 and numerous assurances by respondent that he shall repay investors their funds, complainant has still not received his capital. Complainant concluded he had lost his investment and subsequently lodged the present complaint against respondent.

C. RELIEF SOUGHT

[15] Complainant seeks payment of his capital in the amount of R1 495 000. The basis of complainant's complaint against respondent is respondent's failure to render financial services in line with the General Code of Conduct, (the Code) which *inter alia*, enjoins providers to render suitable advice and make adequate disclosures when advising clients.

[16] Complainant has agreed to abandon the amount of R695 000 to bring the claim within the jurisdictional limits of this Office.

D. RESPONDENT'S VERSION

[17] The complaint was first directed to respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office on 23 October 2013 with the response due on 4 December 2013. There is no evidence that respondent ever provided a response to this letter.

[18] On 19 February 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. The notice of 19 May was followed by two further notices on 15 May 2014 and 9 February 2017 respectively. There is no evidence that respondent replied to the initial notice or the subsequent correspondences.

E. DETERMINATION

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

[20] The issues for determination are:

20.1 Whether respondents rendered financial services at all to complainant?

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

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

20.3 Quantum of such loss.

About FUNDCO

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

[22] FUNDCO 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 credit³.

³ See www.fundco/about.html for fund facts. NB: (Page no longer exists)

[23] FUNDCO (as the 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.

[24] Following a failed business rescue intervention, FUNDCO 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 Code

[25] One must first briefly comment on the “application form” that was completed by complainant:

25.1 The amount is confirmed as R2 000 000, with interest noted as 1.5% per month, alternatively 18% per annum. Income is noted as R30 000 per month for a period of 24 months.

25.2 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.

- [26] There is nothing in the application form that suggests that complainant had agreed to lend his money to respondent, or FUNDSCO. What the application spells out is that complainant invested a defined amount with a financial institution and registered licensed credit provider to secure himself income for a period of 24 months. Complainant would therefore not have understood the nature of the investment to be that of a loan. It was not complainant's intention to lend the money, but to rather invest it.
- [27] Furthermore, the reference to 100% allocation is 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 have been deducted.
- [28] A copy of complainant's bank statement indicates that complainant transferred R2 000 000 into an account by the name of JAM Financial Planning on 21 July 2011. Complainant had no interaction whatsoever with FUNDSCO and did not conclude any contract with this entity. This is confirmed by the application form with FUNDSCO, which is signed by second respondent. There can therefore be no question that complainant's understanding would have been that he was making an investment with a financial institution through first respondent, whilst acting on the advice and recommendation of second respondent.
- [29] 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 complainant's complaint to this Office where he confirmed that he had prior to this transaction invested the funds with Old Mutual on the recommendation of respondent.

[30] 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 even without the requisite authorisation are still enforceable.

[31] In recommending the investment to complainant, respondent breached a number of provisions of the Code such that it would be counterproductive to enumerate all the violations. I set out hereunder, some of the most glaring violations of the Code:

31.1 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 in lending his clients' funds to FUNDCO. 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.

31.2 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 was 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 he would not have agreed to the investment.

31.3 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%. All the while having failed to make the mandatory disclosure to complainant.

31.4 Section 8 of the General Code of Conduct, which pertains to the suitability of advice, requires inter alia, that the provider identify the product or products that would be appropriate to the client's risk profile and financial needs. 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 in violation of section 8 (1) (a) to (c) of the Code.

31.5 Furthermore section 8(1) (d) of the General Code of Conduct requires that where a financial product is to replace an existing financial product wholly or partially, that the Financial Services Provider must fully disclose to the client the actual and potential financial implications, costs and consequences of such a replacement. It is noted that complainant's funds had been previously invested with Old Mutual (OM) in the Fairburn Capital Investment Plan and that the portfolio had comprised a number of collective investment schemes that ultimately provided the complainant with a moderately risk rated portfolio. No documentation exists to indicate that complainant had been informed as to the implications and consequences of replacing the OM investment with FUNDCO. The failure by respondent to fully disclose all the material aspects canvassed in this determination would mean that complainant had not been placed in a position to make an informed decision. This marks a breach of the Code on the part of the respondent. I am persuaded that had respondent properly disclosed what this investment was all about and the risk 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.

[32] Respondent advised complainant move his funds from the OM investment to invest in FUNDCO while withholding information about his licence status from complainant. I conclude that the investment in FUNDCO was the consequence of respondent's conduct. This makes respondent's conduct the factual cause of complainant's loss.

[33] 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

[34] Complainant invested R2 000 000 and after all withdrawals was left with a net investment value of R1 495 000. There appears to be little or no likelihood of complainant's capital being recovered.

[35] As recorded earlier, the complainant has agreed to forgo the amount in excess of this Office's jurisdiction of R800 000.

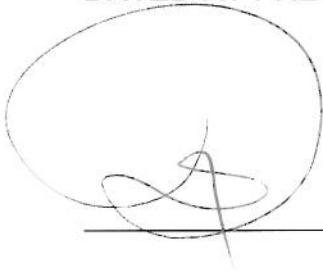
[36] I therefore intend to award complainant the amount of R800 000 plus interest.

G. ORDER

[37] 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 R800 000.
3. Interest is to be calculated 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' and a smaller 'B', is written over a horizontal line. The signature is enclosed within a hand-drawn oval.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS