

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS PRETORIA

Case Number: FOC 3323/08-09/KZN (1)

In the matter between:-

PAMELA MARRIE

First Complainant

SHIRLEY ROOKMONEY GOVENDER

Second Complainant

And

SOOBARAMONEY PERIMAL Trading as

MANNIES FINANCIAL PLANNING SERVICES

Respondent

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

PARTIES

- [1] The First Complainant is Mrs. Pamela Marrie, a 42 year old female residing at Chatsworth, Durban.
- [2] The Second Complainant is Mrs Shirley Rookmoney Govender, a 69 year old pensioner and first complainant's mother residing who resides with her at Chatsworth Durban.
- [3] The respondent is Mr. Soobramoney Perimal ('Perimal') previously an Authorised Financial Services Provider (FSP No.971) in terms of the FAIS Act, trading as Mannies Financial Planning Services, 407 Doone House, 379 Smith Street, Durban, Kwa-Zulu Natal.
- [4] Respondent's license was withdrawn in terms of a Notice of Withdrawal of Authorisation, No 2 of 2011 published in Government Gazette, 7 February 2011. The

withdrawal related to contraventions of S15A of the Financial Services Board Act, Act 97 of 1990 as well as contraventions of Sections 17(4) and 19(2) (b)(iii) of the FAIS Act.

THE COMPLAINT

- [5] Respondent initially acted as an adviser to complainants when they purchased life policies through him early in 2005.
- [6] Thereafter the relationship warmed to the extent that as the complainants put it 'he befriended us to such an extent that he managed to gain our trust.' Respondent then discussed complainants that they could earn high returns by investing directly with him.
- [7] Apparently respondent advised them that he was running a loan operation whereby he loaned money to high profile people like doctors and lawyers from whom he received a very high interest rate.
- [8] Complainants contend that they had no reason to doubt respondent's integrity in that after all he was a financial adviser with a valid financial service provider number who had previously given them financial advice.
- [9] Therefore 1st and 2nd complainants invested R20 000,00 and R10 000,00 respectively with respondent on the understanding that that they would receive a guaranteed return of 10% per month for three months, where after they had the option of having their capital return or investing for a further three months at the same return.
- [10] Complainants chose to invest for only three months and hence were provided with post dated cheques for the 10th October 2005 in their capital amounts. Whilst interest was received for the first three months this ceased thereafter and complainants were advised not to cash the cheques as there was no money in the account.
- [11] Complainants made contact with respondent on numerous occasions only to be advised that respondent was attending to the matter and that they would be paid shortly. At first complainants believed that respondent would honour his word but he

then avoided complainants and even changed his telephone number. Needless to say the capital and or interest remains outstanding to date.

[12] Frustrated with Perumal's evasiveness, Marrie and Govender approached this Office for assistance.

THE RELIEF SOUGHT BY COMPLAINANTS

[13] The complainants are seeking a full return of their capital plus interest they would have earned at bank rates.

INVESTIGATION BY THIS OFFICE

[14] The Office made contact with the respondent who in turn provided his postal address, requested that the complaint be posted to him and undertook to respond thereto.

[15] However, despite several follow ups, during which respondent undertook to revert immediately no response was received. Subsequent further messages left for respondent to contact the Office went unanswered.¹

[16] I must therefore accept complainants version and determine the matter on the information at hand.

THE ISSUES

[17] The issues to be decided are:

[17.1] Whether Respondent in rendering the advice, fell within the parameters of the FAIS Act. In this regard the issue revolves around whether the loan falls within the definition of advice rendered in respect of a financial product as defined in Section 1(1) of the FAIS Act ,

¹ I have previously issued a determination against Perumal (See Dhevdass Naidoo vs Perumal FOC2869/07-08/KZN 3) wherein I noted Perumal's lack of cooperation with this Office. In that matter, Perumal failed to file a response to the complaint.

[17.2] Only if it is determined that respondent's conduct falls within the FAIS Act can it then be determined whether his conduct caused the complainants to suffer damage or financial prejudice.

[17.3] The amount of such damage or financial prejudice would then be computed.

DETERMINATION AND REASONS THEREFORE

Whether Respondent's conduct falls within the ambit of the FAIS Act.

[18] On complainants' version they were aware that they were investing in a loan operation. Loans per se do not fall within the definition of a financial product as defined, which ipso facto would exclude respondent from falling within the ambit of the FAIS Act.

[19] The definition of advice in S1(1) (a) – (d) requires that said advice be in respect of a financial product.

[20] However I take cognisance of the fact that respondent acted as complainants' financial adviser and that a level of trust had developed over time. Respondent was an authorised financial services provider and whilst he may have befriended the complainants, this was the capacity in which he acted for complainants.

[21] The Office has in the past determined matters involving the sale of products which whilst not strictly falling within the definition, clearly amounted to the sale thereof when viewed within the surrounding circumstances and especially the complainants' understanding of the investment.

[22] In the determination of *Nebbe vs MJ Oosthuizen T/A Millennium Financial Advisory Services and Brokers FOC 2243/07-08 KZN (1)* I held that 'authorised financial services providers are confined to recommend those products as defined. They simply cannot recommend other investments not defined as financial products.'

- [23] In making this finding, this Office had in mind the provisions of paragraph (h) of the definition of a financial product, which refers to 'any other financial product similar in nature to a financial product.' This was particularly relevant in the Nebbe determination where the product in question appeared at face value to be strikingly similar to a legitimate Charter Life product which the complainant had taken out through the same adviser some years previously. The document and schedule were formatted in a manner similar to the Charter Life policy and this Office held that 'the conclusion that this investment was simply positioned as the Charter Life investment is inescapable in the circumstances.'
- [24] In the determination of Wilhelm Julius Malan vs Willie Adriaan Jordaan FOC 5452/07-08/EC (1), this Office held that if the product 'bears all the hallmarks of a financial product i.e. an instrument marketed to the public as worthy of investing in to earn a profit, or some benefit To put it colloquially, if it looks like a duck, walks like a duck, squawks like a duck, then it must be duck'.
- [25] In both these instances there was not only some similarity in form or function to a financial product but also complainants understanding thereof and hence the reason for holding that they fell within the ambit of the legislation.
- [26] Turning to the matter at hand I note that the post dated cheques referred to in paragraph 10 are in the name of respondent as opposed to some separate financial entity. Additionally there is no other documentation evidencing the investment, and as already discussed complainants clearly understood that the monies were to be used to fund loans.
- [27] The promised interest rate of 10% per month was so usurious as to immediately suggest that this investment fell outside the realm of a conventional financial product.
- [28] In short the evidence before me is such that complainants could not have believed that they were investing in a conventional investment product or even something remotely similar. Accordingly I am compelled to exclude this investment from falling within the definition of a financial product, thereby excluding respondent's actions

from the ambit of the FAIS Act. I therefore have no option but to dismiss the complaint.

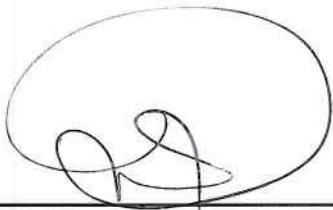
- [29] However this does not void the fact that respondent conducted himself under the guise of his practice as a registered financial service provider namely '*Mannies Financial Planning Services*.' Section 8(1) (a) of the FAIS Act requires that a financial services provider satisfy the registrar that they are fit and proper in respect of 'personal character qualities of honesty and integrity'. Section 2 of the General Code of Conduct for Authorised Financial Services Providers and Representatives requires that a financial services provider '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.
- [30] This is the second determination relating to the conduct of respondent. In both instances he engaged in questionable conduct, which runs counter to that which is expect of a registered financial services provider. His conduct lacks integrity in that over and above his interaction with complainants, he failed to co-operate or even bother to provide a reply to requests from this Office.
- [31] His failure to meet his financial obligations, in terms of the post dated cheques would suggest that he did not meet the financial soundness requirements of S8(c) of the FAIS Act.
- [32] Uncontested evidence provided by complainants in respect of respondent clearly points to him having operated as a loan shark in conjunction with his financial planning business. The monies most certainly appear to have been funnelled through his business bank account. This kind of conduct impugns the integrity of the financial services industry.
- [33] It therefore comes as no surprise and as noted in paragraph 4 that, unrelated to the present matter respondent's authorization to act as a financial services provider had been withdrawn by the Deputy Registrar on the 7th February 2011.

THE ORDER

I make the following order:

1. The complaint is dismissed.

DATED AT PRETORIA ON THIS 5th DAY OF JULY 2011

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a smaller 'B' and 'M', all contained within a large, hand-drawn oval. The signature is positioned above a solid horizontal line.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS

