

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

**PRETORIA**

**CASE NUMBER: FAIS 03052/12-13/LP 1**

**In the matter between:**

**MAGRIETHA CORNELIA PIENAAR**

**Complainant**

**and**

**INTROVEST 2000 CC**

**First Respondent**

**ALESIO MOGENTALE**

**Second Respondent**

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

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**A. INTRODUCTION**

- [1] The complaint arises from a failed investment made by the complainant into BondCare Trust, on the advice of the respondent.
- [2] The complainant alleges that she was advised that BondCare Trust was a suitable, safe investment, capable of producing returns of 18% per annum.
- [3] The complainant has now lost her funds, funds which were earmarked for her retirement, and she holds the respondent liable for such loss.

**B. THE PARTIES**

- [4] The complainant is Mrs R Pienaar, a 54-year-old adult female, whose full details are on file with this Office.

- [5] The first 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. The second respondent's license number 9564 was withdrawn on 12 May 2015.
- [6] The second respondent is Mr Alesio Mogentale, an adult male, key individual and representative of the first respondent whose address is the same as that of the first respondent. At all material times, the second respondent had provided the financial service to the complainant.
- [7] I refer to first and the second respondent as the respondent. Where appropriate, I specify.

***About BondCare Trust***

- [8] BondCare was marketed to potential investors as an opportunity to advance funds to buyers of immovable property who did not have the necessary funds to pay transfer duties and fees. BondCare facilitated an opportunity for these investors to advance their money to potential buyers at an attractive interest rate; effectively using investors' money as bridging finance in conveyancing transactions.
- [9] According to documentation provided by BondCare Trust, the funds were supposedly transferred into an attorneys' trust account where it would be protected by the Attorneys' Fidelity Fund.
- [10] Funds could be withdrawn by way of giving 90 (ninety) days' notice, and the investment was said to generate interest of 18% per annum.
- [11] 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.

- [12] Following the aforesaid investigation, BondCare in 2010 introduced a new funding model. Two new entities were established known as BondCare Trust Association t/a BondCare Trust and BondCare Financing CC (BondCare CC).
- [13] The new model however was an attempt to circumvent legislation, since the underlying business model remained the same. The respondent and his colleague, Mr Smit<sup>1</sup> remained in charge of BondCare CC.
- [14] The new model was a replica of what the original BondCare Trust was doing. It allegedly advanced investor's money to conveyancing attorneys to provide bridging finance for immovable property. The only difference was that in advancing the money to the attorneys, BondCare CC acted as an agent of the investor, for a fee. Investors became members of the Association and were entitled to receive interest on their investments.
- [15] BondCare CC was marketed as a low risk investment, and claimed to be licensed as a Financial Services Provider with license number 9564. However, the entity had never been licensed. The second respondent, being a member of the first respondent, allowed its license to be used by BondCare.

### **C. THE COMPLAINT**

- [16] On 27 February 2012, the complainant invested an amount of R700 000 into BondCare on the recommendation of the respondent. The funds invested were the complainant's entire retirement provision, and had been the proceeds of a divorce settlement.
- [17] The complainant, who was 46 years old at the time the transaction was concluded, was of poor health, having been diagnosed with Meniere Syndrome during 1989. Therefore, whilst

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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.

the complainant was self-employed, doing machine embroidery from home, her income was erratic as a result of her illness and she was reliant on the funds invested in Bondcare.

[18] The crux of the complainant's complaint is that following the misrepresentation by the respondent, which portrayed this investment as a safe alternative, she had been persuaded to invest her funds in BondCare Trust.

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

[19] The complainant seeks payment from the respondent of the capital amount invested of R700 000.

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

[20] On 14 August 2012, the complaint was referred to the respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office, (the Rules), to resolve it with the complainant. To date, no response was received from the respondent.

[21] Further correspondence was addressed to the respondent on 13 February 2013 in terms of Section 27 (4) of the FAIS Act informing the respondent that the matter had been formally accepted for investigation. The respondent was invited to provide its records in order to demonstrate the appropriateness of the advice rendered.

[22] The respondent responded to this correspondence in email correspondence dated 14 February 2013 stating that those who had invested through him had done so into a registered trust, and that they had been receiving an annual return of 20%. The respondent was also of the view that all investors had knowledge of the risks involved. (Note: No documentation in compliance with the provisions of the General Code of Conduct for Authorised Financial Services Providers and Representatives ('the Code') has been provided in support of these claims.)

- [23] The respondent claimed that after an investigation conducted by the South African Reserve Bank it had transpired that the trust had been a family trust who had hidden the funds offshore and that both he and his investors had been misled by the fraudulent actions of the trustees. (Note: Earlier findings and determinations made by this Office in respect of the conduct of the respondent and his partner, Mr Smit, would appear to contradict this claim.)
- [24] Despite the respondent's claims that a high court action seeking the liquidation of the trust and the return of the investors funds was ongoing at the time, the complainant's funds remained outstanding.
- [25] In closing the respondent claimed that he was not in possession of the file relating to the complainant, since all files were taken by Adv Blackbeard who was acting for the Reserve Bank in the investigation against the respondent.
- [26] On 12 September 2018 the respondent was provided with a further opportunity to respond when further correspondence in terms of Section 27 (4) of the FAIS Act was forwarded to the respondent. No response has been received to this notice.

## **F. DETERMINATION**

- [27] Having received no comprehensive response from the respondent addressing the allegations against him nor any supporting documentation (including a record of advice), the matter is determined on the basis of the complainant's version.

- [28] The issues for determination are:

28.1. Whether the respondent, in rendering financial services to the complainant, violated the Code and the FAIS Act in any way. In specific terms, the question is whether the complainant was appropriately advised, as the Code demands;

28.2. In the event it is found that the respondent breached the Code and the FAIS Act, whether such breach caused the loss complained of;

28.3. Quantum.

## **G. FINDINGS**

### ***The FAIS Act and the General Code of Conduct (“the Code”)***

- [29] It cannot be disputed that at all material times, the respondent provided financial services to the complainant. The specific form of financial service that this complaint is concerned with, is advice. Advice in terms of section 1 of the Act, includes any recommendation, guidance or proposal of a financial nature furnished to a client. The advice has to meet the standard prescribed in the Code.
- [30] Section 2 of the Code provides 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.
- [31] Contrary to the above-mentioned section of the Code, evidence at hand would suggest that as soon as funds were paid into BondCare, the second respondent and his colleague, Mr Smit, paid themselves undisclosed amounts of money from investors’ funds. The second respondent was approached by Mr 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. I refer in this regard to earlier findings and determinations made by this Office in respect of the conduct of the second respondent and his partner, Mr Smit<sup>2</sup>.

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<sup>2</sup> Determination FAIS 03914/12-13/ GP (1) JW Van Breda vs Alesio Mogentale and Introvest 2000 CC paragraphs 1 – 15; 43 – 57.

The respondent was therefore aware of the lack of governance within the entity and that no measures existed to protect investors from embezzlement of their funds by the trustees who were meant to safeguard the interest of investors

[32] Section 3 (1) of the Code further 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] In this regard the complainant was led to believe that she was making a legitimate investment into a sound financial institution. She was also assured that her funds were protected by the Attorneys Fidelity Fund. There were no credible means of verifying what happened to investors' funds after it reached the BondCare account. There is also no evidence that the complainant was provided with audited financial statements to demonstrate the financial wellbeing of BondCare. The respondent also deceived the complainant into believing that BondCare was a licensed financial services provider leading to the conclusion that the claims made by the respondent about the alleged safety of the BondCare investment was mere a way of attracting potential, unsuspecting investors, such as the complainant, in contravention of section 3 (1) of the Code.

[34] Section 3 (1) (b) also 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*” which can influence the objective performance of his obligations towards his client, or prevent a provider or representative from rendering an unbiased and fair financial service to his client. This includes a financial or ownership interest.

[35] It is clear from information discussed earlier in this determination and previous rulings by this Office that the respondent could not be objective and treat the complainant fairly whilst rendering financial services to her. The respondent failed to disclose his financial interest to the complainant, and therefore contravened sections 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. The respondent also failed to disclose the commission he earned on the investment, in contravention of section 3 (1) (a) (iv) of the Code.

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

36.1. seek appropriate and available information regarding the complainant’s financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;

36.2. conduct an analysis for the purpose of the advice, based on the information obtained; and



36.3. identify the financial product or products that would be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any other contractual arrangement.

[37] No evidence was presented that the respondent complied with this section of the Code and that any assessment was made of the complainant's risk capacity, profile or circumstances of the complainant prior to recommending the said investment. There is no suggestion that the respondent ensured that the investment was in fact suitable for the complainant. What is evident however from the facts is that the respondent sold the complainant the BondCare investment outside of any analysis of her needs or risk profile, in violation of section 8 (1) (a-c) of the Code.

[38] The respondent further did not disclose all material aspects of the investment to his client, in violation of Section 7 (1) of the Code. The risk inherent in BondCare was by no means suitable for the complainant's circumstances. There is little doubt that the complainant would not have risked hers capital had he been aware of the lack of governance within BondCare. This includes the falsification of BondCare's license status.

## **H. CAUSATION**

[39] The questions that must be answered is whether the respondent's materially flawed advice and actions caused the complainant's loss, and secondly, whether the non-compliance of a provision of the Code can give rise to legal liability, whether in contract or delict.

[40] Reference is made to the decision of the former Appeals Board in the matter of *J&G Financial Service Assurance Brokers (Pty) Ltd and another v RL Prigge*<sup>3</sup>. The Board stated that:

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<sup>3</sup> FAB 8/2016, paragraphs 41 – 44

*“The liability of a provider to a client is usually based on a breach of contract. The contract requires of a provider to give advice with the appropriate degree of skill and care, i.e., not negligently. Failure to do so, i.e., giving negligent investment advice, gives rise to liability if the advice was accepted and acted upon, that it was bad advice, and that it caused loss. And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.*

*In the case of a provider under the Act more is required namely compliance with the provisions of the Code. Failure to comply with the code can be seen in two ways. The Code may be regarded as being impliedly part of the agreement between the provider and the client and its breach a breach of contract. The other approach is that failure of the statutory duty gives rise to delictual liability.*

*In both instances the breach must be the cause of the loss.....”*

[41] There is sufficient information to suggest that the respondent had not been honest with the complainant about the nature of the investment, or his involvement in the entity. The second 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. Meanwhile, the respondent was aware that all of this information was false.

[42] The respondent was aware at all times that he and his colleague were accountable to no one but themselves, thereby putting investors' funds into jeopardy. The harm that could materialise from these actions was therefore foreseeable. I can make no other conclusion than that the complainant's money had been misappropriated.

[43] The respondents' failure to render financial services in line with the FAIS Act and the General Code of Conduct, which includes the respondents' failure to appropriately advise the complainant and disclose the risk involved in the BondCare investment, resulted in the loss of the complainant's capital. The respondents' actions therefore caused the complainant's loss.

**I. ORDER**

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

1. The complaint is upheld.
2. The respondents are ordered to pay the complainant, jointly and severally, the one paying the other to be absolved, the amount of R700 000.
3. Interest at a rate of 10% from date of demand, to date of final payment.

[45] Should any party be aggrieved with the decision, leave to appeal is granted in terms of section 28 (5) (b) (i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

**DATED AT PRETORIA ON THIS THE 10<sup>th</sup> DAY OF APRIL 2019**



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**NARESH S TULSIE**  
**OMBUD FOR FINANCIAL SERVICES PROVIDERS**