

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

**CASE NUMBER: FAIS 00253/12-13/KZN 1**

**In the matter between:-**

**CRAIG KESHWAR**

**Complainant**

**and**

**FIRST NATIONAL BANK LTD**

**Respondent**

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

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**A. THE PARTIES**

[1] The complainant in the matter is Mr Craig Keshwar, an adult businessman who resides in Bluff, KwaZulu-Natal.

[2] The respondent is First National Bank Ltd ('FNB'), a registered bank in terms of the laws of the Republic of South Africa and an authorised Financial Services Provider in terms of the FAIS Act, with its principal place of business at Chamberlain Road, KwaZulu-Natal.

## **B. THE COMPLAINT**

- [3] The present complaint arises out of alleged impropriety committed by one Reginald De Ghee (“De Ghee”), who at the time of the complaint was employed as a Branch Manager and senior staff member of the respondent.
- [4] The nub of the complaint is that De Ghee fraudulently devised an investment scheme and lured clients such as the complainant into investing. The complainant contends that the respondent had an obligation to prevent the commission of the fraud, and that such impropriety constitutes a breach of the General Code of Conduct for Authorised Financial Services Providers and Representatives (‘the Code’). In that connection, the complainant further asserts that actions of De Ghee must be imputed to the respondent, who after all, was De Ghee’s employer and an authorised financial services provider.
- [5] It is convenient to sketch the brief factual matrix that emerges from the complaint.
- [6] Sometime in 2006, and immediately before the complainant retired from formal employment, the complainant met De Ghee. De Ghee introduced himself to the complainant as the Branch Manager of FNB. Following that encounter a strong friendship, seemingly beyond the orthodox client/customer relationship, was forged. The complainant says that from that point onwards, De Ghee went out of his way to ensure that he was given special treatment when visiting the bank.
- [7] As an FNB customer, the complainant says it was only natural that he communicates his intention to leave formal employment to the bank, and thus

seek advice on how best he could invest his retirement savings. The complainant says, as always, De Ghee was readily available to offer advice regarding possible investments. The complainant alleges that during some of his visits to the bank in late 2006 and early 2007, De Ghee would approach him and invite him into his office. It was on those occasions that De Ghee advised the complainant on various investment options. During the course of such advice, De Ghee introduced to the complainant a financial product which he described as “a Million-a-month account”.

In his complaint, the complainant relates how De Ghee persuaded him to invest in this so-called “million-a-month account” as he could earn high interest, and that this would be more beneficial rather than simply storing funds in his cheque account. In effect, the complainant asserted that De Ghee informed him that this “million-a-month account” was approved and authorised by FNB as an investment scheme.

[8] As an illustration of the cosy relationship he enjoyed with De Ghee, the complainant alleges that on his visits to the bank, De Ghee would invite him to his office and have all of his transactions concluded while talking him into investing. In persuading the complainant to invest, the complainant states that De Ghee showed him other FNB clients’ bank accounts which reflected substantial amounts of money, supposedly received as interest earned from the same investment portfolio proposed to him by De Ghee.

It is worth mentioning that the complainant was a businessman, and it would seem (from his complainant) that he understood that being shown other bank clients' accounts was improper. However, the complainant did not express any displeasure at De Ghee's seeming improper conduct. Notwithstanding the dubious ethical nature of De Ghee's conduct, the complainant simply viewed it as an extension of favour and privilege, extended to him by virtue of his closeness to De Ghee. I return to this aspect later.

[9] The complainant alleges that De Ghee continued, over a long period of time, to regale him with tales of possible investment growth, every time he visited the bank. It appears that the complainant viewed these sessions with De Ghee as investment advice which De Ghee rendered at the behest of FNB. Such talks of investment growth and high interest all occurred at Chamberlain Road branch of FNB.

[10] The complainant asserts that as a result of De Ghee's unrelenting recommendations for him to invest in this product, he was finally persuaded in January 2008 to invest an amount of R100 000. The complainant alleges that although he was initially apprehensive about the decision to invest a substantial portion of his money, De Ghee assured him that he too had invested his own money in the same investment. That assurance, so the complainant says, gave him a fair measure of confidence in the investment scheme.

[11] As a measure of security, De Ghee issued a cash cheque of R25 000 from his personal cheque account, in favour of the complainant; declaring that the

complainant should cash the cheque in the event the investment did not deliver returns of over 50% over a period of four to six months. At this point the complainant states that he was convinced that De Ghee was opening up opportunities that were only for the privileged. On his own version, the complainant was aware that the cheque of R25 000 was from De Ghee's own personal account. This point merits further comment, and I deal with its significance later in this determination.

[12] The complainant states that as they were seated in the office, De Ghee called in one of the staff members and instructed that staff member to link the complainant's bank account with De Ghee's personal bank account; further to make De Ghee's account one of the complainant's listed beneficiaries. The complainant says he questioned De Ghee as to why this should be done, to which he replied reassuringly, that this would speed up the process of making the investment and payment of interest into the complainant's account. De Ghee added, if he had anything to hide, he would not have requested a staff member to carry out such instructions. Subsequent to the complainant's and De Ghee's accounts being linked, the complainant states that he and De Ghee went to the ATM outside the bank and transferred R50 000 to De Ghee's FNB account as opposed to the suggested amount of R100 000. On his version, the complainant, a businessman, was aware that it was highly unusual for a person to link his account to a bank employee's. I will return to this point later.

[13] The complainant further alleges that on 5 February 2008, De Ghee requested a further amount of R10 000. De Ghee explained that this amount was meant to cover what he described as "the processing .....and administration costs".

He then assured the complainant that the balance after payment of the so-called administration costs would be added to the complainant's investment portfolio. On this day De Ghee further undertook to deliver the investment certificate "once all the paperwork" had been formalised. As at the time that his complaint was lodged, no such certificate had been received by the complainant.

[14] In the subsequent months after such investment was made, the complainant received messages reporting on the progress of his investment. In addition to this, De Ghee would call the complainant and ask whether he had checked the performance of the investment. The complainant states that he had no reason to suspect that anything was amiss as the messages and calls came from De Ghee, an employee of the respondent.

[15] By the end of February 2008, De Ghee had advised the complainant that interest was due and that it would be paid into his bank account. De Ghee suggested that the complainant invest a further R50 000 so as to bring the portfolio up to the initially suggested sum of R100 000. An amount of R10 000 and a further R 8 700 was paid into the complainant's cheque account totalling R18 700, to which De Ghee characterized such payments as interest from the initial investment of R50 000. The so-called interest payments set the scene for further investments by the complainant. Whatever scepticism or apprehension the complainant might have had, on his account, simply vanished as the so called interest provided a measure of confidence in the legitimacy of the investment.

[16] Following further recommendations made by De Ghee, on the 27<sup>th</sup> of February 2008, the complainant transferred a further amount of R50 000 into De Ghee's personal account. The complainant explained that this amount was meant to be invested into his (complainant's) portfolio. The complainant made further investments in April 2008 of R23 000 into De Ghee's FNB account bringing the total 'investment' to the sum of R 123 000. According to the complainant, De Ghee assured him that all the money he (the complainant) had deposited would be invested by FNB on complainant's behalf. All the while, the complainant claims he was under the misapprehension that De Ghee was acting on behalf of FNB, the respondent. That is in spite of the fact that he had been making deposits into the *personal bank account of De Ghee*. I find it bizarre that as a businessman, the complainant did not see anything wrong with these transactions. He states that later in April 2008, further amounts (described as "interest earned" by De Ghee) of R42 000 and R23 000, respectively, were paid into his FNB account. As already stated, the complainant had on all occasions made deposits into the personal account of De Ghee, however, he claims that the payments he received were all the more reason he believed the investments suggested by the De Ghee were with the bank.

[17] Sometime in June 2008, De Ghee called the complainant to his offices at FNB. On his arrival, the complainant was advised that FNB had introduced yet another innovative investment scheme. Accordingly, De Ghee explained that this "new investment scheme" came about as a result of FNB's desire to cater for its prime customers, like the complainant. De Ghee then advised the complainant to invest a further R30 000 in that new scheme. Incredibly, the

complainant states that De Ghee asserted that the money be paid to him in cash as there would be no bank charges if the transaction was concluded in that manner. Complainant did not see anything wrong with De Ghee's suggestion and complied without demurring. Thereupon, the complainant informed De Ghee that he would invest a further R25 000 into the new scheme. De Ghee arranged for the complainant to do an over the counter cash withdrawal at one of the tellers, after which complainant handed the amount of R25 000 in cash to De Ghee. He claims it was with the understanding that, as always, De Ghee would invest the money on his behalf. None of these unusual arrangements aroused the complainant's suspicion.

[18] After this investment (of R 25 000), the complainant alleges that De Ghee would contact him on numerous occasions persuading him to pay the balance of R5000 to make up the full amount R30 000, as had been agreed. This prompted the complainant to transfer an amount of R3 000 to the personal account of De Ghee and the balance of R2 000 was withdrawn at a teller at the bank and paid over to De Ghee in cash. The complainant alleges that in July 2008, De Ghee urged him to once again, put more funds for investment purposes in order to extend his (complainant's) portfolio.

[19] He alleges that in August 2008 De Ghee shifted his attention to his business bank account. In that regard, De Ghee constantly requested the complainant to invest money that was kept in his business account. So insistent and persuasive was De Ghee that the complainant claims he eventually relented to his overtures. Thus, on the strength of De Ghee's unrelenting requests, the complainant 'invested' money that he kept in his business account in the sum



of R83 000 on 4 September 2008. As had been the case for all investments made immediately before this, the complainant deposited that sum of money into De Ghee's *personal bank account*.

[20] As had become his habit, at the end of September De Ghee summoned the complainant into the FNB branch and asked him to invest a further R20 000. By that time, the two gentlemen enjoyed a strong bond of friendship and the trust between them had grown so much that the complainant, without hesitation withdrew the money from his personal account and handed it in cash to De Ghee. He claims he believed the cash was for investment purposes. By this time, complainant had not received any proof of payment from De Ghee in respect of the amounts paid to him. All he had were withdrawal slips which he held as proof of such payment. The complainant claims he requested an investment certificate from De Ghee as proof of the invested funds, but was assured that such documents would be delivered at a later stage. No precise date of such delivery (by De Ghee) was ever forthcoming, nor insisted upon by the complainant. In spite of this and bizarrely, the complainant's trust in De Ghee persisted. Needless to say, the promised certificates never materialised. Instead, the complainant asserts that he was only issued with what De Ghee described as "a temporary confirmation of the funds available in the investment".

### **C. RESPONDENT'S RESPONSE**

[21] At this stage, it is convenient to briefly touch upon this Office's adherence to the *audi alteram partem* rule. Upon receipt of the complaint, this Office became

duty bound to afford the respondent an opportunity to respond and deal with the allegations raised by the complainant. In addition, the Office invited the respondent to deal with its alleged liability as the employer of De Ghee. The procedure that is followed in the investigation of complaints is strictly governed by the Rules on Proceedings of the Office of the Ombud for Financial Services Providers, 2003 (“the Rules”). The Rules are promulgated in terms of section 26 of the FAIS Act. In terms of the Rules, there were attempts, facilitated by this Office, at resolving the complaint. In that regard, there is a series of correspondence involving the complainant, the respondent and this Office. However, such attempts came to nought.

[22] Eventually, when all resolution attempts failed, this Office was compelled to issue a formal statutory notice in terms of section 27(4) of the FAIS Act, calling upon the respondent to furnish a formal response to the allegations and issues emanating from the complaint. Accordingly, the respondent filed its written response. In what follows below, I touch in broad strokes, on the respondent’s response.

[23] The respondent’s response is predicated on the common law defence that De Ghee had neither actual nor ostensible authority to render advice to clients on financial and investment opportunities. In support of the latter defence, the respondent proffers the following submissions:

23.1 The respondent denies that De Ghee was an authorized representative in terms of the FAIS Act and avers that he was acting outside the course of and scope of his employment.

- 23.2 De Ghee was not authorized to render any financial services on behalf of the bank as contemplated in Section 13(1) of the FAIS Act however, his duties as a Branch Manager involved the overall management of the branch.
- 23.3 According to the respondent, De Ghee acted for his own benefit during his relationship with the complainant. In that regard, De Ghee failed to act in the bank's interest because all the monies received were utilized by him and not invested as alleged by the complainant.
- 23.4 Respondent further alleges that the complainant has failed to prove that De Ghee acted as an agent of FNB when the scheme was presented (if there was such an investment scheme).
- 23.5 According to the respondent there is no insignia, symbols, trademark, connotation, phrase or document produced by the complainant that suggests that FNB was the benefactor of the monies invested by the complainant, and that all recipient account numbers were either in the name of Mr De Ghee or his family members. At all material times, the complainant was aware of all these facts.
- 23.6 The respondent goes on to state that the complainant, in his capacity as a business man, failed to question the authenticity of these investments, particularly his acceptance of the so called interest of approximately R93 750, which was paid to him within a period of three months of making his investment.

23.7 Based on the fact that the complainant transferred monies into the De Ghee's private account and also linked his account to De Ghee's, the respondent submits that, on a preponderance of probabilities, the complainant must have known that this was a scam/pyramid scheme. They state, even if the representations were made by De Ghee in his capacity as an agent of the bank, they were clearly unreasonable and should have put the complainant on alert.

23.8 The respondent accordingly argues that the issues raised in this determination need to be canvassed by leading evidence on credibility of the complainant's statements and asserts that these can only be tested in cross examination in a court of law.

#### **D. DETERMINATION AND REASONS**

[24] In the following paragraphs, I deal with the respondent's response under the general rubric of the issues arising as set out below. Accordingly, in my view this matter turns on the following issues:

24.1 Was the respondent's employee, De Ghee, acting within the course and scope of his mandate when he received monies from the complainant?

24.2 Was the complainant reasonable in his belief that he was transacting with the respondent and not De Ghee in his personal capacity?

[25] I will deal with both questions raised in paragraph 24 above, simultaneously. The present complaint paints a picture of deceit, lies, and greed. There is no

gainsaying that the complainant made several payments to De Ghee, particularly into the latter's personal bank account. At all material times, the complainant was aware that he was making payments either directly into De Ghee's private and personal account, or cash payments which he personally delivered to De Ghee.

[26] There are several uncomfortable facts that reflect adversely on the complainant. Such adverse facts emerge from the complainant's own version. The complainant's own uncontested version stated that there was a time when De Ghee would show the complainant other FNB clients' bank accounts. As a businessman, the complainant ought to have known that De Ghee's conduct was not only unlawful, but improper and unethical. As a businessman, the complainant says he knew that in the normal course of business, clients' bank accounts are treated as a matter of strict confidentiality. Notwithstanding De Ghee's clear breach of several of the bank's clients' confidentiality, the complainant did not seem perturbed by such indiscretion. Surely, as a businessman, the complainant ought to have reasonably known that De Ghee's improper conduct could never have been sanctioned by the bank. However, the complainant nonetheless saw nothing wrong as this did not adversely affect him. In fact, the complainant chose not to report De Ghee's flagrant breach of other bank clients' confidentiality. Instead, the complainant took advantage and pried into other bank clients' confidential information, and saw a business opportunity that enabled him to make an 'investment'.

[27] Furthermore, the complainant kept quiet and failed to alert the respondent when De Ghee made a personal cheque of R25 000 from his (De Ghee's) personal

account and gave it to the complainant. As a businessman, complainant should have known that there was something amiss when a bank's employee gives guarantees on behalf of a bank by issuing a cheque from his private account. If the complainant thought the investment was sanctioned by the respondent, how could he fail to question De Ghee's payment of R25 000 cheque from his private account? By all accounts such conduct was improper and could never be explained in any rational way.

[28] The complainant further states, on his own version, that at some point De Ghee called a staff member and instructed him to link his personal account with the complainant's own private account. With the full knowledge and acquiescence of the complainant, De Ghee became the beneficiary of the complainant's account. At this stage, one would have expected the complainant to protest or raise an objection. Instead, he simply went along with De Ghee's suggestion and added him as the beneficiary into his personal bank account. Again, the complainant failed to either question or alert the bank to De Ghee's improper conduct. If anything, it would appear as though the complainant was content to go along with the proposed plan as long as he stood to benefit.

[29] Moreover, the complainant's uncontested account of events states that on one occasion, he and De Ghee went to the bank's Auto Teller Machine ("ATM") and made a transfer of R50 000 into De Ghee's account. The complainant was fully aware that he was transferring money into the private account of De Ghee, and once again failed to inform the bank. At various stages of their friendship, the complainant paid substantial amounts of money into the private and personal

account of De Ghee. On other occasions, the complainant personally handed substantial amounts of cash to De Ghee. All the while, the complainant did not receive any proof of these payments.

[30] On his own version, the complainant says he would occasionally make cash payments to De Ghee so as to avoid bank charges. Clearly, the complainant's conduct raises more questions than answers here. Cash deposits into a bank account attract cash deposit fee for legitimate reasons. While bank customers may not like to pay cash deposit fees, paying monies into bank officials' private and personal accounts is not a legitimate option available. One must question why, if complainant thought he was investing in a bank approved scheme, he felt it was appropriate to make cash payments to De Ghee? Why would complainant, who describes himself as a businessman, link De Ghee's personal account to his own and add him as a beneficiary? Indeed, why would the complainant fail to enquire from the bank about the supposed bank statements reflecting the investment he allegedly made? These are some of the numerous uncomfortable questions that reflect adversely on the complainant. On the basis of the complainant's own version, it is difficult to see how the respondent could have prevented the complainant's loss of money. The complainant willingly and knowingly, entered into what appears to have been a private and personal arrangement with De Ghee.

[31] Throughout his friendship with De Ghee, the complainant never once brought to the attention of the respondent the improper conduct of De Ghee. On the contrary, it would appear that the complainant benefited from some of De Ghee's improper conduct. He happily went along with De Ghee's irrational

suggestions, and if anything, the respondent would seem to have been prejudiced by the conduct of De Ghee and the complainant. The complainant enjoyed what seems to have been an improper friendship with De Ghee. The fact that the complainant would have sight of the bank's clients' accounts and paid monies in cash to De Ghee, must have been to the prejudice of the respondent. If De Ghee defrauded other customers of the respondent, then it is possible that the complainant could have benefited from such fraud. Certainly, if other bank customers were being defrauded by De Ghee, then the complainant was not one of them.

[32] The complainant knew or ought to have reasonably known that De Ghee's conduct was improper. I have already mentioned the cash payments complainant made to De Ghee and the fact that he linked his own personal account and made De Ghee his beneficiary. Those are not the kind of financial arrangements a reasonable businessman would ordinarily enter into with their bank. Surely the unusual nature of the arrangements should have alerted the complainant to the fact that the schemes touted by De Ghee had nothing to do with FNB. The probable explanation, since the complainant went along with De Ghee's suggestion, could perhaps be explained by their cosy friendship.

[33] In the circumstances, the complainant cannot lay the blame for his misfortune on the respondent. For a very long period of time, the complainant seems to have benefited from De Ghee's apparent defrauding of his employer, the respondent. All of these facts emerge from the uncontested evidence presented by the complainant himself. The respondent had no way of knowing that the



complainant was personally making substantial amounts of payment to De Ghee.

[34] I should point out that the facts of the present matter are vastly distinguishable from the determinations of this office in the matters of **Newlove v FNB (FAIS 03299/09-10/ WC 1)**, and **Tshitema v Standard Bank (FAIS 01836/10-11/GP 1)**. In the present complaint, the complainant on his own version, knew that he was making payments into the personal account of the bank's employee. The complainant in the present matter, even went to the extent of linking the personal account of the bank's employee with his own account. Moreover, in the present matter, the complainant enjoyed a close and cosy friendship with the bank's employee, which spun over many years. It would appear from the facts furnished by the complainant that that friendship might have been to the prejudice of the respondent.

[35] Accordingly, the facts of the present matter clearly indicate that De Ghee, the respondent's employee, acted outside the scope of his employment. He was on a frolic of his own and the respondent cannot be held liable for the complainant's loss.

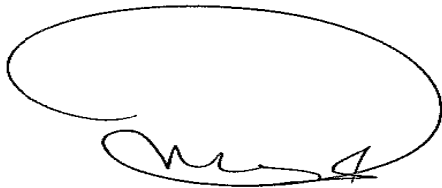
[36] All things considered, the complainant was the author of his own misfortune.

**E. THE ORDER**

[37] In the result, I make the following order:

The complaint is dismissed.

**DATED AT PRETORIA ON THIS THE 20<sup>th</sup> DAY OF NOVEMBER 2013.**

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

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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**