

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

**CASE NUMBER: FAIS 05296/12-13/ GP 1**

**In the matter between:**

<b>WILLIAM JOHANNES LLOYD</b>	<b>First Complainant</b>
<b>SUSANNA ELIZABETH LLOYD</b>	<b>Second Complainant</b>

**and**

<b>ALESIO MOGENTALE</b>	<b>First Respondent</b>
<b>TINA MOGENTALE</b>	<b>Second Respondent</b>
<b>INTROVEST 2000 CC</b>	<b>Third Respondent</b>

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

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**A. INTRODUCTION**

- [1] The complaints arise from failed investments made by complainants into BondCare Trust, on the advice of first respondent.
  
- [2] In their complaint, complainants allege that they were advised that BondCare Trust was a suitable investment, safe and capable of producing returns of about 18% per annum. Their funds were to be maintained in the attorneys' trust account and protected by the Attorneys Fidelity Fund.

[3] Complainants maintain that had it not been for respondents' advice, they would not have invested their retirement savings into BondCare Trust.

### **ABOUT BONDCARE TRUST**

[4] BondCare was marketed to potential investors as an answer to buyers of immovable property, who often did not have the necessary funds to pay the transfer duty and transfer fees. Thus BondCare presented an opportunity for investors to advance their money to these potential buyers at an attractive interest rate, thereby using the money as bridging finance in conveyancing transactions.

[5] According to documentation provided by BondCare Trust, the funds were allegedly transferred into an attorneys' trust account where it would be protected by the Attorneys' Fidelity Fund.

[6] Funds could be withdrawn by way of giving 90 (ninety) days' notice and the investment was said to generate interest of 18% per annum.

[7] During November 2009 the Registrar of Banks appointed an investigator to establish whether BondCare or any of its associated entities were conducting the business of a bank.

[8] Following the aforesaid investigation, BondCare introduced a new funding model in 2010. As such, two new entities were established known as BondCare Trust Association, t/a BondCare Trust and BondCare Financing CC, (BondCare CC).

[9] The new model however, was nothing more than a smoke screen, since the underlying business model remained the same. Respondent and his colleague, Mr Smit<sup>1</sup> remained at the helm of BondCare CC.

[10] The new model replicated what the original BondCare Trust was doing. For one, it allegedly advanced investor's money to conveyancing attorneys to provide bridging finance for immovable property. The only difference being that in advancing the money to the attorneys, BondCare CC acted as an agent of the investor, for a fee. Investors further became members of the Association and were entitled to receive interest on their investments.

[11] BondCare CC was marketed as a low risk investment and was said to be licensed as a Financial Services Provider with license number 9564. The truth however, is that no entity in the BondCare stable had ever been licensed. Second respondent, being member of first respondent, allowed its license to be used by BondCare.

## **B. THE PARTIES**

[12] First complainant is Mr William J Lloyd, a male retiree who was 73 years at the time the advice was rendered. Second complainant Mrs Susanna E Lloyd, who is married to first complainant, was 70 years at the time. Complainants' full details are on file with this office and they both reside in Gauteng.

[13] First respondent is Mr Alesio Mogentale, an adult male, key individual and representative of third respondent whose address is the same as that of third respondent.

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<sup>1</sup> Louis Jeremia Cornelius Smit was at all material times either a director or member of BondCare, BondCare Financing and BondCare Trust.

[14] Second respondent is Tina Mogentale, an adult female, a member and representative of third respondent whose address is the same as that of third respondent.

[15] Third respondent is Introvest 2000 CC, registration number 1991/002857/23, a close corporation duly incorporated in terms of South African laws, with its business address noted in the regulator's records as 604 Amandelboom Road, Doornpoort, Pretoria, Gauteng. Third respondent's license number 9564 was withdrawn on 12 May 2015.

[16] For the sake of convenience, I refer to first and second complainants as complainant.

[17] Likewise, I refer to first and second respondents as respondent. Where appropriate I specify.

### **C. THE COMPLAINT**

[18] On or about 19 May 2010, first complainant invested an amount of R300 000. The interest on the investment was to be capitalised annually. On the same day, first complainant invested a further R320 000. In respect of this investment, interest was to be paid monthly.

[19] On the advice of first respondent, second complainant invested R25000 and R18 0000 on 3 February and 28 April 2011, respectively. In respect of the both investments, interest was to be paid monthly.

[20] The crux of complainant's complaint is that following the misrepresentation and false information furnished to them by respondent, complainant was persuaded to invest their funds in BondCare Trust as they were assured that it is a legal financial institution.

[21] Complainant further goes on to say, respondents' failure to render financial services in line with the FAIS Act and the General Code of Conduct, which includes respondents' failure to appropriately advise complainant and disclose the risk involved in the BondCare investment, resulted in the loss of complainants' capital.

[22] As a result of the respondents' failure to appropriately advise complainant, complainant invested a substantial amount of their retirement savings to the value of R663 000 combined, which is now lost.

#### **D. RELIEF SOUGHT**

[23] Complainants seeks payment from respondent of the capital amount of R620 000 and R43 000 respectively.

#### **E. RESPONDENT'S VERSION**

[24] During October 2012, the complaint was referred to respondent in terms of Rule 6(b) of the Rules on Proceedings of this Office, (the Rules), to resolve it with complainant. A response was received from respondent dated 12 March 2013. None of the questions raised in the original letter had been responded to. Instead, respondent provided a so-called sworn affidavit made by the first respondent which provides details of his involvement with BondCare Trust and Mr Smit. I will deal with the affidavit later in the determination.

[25] On 7 February 2014 and 26 February 2016 respectively, the FAIS Ombud addressed correspondence to respondents in terms of Section 27(4) of the FAIS Act informing them that the complaint has not been resolved and that the office was proceeding towards an investigation. The letter invited respondent to deal with the question of appropriateness of advice, taking into account the risk involved in the investment and matching that with complainants' circumstances.

[26] Despite the FAIS Ombud's best efforts, no response to the aforesaid letters were received. Respondents were furthermore afforded ample opportunity to give their response to the complaint. The only submission that was made, was an attempt to justify respondent's conduct as far as it relates to the business dealings with Mr Smit. Despite being advised that the said response has not answered the complaint and that a proper response was required, no response was received from respondent and neither were any of the required documents.

## **F. DETERMINATION**

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

[28] The issues for determination therefore are:

- i) Whether respondent, in rendering financial services to complainant, violated the Code and the FAIS Act in any way. In specific terms, the question is whether complainant was appropriately advised, as the Code demands;
- ii) In the event it is found that respondent breached the Code and the FAIS Act, whether such breach caused the loss complained of;
- iii) Quantum.

## **G. LEGISLATIVE FRAMEWORK**

[29] It is appropriate at this stage to set out the applicable provisions of the FAIS Act and General Code of Conduct, (the Code) which are relevant in the present matter.

[30] Section 16 (1) of the FAIS Act provides:

*‘A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions, that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied and that for those purposes authorised financial services providers, and their representatives, are obliged by the provisions of such code to-*

*(a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;*

*(b) have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities;*

*(c) seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;”*

Section 16(2) further provides that:

*“A code of conduct must in particular contain provisions relating to-*

*(a) the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;*

*(b) adequate and appropriate record-keeping;”*

## General Code of Conduct

[31] Section 2, of Part II of the General Code provides:

*“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.”*

[32] Section 3(1) provides that:

*“ (1) When a provider renders a financial service –*

*(a) Representations made and information provided to the client by the provider –*

*(i) Must be factually correct;*

*(ii) Must be provided in plain language, avoid uncertainty or confusion and not be misleading;*

*(iii) Must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client.*

*(iv) Must be provided timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction.*

[33] Section 3(1) (b) notes that a provider and a representative must avoid or mitigate any conflict of interest between the provider and the client or the representative of a client. In this instance “conflict of interest” is defined as “.....*any situation in which a provider or representative has an actual or potential interest that may, in rendering a financial service to a client –*

*(a) Influence the objective performance of his, her or its obligations to that client; or*



*(b) Prevent a provider or representative from rendering an unbiased and fair financial service to that client, or from acting in the interests of that client, including, but not limited to –*

- (i) A financial interest;*
- (ii) An ownership interest:.....”*

[34] Section 8(1) of the General Code of Conduct provides that a provider must, prior to providing a client with advice:

*“ (a)Take reasonable steps to seek from the client appropriate and available information regarding the client’s financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;*

*(a) Conduct an analysis, for purpose of the advice, based on information obtained;*

*(b) Identify the financial product or products that will be appropriate to the client’s risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangement; and....”*

**Did respondent comply with the FAIS Act and the General Code when rendering the financial services to complainant?**

[35] There is not a shred of evidence that respondent assessed the risk capacity and profile of complainants prior to recommending the said investment. There is no relevant information relating to complainants’ circumstances. How respondent was able to appreciate complainant’s capacity for risk is a mystery. What the Code envisages in section 8 (1) is that a provider take into account necessary and available information for the purpose of conducting an analysis. Complainants were 73 and 70 at the time. The funds used to purchase this investment came from

complainants' retirement capital. There is no suggestion that respondent had applied his mind to find a suitable investment to complainants' circumstances. What is evidenced from the facts is that respondent sold complainants the BondCare investment outside of any analysis of their needs or risk profile in violation of section 8 (1) (c) of the Code.

[36] Complainants were under the impression that they were making a legitimate investment into a sound institution. They were also assured that their funds were protected by the Attorneys Fidelity Fund. The reality however was somewhat different in that no investor knew what happened to their money after paying it into BondCare. Not one set of audited financial statements was provided to demonstrate the financial wellbeing of BondCare. In addition, there were no credible means of verifying what happened to the funds after it reached the BondCare account.

[37] There were simply no visible means of holding first respondent and Smit, the two dominant individuals in BondCare, accountable. Thus, the claims made by first respondent about the alleged safety of the BondCare investment were nothing more than lies to lure unsuspecting investors.

[38] Predictably, as soon as the money was paid into BondCare, first respondent his colleague, Smit, hiding behind an undisclosed conflict of interest, started paying themselves undisclosed amounts of money from investor's funds. It is noteworthy that first respondent, in his affidavit to this office, estimated the value of his investment book to be R11 554 407.70. First respondent further confirmed that he earned commission of 6% on each investment, which, on the total amount of investments introduced by first respondent, would worked out to R693 264 worth of

commissions. There is no evidence that respondent disclosed the commission earned on complainants' investment. Complainants were not placed in a position where they could make an informed decision about the BondCare investment. This marks a contravention of the code, Section 3(1) (a) (iv) on the part of respondent.

[39] The information uncovered during the investigation of this matter demonstrates that respondent was not merely providing financial services with regard to a product provider; that is at arms-length. By his own admission, first respondent stated that whilst he was still in the employment of ABSA, he referred clients to Smit to invest money in BondCare Trust, based on the returns the product was providing. First respondent subsequently resigned from ABSA and started his own brokerage<sup>2</sup>. This is where first respondent was able to channel his clients' funds into BondCare.

[40] First respondent states that he was approached by Smit to become a trustee of BondCare, a position which he accepted and maintained for approximately two years. Due to internal conflict with other trustees, he resigned and started BondCare Financing CC in 2010, the vehicle that was ultimately used to market to investors the bridging finance concept as an investment. First respondent is noted in the registration papers as the sole member of BondCare Financing CC, registration number 2010/027207/23. .

[41] Respondent as an insider knew there were no governance arrangements and no measures to protect investors from embezzlement by the very trustees who were meant to safeguard investors' interest. On his own version, respondent corralled complainant and other investors to the BondCare stable, where respondent and his

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<sup>2</sup> Introvest2000 CC, FSP 9564

colleagues had unbridled control of investors' funds. BondCare was by no means an investment but a cesspit.

[42] Based on the aforesaid, it is clear that respondent could not be objective and treat complainants fairly while rendering financial services to them. Respondent failed to disclose his financial interest to complainant. In this regard, respondent's actions contravened section 3(1) (b) and 4(1) (d) of the Code. The latter states that a client should be informed if a provider directly or indirectly holds more than 10% of the relevant product supplier's shares, or has any equivalent substantial financial interest in the product supplier.

[43] Respondent also deceived complainant into believing that BondCare was a licensed financial services provider. This was part of the respondent's designs to win investors' trust.

[44] Respondent failed to disclose the risk involved in the investment, in violation of Section 7(1). The section calls upon providers other than direct marketers to provide (a) '*reasonable and appropriate general explanation of **the nature and material terms of the relevant contract** or transaction to a client, **and generally make full and frank disclosure** of any information **that would reasonably be expected to enable the client to make an informed decision.** (my own emphasis).*

[45] The risk inherent in BondCare was by no means suitable to complainant's circumstances. There is little doubt that complainant would have risked their savings had they been properly informed about the lack of governance to protect investors' interests in BondCare. This includes the falsification of BondCare's license status.

[46] For the record, respondent was asked to produce any record of advice reflecting the nature and process followed in advising complainant. Respondent failed to produce same. It is therefore not known what informed respondent that the investment was suitable to complainant's circumstances

[47] What is even more disconcerting is the respondents' blatant disregard of the provisions of Section 2 of the Code. Complainants signed a document<sup>3</sup> where the following is stated:

*"I hereby appoint INTROVEST 2000 BK, herein represented by Tina Mogentale, as my broker and authorise them to perform the necessary actions, including obtaining information with regard to my retirement / provident fund, insurance / investment companies in order to assist them in advising me / us to the best of their abilities...."*  
*(my own emphasis).*

[48] Respondents utilised the authority obtained above to gain access to complainants' personal financial information. Instead of using the information to properly assess their risk and act in their interest as the Code demands, it was utilised to exploit complainants by persuading them to invest their retirement savings into BondCare, in the process, violating the trust in their relationship.

**Did respondent's failure to comply with the FAIS Act and Code cause the loss complained of?**

[49] Respondents advised complainants to invest in BondCare. There is no dispute on this aspect.

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<sup>3</sup> Translated from Afrikaans

[50] First respondent, being aware of what occurred inside BondCare, went about persuading clients that the investments in BondCare were safe and that BondCare was a licensed institution. In presenting BondCare to complainants, respondent went so far as to invoke the so called protection provided by the Attorneys Fidelity Fund. Meanwhile, respondent was aware that all of this information was false.

[51] Respondent was aware at all times that he and his colleague were accountable to no one but themselves, thereby putting investors' funds into jeopardy.

[52] There is no question whether respondent could not foresee the harm that would materialise out of his actions.

[53] Respondents' actions caused complainants' loss.

## **H. FINDINGS**

[54] In light of the evidence before this office, the investment in BondCare Trust was made a result of respondents' advice. Respondent failed to place complainant in a position where they could make an informed decision about the BondCare investment.

[55] Outside of complainant's version, there is no evidence pointing to respondent's adherence to the law. The information at this office's disposal points to the following conclusions:

55.1 Respondent failed to appropriately advise complainant in contravention of the General Code.

- 55.2 When the investment was recommended, respondent was not acting in the interest of complainants. In fact, the only interest that was being advanced here was that of respondent.
- 55.3 There is no evidence that complainants' needs were assessed, nor that the risks inherent to this investment were properly explained to complainant, in violation of section 7(1) (a) of the Code.
- 55.4 The respondent failed to render financial service honestly, fairly with due skill, care and diligence and in the interest of the client and the integrity of the financial services industry, thereby contravening section 2 of Part II of the General Code of Conduct;
- 55.5 Complainants wanted a safe investment which required respondent to apply his mind and recommend a financial product that would suit those needs. BondCare simply did not fit that description.
- 55.6 Respondent failed to maintain his records of advice as required by Section 9 of the Code.
- 55.7 Respondent's failure to comply with the General Code was a direct cause of complainants' loss.

## **I. QUANTUM**

[56] Complainants invested an amount of R620 000 and R43 000 respectively.

[57] It needs to be mentioned that this Office communicated with the liquidator, ML Stewart of Bombani Liquidators. According to his report which was submitted at the second meeting of creditors on 16 September 2014<sup>4</sup>, there was already a shortfall

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<sup>4</sup> Report in the matter of the Consolidated Insolvent Estate of Louis Jeremia Cornelius Smit – Master's Reference number T3989/12 BC Trust Association – Master's Reference number T4352/12 BondCare Financing CC (In Liquidation) – Master's Reference number T3976/12 – Pretoria 16 September 2014.

of about R23 million. Add to this the claim by the South African Revenue Services, (SARS) which had not been taken into account at the time the report was compiled, and the prospects of a dividend towards complainants becomes bleak as SARS' claim must be paid in full before any concurrent creditor can be paid. Complainants are part of the many concurrent creditors. To date, complainants have not seen a cent of their capital.


[58] It is fair to conclude that complainants have lost their investment.

#### **J. ORDER**

[59] In the premises, I make the following order:

1. The complaints are upheld.
2. Respondents are ordered to pay complainants, jointly and severally, the one paying the other to absolved, the amounts of R620 000 and R43 000 respectively.
3. Interest on the said amount from date of this determination to date of payment at the rate of 10.25% per annum.

**DATED AT PRETORIA ON THIS THE 18<sup>th</sup> DAY OF MAY 2016**



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**NOLUNTU N BAM**  
**OMBUD FOR FINANCIAL SERVICES PROVIDERS**