

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FOC 06309/08-09 WC (4)

In the matter between:

FRANCOIS BARNARD

Complainant

and

FIRST GLOBAL INVESTMENT MANAGERS (Pty) LTD

Respondent

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

A. THE PARTIES

[1] Complainant is Francois Barnard, an adult male residing at 92, 15th Avenue, Boston, Belville, Western Cape.

[2] Respondent is **FIRST GLOBAL INVESTMENT MANAGERS (Pty) Ltd**, an authorised financial services provider and a duly registered company in terms of the company laws of the Republic of South Africa having its principal place of business at Waterside Place, Carl Cronje Rylaan, Belville, Western Cape. At all material times respondent was represented by Mr Jacques Christiaan Hattingh, respondent's key individual.

B. COMPLAINANT'S VERSION

- [3] Complainant, at 61 years old and effectively a pensioner having been retrenched from Sanlam in 2001, was invested in an Investment Linked Life Annuity ('ILLA') with Investec, Investment Management Services. This investment was managed by respondent in accordance with a discretionary investment mandate.
- [4] Respondent was the expert adviser and complainant as an old man was compelled by his persuasive personality to accept everything he said in good faith. All respondent's graphs and explanations were really beyond his level of understanding.
- [5] With an eye on commission and against both complainants' wishes and his conservative profile, respondent refused to move complainant to a money market fund, but instead upped his equity component, and as such his risk exposure thereby exposing him to the vagaries of the market.
- [6] Not only did respondent exceed this conservative mandate but went further and altered a later mandate and risk profile to align the documentation with the very aggressive portfolio to which complainant was exposed.
- [7] As a result of such exposure complainant experienced significant losses in the recent downturn in world markets.
- [8] When challenged on this respondent was evasive and attempted to deceive complainant with fancy figures.
- [9] In essence respondent provided inappropriate and poor advice.

[10] Consequently in March 2009 complainant withdrew respondent's mandate and personally switched the funds into the money market.

C. THE ISSUES

[11] From complainant's version coupled with an examination of the documentation provided by respondent, it is evident that the pivotal issues are as follows:

11.1. Did respondent exceed his mandate and as such expose complainant to excessive risk?

11.2. Did respondent fail to comply with complainant's explicit instructions to move to the money market?

11.3. Was documentation altered, and or attempts made to mislead complainant?

11.4. Did complainant suffer any pecuniary loss?

D. DETERMINATION

[12] Prior to specifically dealing with the issues it is pertinent to mention that in his complaint, complainant makes reference to an additional issue, namely a property investment carried out through the intermediation of respondent.

[13] This issue was however resolved in terms of a settlement agreement entered into between the parties in May 2009. In terms of the agreement both parties waived the right to institute any further action against each other. This issue needs no further attention as far as this Office is concerned.

[14] Turning to the matter at hand, complainant has in all communication with this Office

stressed his cautious nature and indeed the initial mandate entered into with respondent in 2003 confirms this.

[15] Subsequent mandates signed in 2005 and 2007 reflect a moderate risk profile. Complainant however disputes the veracity of these latter mandates.

[16] However for reasons which will become apparent it is appropriate that I investigate complainant's actual equity and or risk position prior to ascertaining whether there is any substance in the preceding allegations.

[17] Complainant's ILLA was essentially in three fund of funds unit trusts as well as a money market fund. Each of the fund of funds comprised of other underlying unit trusts, all of which fitted within the particular funds risk profile or objectives.

[18] The portfolio comprised of a cautious fund of funds, moderate fund of fund and international cautious fund of funds.

[19] The net effect of the above was a degree of automatic rebalancing of equity exposure as the underlying fund managers amended their exposure to ensure that they remained within their mandate.

[20] This becomes evident when one examines the asset allocation at end October 2008 at the market peaks, against the lows of March 2009. It is noted that the equity component remained remarkably similar, being in the region of 31 per cent.

[21] Even if one were to incorporate complainants 'private' share portfolio, which he expressly states has nothing to do with the asset allocation of the ILLA, this only

marginally increased the percentage to 33.8 per cent even at the height of the bull market.

[22] The percentage mentioned above unequivocally aligns with complainant's stated conservative risk profile and are nowhere near the 45 per cent mentioned by complainant.

[23] In fairness to complainant he was initially placed under this misapprehension in consequence of a data error on the Investec website which treated all foreign investments, no matter their asset class, as equity.

[24] However, upon being appraised of the correct position by respondent and subsequently Investec itself, complainant nevertheless refused to accept the information and instead accused both parties of a conspiracy to mislead him.

[25] In short complainant's risk exposure aligns with his own stated profile and the initial undisputed mandate.

[26] Complainant was not exposed to the slightly higher risk of the latter mandate as he alleges. As such they have no bearing on any alleged loss.

[27] Furthermore this Office can find no substance in complainant's allegation that these latter documents did not accurately reflect his position at date of signature. On the contrary the evidence indicates this to have been part of an agreed strategy to, over time, incorporate more growth assets within complainant's portfolio, as a hedge against inflation.

[28] As to whether respondent failed to act in accordance with complainant's instructions

that he be transferred to a money market fund, I can find no such instruction within the extensive pile of papers submitted by complainant.

[29] Whilst the possibility of such a transfer was raised on numerous occasions, the evidence suggests a healthy and robust interaction between adviser and client in uncertain times, rather than an unequivocal instruction.

[30] To his credit, respondent stuck to his advice that complainant not try and time the markets. Whilst stating that patience is required and that the markets may well dip further he goes on to state that the markets are at record lows, with most asset managers buying.

[31] As such whilst providing various options respondent's recommendation was that complainant remain invested.

[32] Regrettably in March 2009 and at the very bottom of the market complainant of his own volition switched into the money market fund thereby sustaining losses.

[33] Interestingly since then the All Share Index has re-priced by over 40 per cent. What this indicates is that had complainant remained invested as advised by respondent he would have in any event largely recouped any potential losses.

[34] This in effect leads me to the remaining issue, being whether over the course of the investment complainant actually suffered a loss.

[35] In this regard R3 652 808, 15 transferred to Investec in August 2003. Capital and growth amounting to R3 906 467, 38 was withdrawn by complainant and switched to the money market in March 2009. During this time frame complainant also took

income withdrawals of R1 634 052, 36. Combining the income withdrawals with the funds switched out effectively leaves complainant with a growth of R1 887 711, 59.

[36] Simply stated no loss was suffered.

[37] I should also mention that investment performance is outside the mandate of this Office unless guaranteed or so deficient as to raise a *prima facie* presumption of misrepresentation, negligence or maladministration.

[38] Considering complainant's risk profile coupled with his own unfortunate timing of the switch, I have no hesitation in stating that the investment performance is such as to not raise any such *prima facie* presumption. In fact quite the contrary.

E. CONCLUSION

[39] Recent market events were and to a large extent continue to instil uncertain and very stressful times for adviser and client alike.

[40] As such one must sympathise with complainant's inability to sit out the markets, daily noting the diminution of his hard earned retirement capital.

[41] However on the evidence before me I am unable to fault respondent's actions or advice. On the contrary the numerous lengthy replies to frequent correspondence from complainant evidence not only a genuine concern for complainants financial well being but a desire to guide him through the difficult period.

[42] Whilst complainant has attempted to portray himself as a hapless old man, ignorant of financial markets and vulnerable to respondent's manipulation, correspondence

between himself and respondent as well as with the Office paints another picture.

[43] Allegations as to the alteration of documentation and manipulation of facts and figures are not supported by the evidence.

[44] Quite simply and in contrast to the image he wishes to portray, complainant appears to be a very persuasive individual, not above berating respondent when he disagreed with him, and with at the very least an above average knowledge of markets.

[45] In the instance complainant was the author of his own misfortune and seeks to blame everyone but himself for his losses. This is not borne out by the evidence.

[46] As such I have no hesitation in dismissing this complaint.

ORDER

The following order is made:

1. The complaint is hereby dismissed;
2. Respondent is ordered to pay the case fees of R1000,00.

DATED AT PRETORIA ON THIS THE 23 DAY OF MARCH 2010

CHARLES PILLAI

OMBUD FOR FINANCIAL SERVICES PROVIDER