

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 09073/12-13 WC 1

In the matter between:

LEONIE BEUKES

Complainants

and

WILLEM JOHANNES ABRAHAM

1st Respondent

JAM FINANCIAL PLANNING CC

2nd Respondent

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

A. THE PARTIES

[1] The Complainant is Mrs Leonie Beukes, an adult female whose full contact details are on file with the Office.

[2] Accompanying Mrs Beukes as co-complainants, are her two minor children on whose behalf she also acts. Their details are on file with the office, and given both that they are represented by Mrs Beukes, and to protect their privacy I deem it necessary to cite only Mrs Beukes.

[3] The 1st respondent is Mr Willem Johannes Abraham, a member and representative of 2nd respondent, residing at 46 Protea Park, Sandbaai,

Hermanus, Western Cape. Abraham at all material times rendered financial advice to complainant on behalf of 2nd respondent.

- [4] The second respondent is Jam Financial Planning CC, a close corporation with the address of its registered office being, 46 Protea Park, Sandbaai, Hermanus, Western Cape.

B. BACKGROUND AND UNDISPUTED FACTS

- [5] Complainant had engaged Abraham in his capacity as an “Executive Financial Planner” working for Nedbank in Hermanus.

- [6] It was in this capacity that Abraham invested the proceeds of complainant’s late husband’s life assurance policy with Momentum. The investments were split between her children and herself.

- [7] Subsequent to the investment, as complainant puts it, she built up a good relationship with Abraham as he always kept her up to date on her investment.

- [8] Yet little over a year later, and whilst he was still employed with Nedbank, Abraham approached complainant in June/July 2011, and advised that he was to start his own financial planning business, namely Jam Financial Planning.

- [9] Pursuant thereto and acting on the advice of Abraham, complainants withdrew an amount of R1,000 000.00 in her name from the initial investment in Old Mutual; with additional amounts of R100 000.00 each in respect of the investments of her two children. These amounts were then likewise proportionally invested in Jam Financial Planning CC.

- [10] Abraham assured her that the money invested with him will be safe. To use

complainants own words, 'he made such a convincing story about his new venture and I believed everything that he told me, as I was under the impression that he still was a registered financial planner with a FSP number.'

[11] For the record, the Financial Services Board has advised that whilst a provisional FSP number was issued to Jam Financial Planning, no application was received and hence the number cancelled. The contact details were given as Mr J Abraham.

[12] At this point it is appropriate to mention that complainant has confirmed to the Office that she was aware that the proposal from Abraham was not related to Nedbank in any way; in fact complainant has signed a document indemnifying Nedbank in this regard.

[13] As to the specifics of the investment; on the 14th July 2011, Abraham brought complainant application forms headed, 'Jam Financial Planning cc' to sign; the documentation is identical in all three investments save for the expected differences in names and amounts.

[14] The term of the investment is reflected as 24 months with an interest rate of 18% per annum.

[15] The investment amount was to be paid into the bank account of Jam Financial Planning CC, FNB Hermanus; the reference being 'Money Market Invest'

[16] Under a section headed, 'It is agreed as follows' I note the following:

16.1. 'The capital is secured by way of loan agreement with a registered licenced financial service provider and licenced credit provider;

- 16.2. The minimum term is 24 months;
- 16.3. Income payments will be made within the last week of each month;
- 16.4. There will be 100% allocation and no additional fees'

[17] Whilst complainant received a monthly income from Jam Financial Planning for 18 months up and until the end of November 2012; problems started being encountered thereafter and the income ceased from the end of January 2013 to date. No capital has been recovered.

[18] Upon making enquires as to what had happened to her investment, Abraham provided complainant with an agreement between Fundco CC T/A Fundco and Jam Financial planning. This agreement from Abraham appears to be a money lending agreement between Fundco and Abraham. Whilst it is signed by Abraham, complainant's signature appears nowhere on the document and certainly no reference is made to either her or her children.

[19] Additionally this latter document was evidently signed on the 1st August 2011 as opposed to the investment agreement between complainant and Jam Financial Planning which sports an earlier date of the 14th July 2011.

[20] In short she is not a party to this agreement. Complainant herself states that Abraham never once told her that the money was to be invested with Fundco.

[21] Fundco was placed under business rescue on the 12th April 2012 and there appears to be little chance of any recovery.

C. DETERMINATION

- [22] Despite having been afforded an opportunity to respond to the complaint; Abraham's sole response was as follows; 'please note that this was a loan and not an investment.'
- [23] Now I have already noted that complainant was not a party to the money lending agreement between Jam Financial Planning and Fundco and as expected, payment was made into the bank account of Jam Financial Planning as opposed to Fundco; the relevant reference being 'Money Market Invest.' Reference has already been made to the fact that these documents were signed on different days.
- [24] The documentation actually signed by complainant clearly reflects an agreement between Jam Financial Planning and Complainant, an agreement being more along the lines of an investment agreement; which agreement stands in complete contrast in shape and form to that of the moneylending agreement between Jam Financial Planning and Fundco.
- [25] In this regard I also note that the agreement with complainant speaks to income as opposed to interest, income more properly being used with reference to a form of investment and interest more commonly to that of a deposit or loan agreement.
- [26] Additionally it is clear that the relationship between the parties was that of a financial adviser and client; more specifically it was Abraham who as a financial adviser supposedly had the necessary knowledge as to investments and such like; knowledge which the complainant depended upon to ensure the financial stability of her and her children. Nowhere is this more evident than the fact that it was Abraham who was entrusted to advise on the placement with Old Mutual,

of complainant's deceased husband's life assurance policy, proceeds.

[27] No reference is made on either the indemnity or investment application forms to a loan.

[28] On the documentation I am satisfied that complainant would not have understood the nature of the investment to be that of a loan. Certainly given the relationship between the parties, had this indeed been the case then I would have expected this to have to be crystal clear from the documentation.

[29] The sentence that however best of all tells the lie to Abraham's version is the portion of the agreement that states 'there will be 100% allocation and no additional fees;' firstly if this was actually a loan agreement why would there be fees chargeable to the complainant who is in fact supposedly loaning the money.

[30] Secondly a reference to a 100% allocation is one commonly found on investment application forms and would in fact be nonsensical were this indeed a loan agreement. The term is commonly used to explain that complainant's full investment amount is allocated to the investment prior to deducting any costs.

[31] The very name of the entity with which complainant was contracting, namely 'Jam Financial Planning' is illustrative of the type of relationship between the parties. This is also supported by the fact that the FSB has confirmed that a provisional Financial Service Provider number was indeed allocated to this entity, although it was never actually registered.

[32] In short there is no question in my mind that complainant's understanding was that she was making an investment with Jam Financial Planning whilst acting on the advice and recommendation of Abraham as her financial adviser.

[33] I have no doubt that Abraham abused his position of trust to take advantage of complainant. Jam Financial Planning was never an authorised financial services provider and as such by Abraham providing a recommendation on its behalf to complainant there was a breach of section 7 (1) of the FAIS Act, which requires that a person may not act or offer to act as a financial services provider unless such person has been issued with a license under section 8 of the Act.

[34] Complainant states that she is not even sure if the money was actually paid across to Fundco CC. Whilst a valid question, this is of itself largely irrelevant, in that quite simply the agreement is quite clearly between Jam Financial Planning and complainant, and it is Abraham as adviser and member of Jam Financial Planning that is accountable to explain what actually happened to complainant's investment.

[35] In making the investment he breached practically every single section of the General Code of Conduct for Authorised Financial Service Providers ('the Code'). To name but a few:

35.1. 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 clients and the integrity of the financial services industry. It is fairly safe to say that Abraham only had one person's interests at heart and they were certainly not those of a widow and her two children.

35.2. Section 3.(1) (a) (iii) requires 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 self-evident that the representations were anything but adequate, certainly to assure the complainant that the monies invested with Abraham are safe, is nothing short of blatant dishonesty.

35.3. Section 3.(1) (vii) requires proper disclosure of any fees, remuneration or monetary obligations yet all that is mentioned in the agreement is that there will be 100% allocation and no additional fees. Quite simply it would be incredulous of one to believe that Abraham invested his time without expecting to take a cut as it were.

35.4. Section 8 of the Code, which pertains to suitability of the advice requires, *inter alia*, that the adviser identify the product or products that will be appropriate to the client's risk profile and financial needs. Quite simply why would an investor withdraw from a large well-established and reputable financial service provider, and replace same with an investment in a new and unknown entity. It is no wonder that Abraham did not comply with section 8(1) (d) which requires disclosure of the actual and potential financial implications of the switch.

35.5. Likewise and despite the requirements of section 9 of the Code, no record of advice was furnished to complainant.

D. CONCLUSION

[35] The intent of the parties and their understanding of the type of transaction that they are entering into are paramount. The guidance of the financial adviser and

client's level of financial knowledge unquestionably plays a role in this understanding. The FAIS Act imposes an obligation on the adviser to substantiate the advice and ensure a proper understanding of the product entered into.

[36] Complainant was a widow with limited knowledge of financial matters; accordingly she entrusted the funds to Abraham who was at the time was a financial adviser with a registered Financial Service Provider. In fact the initial investments appear to have been well suited to complainant's needs and there is every indication that had she so remained they would have given her a comfortable return.

[37] There is no question that Abraham whilst acting as a representative of Jam Financial Planning CC abused his position as a financial service provider to mislead complainant into investing with him, and in doing so he acted in breach of the FAIS Act.

[38] There appears to be little or no likelihood of complainant's capital ever being recovered.

[39] The jurisdiction of the Office is limited to R800 000 and hence complainant has agreed to waive the portion of her investment, which exceeds the aforesaid amount. The R100 000.00 investments being in respect of each of the two children are two separate causes of action. This leaves the quantum at issue as being R1,000 000.00 (one million rand) in total.

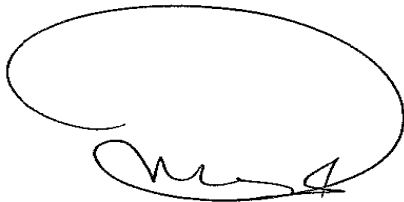
E. ORDER

[40] For all the reasons as detailed in this determination it is necessary that I hold all respondents liable jointly and severally, the one paying the other to be absolved.

Accordingly the following order is made:

1. The Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to complainant the amount of R1,000 000.00.
2. Interest on the aforesaid amount at the rate of 15.5%, per annum seven (7) days from the date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 14th DAY OF MARCH 2014



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS