

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 03914/12-13/ GP (1)

In the matter between:-

JOHANNES WILLIAM VAN BREDA

Complainant

and

ALESIO MOGENTALE

First Respondent

INTROVEST 2000 CC

Second Respondent

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

A. INTRODUCTION

[1] The complaint arises out of a failed investment into a scam known as BondCare.

[2] Complainant invested his life savings into BondCare Trust, following advice offered by first respondent.

[3] In recommending the investment, Complainant was advised that BondCare 'was as safe as houses'.

- [4] In terms of how the product worked, complainant was informed that funds were invested with attorneys' firms for use as bridging finance in conveyancing transactions.
- [5] Invested funds could be made available subject to a 90 days' notice period. BondCare reserved the right to immediately repay any money obtained from a client in the event it could not successfully negotiate a transaction with an attorney.
- [6] During November 2009 the Registrar of Banks appointed an inspector to establish whether BondCare or any of the entities associated with BondCare were not conducting the business of a bank.
- [7] This resulted in a new model being introduced by BondCare in 2010. Two new entities were established known as BondCare Trust Association, t/a BondCare Trust (hereinafter referred to as the Association) and BondCare Financing CC, referred to as BondCare CC.
- [8] The new model was nothing more than a farce as the underlying business model remained the same. Respondent and his colleague Jeremia Smit, (Smit) remained at the helm of BondCare CC as its only member.
- [9] In the new model, which essentially mirrored what the original BondCare Trust was doing, investors' monies were advanced to conveyancing attorneys to provide bridging finance. The only difference being, in advancing the monies to the attorneys, BondCare CC acted as agent of the investor for a fee.

- [10] Investors became members of the Association and were entitled to receive interest on their investments.
- [11] Investors were informed that the investment could be withdrawn at any time subject to a 90 days' notice and availability of funds in the attorneys' trust account.
- [12] Depending on the choice of product selected, investors could earn between 15%, 18% and 22% interest per annum. For example, an investor who invested money for two years could earn 18% interest per annum. The investment could be withdrawn at any time in the two years, subject to the 90 days' notice and availability of funds in the attorneys' trust account.
- [13] The new scheme was punted as low risk and BondCare CC was said to be a licensed Financial Services Provider with license number 9564.
- [14] In truth, no entity in the BondCare stable had ever been licensed. A little unknown entity known as Introvest 2000 CC, registration number 1991/002857/23, the members of which were first respondent and his wife Tina Mogentale, allowed its license number to be used by BondCare in their expedition to defraud investors.
- [15] During 2013, a request was made to the regulator to lapse the FAIS license of Introvest 2000 CC.

B. THE PARTIES

[16] Complainant is Johannes William van Breda, an adult male retiree whose contact details are on file in this Office.

[17] First Respondent is Alesio Mogentale, an adult male and key individual of the second respondent whose physical address is 604 Amandelboom Road, Doornpoort, Pretoria, Gauteng Province.

[18] Second 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.

[19] Second respondent was authorised as a Financial Services Provider (FSP No. 9564) in September 2004. Sometime in 2013, first respondent made a request to lapse its license.

[20] At all times material hereto, first respondent rendered financial services to complainant.

[21] The word respondent/ respondents are used interchangeably in this determination and should be read to refer to both respondents.

C. COMPLAINT

[22] During or about 20 October 2010 complainant met with first respondent in order to seek advice on how to invest his life savings. Being all the savings he had at

the time, complainant says he was circumspect and carefully questioned first respondent as to the stability of BondCare Trust. Complainant states:

'In the light of the failure of Sharemax in which Mr advised me to invest, I saw Mr Montgale and asked about the stability of the investment in Boncare Trust and he gave me the assurance that all was well and that the investment was "as safe as houses". Notwithstanding, his assurance I was still concerned and explicitly mentioned that my investment in Bondcare was critical to my future financial needs and that I could not risk investments in debatable investments..'

- [23] The first investment was made in October 2010 in the amount of R200 000.
- [24] In March 2011, complainant made a further investment of R250 000. 00. According to the statement from BondCare Trust, complainant's investment had already grown to R262 260, in five months, this notwithstanding the monthly income paid. A further investment in the amount of R5500 was made on 23 January 2012.
- [25] In June 2012, complainant received a note from Smit informing him of an investigation into the affairs of the BondCare group by the South African Reserve Bank, (SARB). According to Smit, SARB was concerned that BondCare group were conducting the business of a bank.
- [26] Smit further mentioned that they as BondCare had already responded to SARB stating that BondCare was a voluntary association. However, SARB was

unimpressed by the response and went ahead with the appointment of a Mr Jaco Spies as Receiver.

[27] Complainant was advised by Smit that the Receiver would liquidate all the assets and divide them amongst the investors, after subtracting certain funds. Complainant was further invited to direct any query he might have to Spies.

[28] Complainant states that upon contacting first respondent for an explanation, the latter apparently confirmed the SARB investigation, adding that it would soon be settled.

[29] Subsequent thereto, complainant delivered a letter to first respondent on 30 July 2012 requesting immediate return of his capital.

[30] Having not heard positively from first respondent, complainant lodged the present complaint on 21 August 2012.

[31] Complainant states, *'As a result of the problems in Bondcare, I no longer have financial reserves to fall back on. I have a small business providing services to the refrigeration industry, but a serious back injury and a pending big surgery operation has stopped all work and income for at least three months.'*

D. RELIEF

[32] Attaching the latest statement from BondCare Trust at the time, Complainant requests that respondent be held liable to pay his capital together with all interest, subject to the FAIS Ombud's jurisdiction.

[33] The basis of complainant's claim against respondent is the latter's failure to render financial services in line with the FAIS Act and the General Code, which includes respondent's failure to appropriately advise complainant and disclose the risk involved in the BondCare investment.

E. RESPONDENT'S VERSION

[34] This Office referred several letters to respondent inviting him for his response, only to be met with deafening silence.

[35] A letter in terms of Rule 6 (b) of the Rules on Proceedings of the Office, ('the Rules') was sent to respondents on 30 August 2012 followed by a notice in terms of section 27 (4) of the FAIS Act, inviting respondent to furnish his version in order for this Office to begin its investigation.

[36] On 13 April 2015, respondent was invited once again, to provide his response and warned that in the event he failed to respond, the matter would be investigated and determined without his version.

[37] To date, no response has been received from respondents.

F. DETERMINATION

[38] Having not heard from respondents, notwithstanding numerous invitations, the matter is determined on the basis of complainant's version, along with supporting documents.

[39] The following issues are to be determined:

- (i) Whether respondents complied with the FAIS Act and the General Code while rendering financial services to complainant?
- (ii) In the event there was violation of the Act and Code, whether such violation is sufficiently connected to the loss complained of by complainant?
- (iii) Quantum.

(i) Whether respondents complied with the FAIS Act and the General Code when rendering the financial services to complainant?

[40] Section 3 (1) of the General Code of Conduct, (the Code), provides:

(1) When a provider renders a financial service-

(a) Representations made and information provided to a 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.

[41] Complainant was told that his investment in BondCare was 'as safe as houses'.

This was a complete fabrication on the part of first respondent.

- [42] BondCare solicited investments from members of the public to advance to conveyancing attorneys as bridging finance in immovable property transfers. Funds were allegedly paid into the 'trust bank account' of BondCare and later into the attorney's trust account, where it would be protected by the Attorneys Fidelity Fund. There was no evidence to support the aforementioned claims. No investor knew what happened to their money after paying it into BondCare. There was not even a set of audited financial statements to demonstrate the financial wellbeing of BondCare. In addition, there was no credible process of verifying what happened to the funds after they were paid into BondCare.
- [43] There were simply no visible means of holding first respondent and Smit, the two dominant individuals in BondCare to account. Thus, the claims made by first respondent about the alleged safety of the BondCare investment were nothing more than lies to lure unsuspecting investors.
- [44] Predictably, as soon as the money was paid into BondCare, first respondent and Smit, hiding behind an undisclosed conflict of interest, started paying themselves undisclosed amounts of money from investors' funds.
- [45] Complainant had stressed to respondent that the investment was critical for his financial needs, only for the latter to mislead him. In summation, respondent failed to place complainant in a position where he could make an informed decision about the BondCare investment.

[46] Part III section 4 (1) (d), requires the provider to furnish the client with full particulars of the following information:

Where applicable, the fact that the provider –

- (i) *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.*

[47] Information uncovered during the investigation of this complaint revealed that respondents were not merely providing a financial service with regard to a product provider that is at arms - length. BondCare Trust, IT 10396/04 (hereinafter referred to as BondCare), was registered in 2004. The two people who exercised control over BondCare were first respondent and Smit; the only trustees noted in the Deed of Trust.

[48] Even the so called new model after the query by the SARB in 2009 was a farce. Respondent and Smit remained at the helm of BondCare. First respondent and Smit were the only members of BondCare Financing CC, the entity that represented investors when funds were allegedly placed with the attorneys' firms. This is the entity that charged and paid itself commission from the investors' funds.

[49] Complainant was not informed by respondent that his retirement funds were to be invested in the latter's business. This marks a violation of the Code in respect of Part III section 4 (1) (d) in that respondents failed to disclose the extent of their interest in BondCare. In short, BondCare was nothing more than Respondent's alter ego.

[50] Section 8 which deals with the suitability of advice, enjoins providers to, prior to providing clients 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.*

(b) *conduct an analysis for the purposes of the advice, based on the information obtained;*

(c) *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.*

[51] Earlier on I pointed out that respondents did not bother to respond to any of the requests made by this Office. Nevertheless based on information furnished by complainant and relevant documentation that was analysed, respondent as an insider at BondCare knew there were no governance arrangements and no measures to protect investors from embezzlement by the very trustees who were meant to safeguard investors' interests.

[52] Investors were told that they qualified as beneficiaries of the BondCare trust, yet they were not even furnished with basic information such as an audited set of financial statements. Investors relied on the word of mouth of first respondent and his fellow travellers, who were actively spreading the word about how well BondCare was doing to lure unsuspecting victims.

- [53] Hiding behind an undisclosed conflict of interest, respondent corralled complainant and other investors to the BondCare stable, where respondent and his colleagues had unbridled control of investors' funds. BondCare was by no means an investment but a cesspit.
- [54] Respondent also deceived complainant into believing that BondCare was a licensed financial services provider. This was part of respondent's designs to win investors' trust.
- [55] Not only did respondent fail to disclose his interest in BondCare, he also 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.*** (emphasis mine)
- [56] The risk inherent in the BondCare was by no means suitable to complainant's circumstances. There is little doubt that complainant would have risked his life savings had he been properly informed about the lack of governance to protect the investors' interests in BondCare. This includes the falsification of BondCare's license status.
- [57] When he was asked by complainant to explain Smit's note regarding the investigation by SARB, respondent was not candid. Instead, he told

complainant to wait until end of June, by which time his capital would be paid. Smit's letter on the other hand, had already given away the truth that the Receiver was headed for selling assets and distributing whatever remained among investors.

[58] *Section 3 (1) (b) states:*

'A provider and a representative must avoid and where this is not possible mitigate any conflict of interest between the provider and a client or the representative and a client.

© A provider or a representative must, in writing, at the earliest opportunity – (i) disclose to a client any conflict of interest in respect of that client including- (aa) the measures taken, in accordance with the conflict of interest management policy of the provider.....'

[59] The section, no doubt, is there primarily to protect clients from the kind of abuse perpetrated by first respondent.

[60] First respondent was not only a provider of financial services to complainant, he was part of BondCare. Due to the undisclosed interest in BondCare, first respondent continued to feed complainant false information even in the face of the SARB letter.

H. FINDINGS

[61] Based on the facts of the case, respondents failed to place complainant in a position where he could make an informed decision about the BondCare investment.

- [62] Respondents failed to appropriately advise complainant in contravention of the General Code.
- [63] Respondents' failure to comply with the General Code was a direct cause of the complainant's loss.
- [64] Respondents, in violation of the General duty of a provider set out in Part II, section 2 of the General Code, failed to render financial services to complainant honestly, fairly, with due skill, care and diligence and in the interests of its client and the integrity of the financial services industry.
- [65] Complainant had asked for 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.
- [66] Respondent failed to act in complainant's interests in violation of his legal duty.

I. QUANTUM

- [67] Having confirmed complainant's investment of R455 000 into the account of BondCare, Complainant has requested this Office to order its return together with interest. The difficulty here is that there is no evidence that complainant's funds had ever been invested in any legitimate economic cause. Accordingly, I am only prepared to grant complainant his capital with reasonable interest.
- [68] 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 2014¹, there was already a shortfall 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 the complainant becomes bleak as SARS' claim must be paid in full before any concurrent creditor can be paid. Complainant is one of the many concurrent creditors. To date, complainant has not seen a cent of his capital.

[69] It is fair to conclude that complainant has lost his investment.

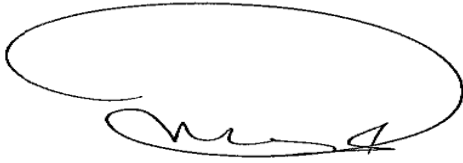
J. ORDER

[70] In the premises, the following order is made:

1. The complaint is upheld;
2. Respondents are hereby ordered to pay complainant, jointly and severally, the one paying the other to be absolved, the amount of R455 000.
3. Interest at a rate of 9%, from date of demand, being 14 August 2012 to date of final payment.

¹ 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.

DATED AT PRETORIA ON THIS THE 29th DAY OF JANUARY 2016

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a series of connected strokes, all contained within a large, hand-drawn oval.

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