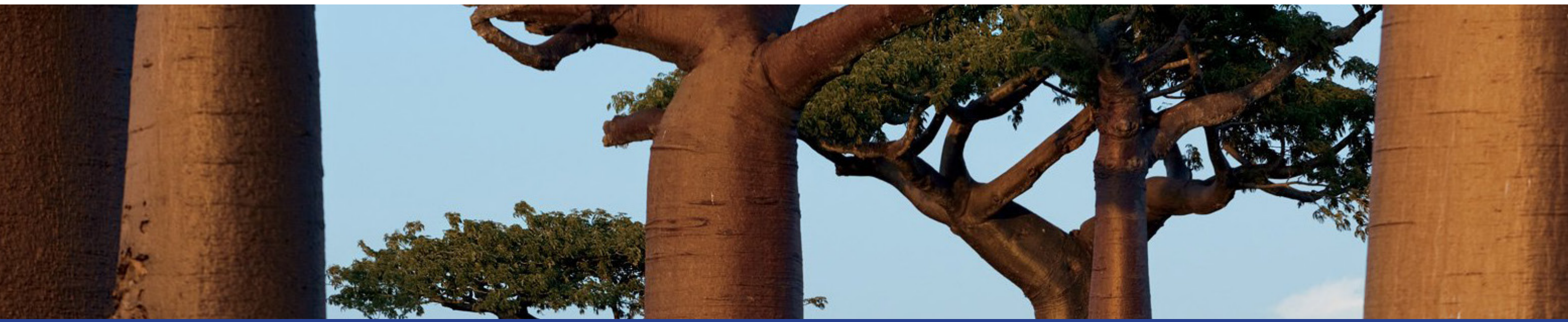
FAIS Ombud
Office of the Ombud for Financial Services Providers

under the baobab tree

2017 Edition



Introduction:

This, the 14th issue of Under the Baobab Tree, the newsletter of the Office of the FAIS Ombud, sees the end of the fourth quarter of 2016. During this quarter this Office also launched its annual report for the 2015/2016 financial year. The theme of the annual report was 'Constantly striving to educate both ourselves and those we serve', which is also what we look to achieve with this quarterly newsletter, where each case study is preceded by information pertaining to a specific product, and ends with lessons to be learnt from the circumstances surrounding the case study. In terms of performance, the 2015/2016 financial year saw the Office of the FAIS Ombud receive 9891 complaints of which 4263 complaints fell within the ambit of this Office. Both these amounts were an improvement on the previous financial year, and point to an increase in the awareness of this Office and the service we provide. Short Term Insurance complaints at 3161 continue to be the largest number of complaints received by this Office, another incitement on this sectors continued failure to embrace the provision of the FAIS Act and its corresponding General Code of Conduct for Authorised Financial Services Providers and Representatives ('Code'). In total this Office in resolved 1150 complaints in favour of the complainant which saw a total of R50 215 518.00 returned to complainants.

In FAIS Ombud's Operational Report the FAIS Ombud Ms Noluntu Bam highlighted the following "Due to the intangible nature of financial products, the consumers are unable to identify the disparity between their needs and what the product can really do. Unlike tangible products, there is no opportunity to examine or put the product to test. The consumer relies on the advice of the insurer's or bank's representative. By the time the consumer awakens to the limitations of the product, the damage has already been done; by then it is the consumer's recollection of the advice, against the written contract." Ms Bam then reiterated the importance of clients receiving appropriate advice in stating that "There is no question, appropriate advice is indispensable when it comes to dealing with financial products. Yet to many consumers, financial advice remains mythical until they come face to face with the consequences of poor advice."

In this fast paced world of financial services, the FAIS Ombud is compelled to continually develop its personnel to keep abreast with the changes. Not only are there changes to the financial products and services as the industry continues to innovate, but the manner in which business is done keeps evolving. Unless the FAIS Ombud take seriously the need to educate themselves and those they serve, including the alignment of its business processes, it will run the risk of failing to deliver on the FAIS Ombud's mandate. This makes the theme of the annual report all that more poignant, and it is only appropriate that we leave the last word to the FAIS Ombud herself "Today a significant number of consumers are free to participate in the financial services industry because the South African legal system has provided them with a forum that is accessible. As one of the fora that is tasked with the responsibility of administering remedial action, we appreciate the enormity of the responsibility entrusted upon us."

Case Study 1

Retirement planning encompasses saving towards retirement, preserving those retirement savings and ensuring that one has sufficient capital to provide an income for life. The importance of retirement planning to ensure that one makes sufficient provision for retirement is highlighted by the retirement reform proposals that were introduced by the Taxation Laws Amendment Act 2015, which came into effect on 1 March 2016. This legislation and other enactments of parliament have sought to stimulate South Africans to contribute to their retirement by making the more traditional retirement products such as pension funds, provident funds, and retirement annuities more attractive to potential clients. One such amendment allows employees and members of retirement annuity funds to deduct contributions to all retirement funds up to a maximum of 27.5%.This together with the fact that funds invested grow free of taxation and that such products are subject to prudential investment guidelines, mean and you have an investment vehicle that not only allows one to maximise retirement savings, but also contributes to the preservation of such funds.

Retirement planning is not however restricted to these retirement products, and there are numerous products and strategies that can assist one in achieving ones retirement objectives. Any financial planning conducted therefore requires financial advice that includes disclosures with regards to all material aspects of the various options, to allow one to make an informed decision. The implications and consequences of implementing a specific retirement strategy can have significant long term effects, making it all the more important that any recommendation made by a financial services provider is appropriate to one's financial needs and circumstances.

The Facts:

The complainant had retired as a member of a pension fund, and was still supporting his wife and had one dependent child, who was a student at the time the transaction was concluded. The complainant had at the time sustained debt which he had consolidated by taking out a loan shortly before his retirement. This had been done in the knowledge that he would have access to one third of his pension benefit with which he could settle the loan. Upon retirement the complainant had consulted the respondent with regards to his pension fund, and the recommendation made had been to apply for an annuity. Shortly after the pension fund had been transferred the complainant had enquired as to his one third payment that is afforded in terms of the Income Tax Act, and was informed that the full pension benefit had been used to purchase an annuity. The complainant was therefore unable to access any part of his pension benefit, and what's more, the monthly annuity he was receiving from the annuity was not sufficient for him to provide for both his family and the outstanding debt.

The complainant, aggrieved by respondent's conduct, approached this Office for assistance.

FAIS Ombud's Intervention:

Upon receipt of the complaint, the matter was referred to respondent in terms of the Rules on Proceedings of this Office. The respondent was requested to provide this Office with documentation showing compliance with the provisions of the Code. The respondent was also requested to provide documentation showing that he had obtained all relevant and available information with regards to the complainant's financial situation at that time that had seen it appropriate to have invested the entire pension benefit, instead of looking to reduce any outstanding obligations that may have allowed the complainant to budget in accordance with the income provided by the annuity. Following an in depth investigation, together with the respondent's response, it was established that the respondent had not maintained a record of the advice provided, and that the respondent had also failed to conduct an analysis of the complainants needs. As a result the complainant's needs had not been taken into account, and the respondent had as a result been able to make a recommendation that was appropriate to the needs of the complainant. This Office recommended that the respondent look to resolve this matter with the complainant. The respondent subsequently obliged and the complainant was paid out an amount equal to one third of his retirement benefit in full and final settlement.

Lessons learnt

1. A member who retires from a pension fund will have the option to commute one third of the pension benefit in the form of a lump sum. This is however a decision that should not be taken lightly and must be considered in accordance with one's financial needs and circumstances.

2. Prospective clients who retire from pension, provident and retirement annuity funds must ensure that they are provided all information with regards to the various options available together with the implications and consequences of these options. This will allow one to enter into more meaningful dialogue with the financial planner and not rely solely on his or her recommendation;

Case Study 2: Endowment Policies

When one withdraws from a pension or provident fund there are specific tax consequences should one choose to access these benefits in the form of a lump sum. These tax consequences, which see only the first R25 000 free from tax, differ significantly from those applicable at retirement where the first R500 000 commuted as a lump sum is free from tax. Retrenchment however allows one the opportunity to access lump sum benefits as if one had retired from a pension or provident fund. When considering retrenchment benefits, which in essence refer to the withdrawal from your employer's retirement fund at retrenchment, this amount is also taxed in accordance with the retirement lump sum tax table, again subject to the cumulative value of any previous retirement fund withdrawals made. What is vitally important however is that one can transfer this benefit to a preservation fund, however this has the effect of the lump sum losing its "identity" as a retrenchment benefit, and even though you will be entitled to make one full or partial withdrawal from the preservation fund before retirement (earliest age 55), the withdrawal will be taxed as a normal withdrawal from the preservation fund, with only the first R25 000 being free from tax.

The Facts:

The complainant a 51 year old married man and father had previously been employed as a general worker and had been retrenched during late 2014, at the age of 49. The complainant claims that upon approaching the respondent he had not been advised with regards to the material terms of the policy and that he had not consented to his funds being, what he referred to as 'reinvested'. The complainant claims that he had only received R 130 000 from his retrenchment benefit, and that he had later been informed that a further R 400 000 had been invested with Old Mutual. The complainant was not receiving any income from his investment and he is under financial distress as a result of being unable to pay for his child's tertiary education, his monthly rent or to be able to take care of his family as the sole breadwinner. The complainant's total retrenchment benefit from his provident fund of R543 000, had been placed into a provident preservation fund, where he had withdrawn a lump sum equal to 1/3rd of the amount invested amounting to R 181 000. The complainant had also received R 105 000 as a severance package. The complainant was dissatisfied, as he required funds to pay for his child's education and was unable to access the funds from the preservation fund, despite the proceeds having been from a provident fund, as he had already made use of the one withdrawal available to him.

The complainant had approached this Office for assistance after having been unable to resolve the matter with the respondent.

FAIS Ombud's Intervention:

The complaint was directed to the respondent in accordance with Rule 6(b) of the Rules on Proceedings of this Office where the respondent was required to provide documentation evidencing what financial planning activities had been conducted which saw the recommendation made as appropriate to the complainant's needs and circumstances. The respondent however responded that the 'advice' that was rendered had been in the form of a mass presentation to all retrenched staff, presented by a representative of the product provider. It was evident from this response that there had been no attempt to source all relevant and available information from the complainant to ensure that the recommendation ultimately made was appropriate, and that the complainant had simply signed forms according to what had been presented.

This Office informed the respondent that there were serious concerns with regards to the manner in which the transaction had been concluded. Not least of which was that he had failed to take into account the complainants circumstances in advising him with regards to the extent of the lump sum required. It is worth noting that the complainant had been able to access a withdrawal before the funds had been transferred, which had not been considered and or disclosed to him, and by transferring the retrenchment benefits to a preservation fund the withdrawal ultimately taken had been taxed as a withdrawal benefit to the detriment of the complainant. A recommendation was made that the respondent reconsider its stance and look to resolve the matter with the complainant, which resulted in the respondent reaching a settlement with the complainant in full and final settlement of the complaint.

Lessons learnt

1. Retrenchment benefits, should one choose to access the retirement benefits in the form of a lump sum, are taxed in the same way as a lump sum withdrawal upon retirement. This means that the first R500 000 is tax free. (Assuming that no previous withdrawals had been made from any other retirement funds).

2. The lump sum withdrawal can be made prior to the transfer to a preservation fund, and the decision with regards to how much should be withdrawn is an important one, that mast take all the clients circumstances into account. The reason for this is that once transferred to a preservation fund, retrenchment benefits lose their 'retirement status' and whilst a further one withdrawal is available, the funds will be taxed as a withdrawal benefit where only the first R25 000 is free from tax.

Case Study 3:

When one withdraws from a pension or provident fund, there are many decisions one must make with regards to how the funds shall be utilised. One of those decisions is whether to transfer the funds to a preservation fund or a retirement annuity. Both products are retirement funds for individuals, and both are governed by the Pension Funds Act. A preservation fund is however more flexible than a retirement annuity. With a retirement annuity you can only access the money from age 55, and eve then you must use two-thirds to buy an annuity. With a preservation fund you are allowed one (full or partial withdrawal) before retirement (earliest retirement age is 55). If it is a pension preservation fund, you must also use at least two-thirds of your benefit to buy an annuity if you retire (rather than withdraw) from the fund, with a provident preservation fund you can take the whole amount as cash (net of tax). With a retirement annuity fund you can make further contributions to the fund, while you cannot contribute to a preservation fund. In the end it is your specific needs and circumstances that should dictate which option is the most appropriate.

The Facts:

The complainant an engineer had during July 2012, after much consultation with his employer, accepted a voluntary retrenchment package. The complainant was 48 years old at the time he was retrenched. The complainant subsequently approached the respondent to advise him of the options available to him upon retrenchment. Complainant claims to have given strict instructions to his adviser to withdraw the full pension benefit of R965 476. 73. The complainant had wanted the funds placed in an "investment account", where he would have access to the funds, as he was starting his own engineering business and he needed to purchase equipment to get the business up and running. Complainant claims to have signed various documents presented by his adviser believing that the respondent was acting in his best interest. On 28 November 2012, the complainant received an amount of R426 772. 84 which was paid into his bank account, with the remaining R538 703. 46 transferred into retirement annuity (RA). When the complainant required funds to purchase equipment he had contacted the respondent to withdraw from the RA and was told that he could not withdraw from the RA until the age of 55.

Complainant approached this Office to assist him to withdraw a portion of his remaining pension to purchase machinery and equipment for the business.

FAIS Ombud's Intervention:

We sent the complaint to the respondent, in accordance with Rule 6(b) of the Rules on Proceedings of the Office. In its response the respondent alleged that he was informed by a consultant from the pension fund that the complainant could not take the full amount in cash. Respondent had taken that information at face value and did not do his own investigation. As it turned out, the fund rules allowed the complainant to take the full benefit in cash, less deductions; or take any part thereof and to transfer the remainder or to transfer the full benefit to an approved fund. The respondent was also unable to provide any documentation in compliance with the provisions of the Code demonstrating that any analysis had been conducted for the complainant and that the respondent had obtained any relevant and available information, such as the complainants business prospects, which would have ensured that the funds would have been transferred to a product appropriate to his need for liquidity.

After having received correspondence from this Office, where a recommendation had been made to resolve the matter with the complainant, the respondent conceded that it had failed to render appropriate advice as defined in the FAIS Act and Code, and made an offer that was accepted by the complainant in full and final settlement.

Lessons learnt

1. A preservation fund, whether it be a pension or a provident preservation fund, is also considered to be an approved retirement fund. Should one believe that there may be a need to access funds from one's retirement benefits that have been preserved then a preservation fund, where you are allowed one withdrawal prior to retirement would be a more appropriate option that a retirement annuity where the funds are inaccessible until you are 55.
2. Unless you are a member of the GEPF, all individuals who withdraw from a pension or a provident fund after March 2012, are allowed to make a withdrawal prior to transferring the funds to a product such as a preservation fund. This withdrawal will not affect the one withdrawal provided within the provident fund.
3. It is important that you determine with the help of your financial planner exactly what may be required so that a lump sum is withdrawn that is sufficient for your needs.

Case Study 4

The complainant, a 56 years old correctional officer, with the Department of Correctional Services, resigned during 2015 with a pension interest due to him from the GEPF calculated at R2 363 489.00. The reason for the complainant having resigned was to start a business as a mechanic. The complainant who was a single parent to four minor children, claimed to have informed the respondent that he wanted to withdraw a lump-sum from the total pension benefit and to thereafter invest the rest of the funds in a product that would provide him with an income, but which would also allow him to have access to the money when needed. The complainant knew that he would not be receiving an income until the business showed a profit, which is why he needed to have both access to the funds as well as to receive an income.

The complainant subsequently received an after tax lump sum R787 000.00 with the remainder of the funds invested in a product that would provide him with an income. A few months later the complainant contacted the respondent and requested a withdrawal from the remaining funds. The complainant was then advised that the money would only be available to the complainant when he turned 55. The complainants did not oppose this, however when he contacted the respondent during 2016 when he turned 55, he only received R8 000.00. After querying this with the respondent, he was advised that his pension benefit had been used to purchase an annuity.

The complainant unsuccessfully attempted to resolve the matter with the respondent, which saw him lodge a complaint with this Office.

FAIS Ombud's Intervention:

Upon receipt of the complaint, the matter was referred to the respondent to provide this Office with documentation showing compliance with the provisions of the General Code of Conduct for Authorised Financial Services Providers and Representatives ("the Code'). The respondent was also requested to respond to the question of what relevant and available information had been gathered from the complainant that had resulted in the recommendations having been seen as appropriate. From the response received it became evident that the respondent had not included details of the nature of the product that the complainant's pension benefits had been paid into. The respondent instead referred this Office to the policy contract that only evidenced the terms and conditions of the annuity, and provided no record of the discussions that had preceded recommendation of the product concerned. This Office recommended that the respondent settle the matter by paying to the complainant the commission that the advisor had earned as well as an ex gratia amount to compensate the complainant for the failure by its representative to ensure that the application form signed by the complainant was not blank and for failing to honour the instructions of the complainant. The respondent in response to the recommendation made an offer to the complainant in full and final settlement, which the complainant had accepted

Lessons learnt

1. As a consumer of a financial product, one must never sign a blank form because you leave it to the respondent to include details that may not be correct and which may not correctly reflect the discussions that preceded the acceptance of the recommended product. This may see you left with a product that you did not want and which is unable to serve your needs.

2. The retirement laws are there to protect and benefit retirees by protecting the interest that one receives on their retirement and this is why there are certain restrictions that are imposed. An advisor is required by law to act in the best interests of a client and to recommend a product that is suitable to a client's needs, with retirement products this is often by way of an annuity that will provide you with an income as opposed to allowing you to access the entire benefit.

Determinations:

In terms of Section 28 of the Financial Advisory and Intermediary Services Act, where a matter has not been settled or the FAIS Ombud's recommendation not accepted by the parties, the FAIS Ombud will make a final determination which may include –

- the dismissal of the complaint; or
- the upholding of the complaint wholly or partially, e.g. by awarding the complainant an amount as fair compensation for the financial prejudice or damage suffered.

The FAIS Ombud's determination has the effect of a civil judgement of a court.

Determinations issued by this Office provide valuable insight into the manner in which this Office interprets the provisions of the FAIS Act and its corresponding General Code of Conduct for Authorised Financial Services Providers and Representatives.

Below is a table of all determinations issued during the quarter October 2016 to December 2016, and are available on our website at www.faisombud.co.za.

2016/17	Investments	DEON VICUS SMIT	HUIS VAN ORANJE FINANSIËLE DIENSTE BPK and STEPHANUS JOHANNES VAN DER WALT	20161215
2016/17	Investments	DOUGLAS CHARLES TILLIDUFF	GROENELAND INSURANCE BROKERS CC and PETRUS SWART	20161212
2016/17	Investments	MARTHA MARIA BOTHA	HUIS VAN ORANJE FINANSIËLE DIENSTE BPK and STEPHANUS JOHANNES VAN DER WALT	20161212
2016/17	Short-term	AARVARN RAJCOOMAR	PIETER DE WET t/a MODEL INSURANCE COMPANY	20161205
2016/17	Investments	MARGARETHA ELIZABETH LAMBRECHTS	OPTIMUM CONSULTANTS (PTY) LTD and JANNIE R VAN DER MERWE	20161205
2016/17	Investments	PETER WHARTON MACKIE	GERHARDT ARNOLD HATTINGH	20161130
2016/17	Investments	WILLEM CHRISTIAAN STEYN OOSTHUYSEN	ERNEST LEHANIE	20161130
2016/17	Investments	JOHANNES CHRISTOFFEL BOSHOFF	HUIS VAN ORANJE FINANSIËLE DIENSTE BPK & STEPHANUS JOHANNES VAN DER WALT	20161129
2016/17	Investments	HAROLD SYDNEY JACKSON	JOHANN NELL FINANCIAL SERVICES CC & JOHANN NELL	20161124
2016/17	Investments	HELOISE ALETTA STEPHINA JACKSON	JOHANN NELL FINANCIAL SERVICES CC & JOHANN NELL	20161124
2016/17	Investments	JAN WILHELM NEL	HUIS VAN ORANJE FINANSIËLE DIENSTE BPK and STEPHANUS JOHANNES VAN DER WALT	20161123
2016/17	Investments	SUSARA GERTRUIDA KRŰGER	HUIS VAN ORANJE FINANSIËLE DIENSTE BPK and STEPHANUS JOHANNES VAN DER WALT	20161122
2016/17	Investments	ELSA JOHANNA ZANDBERG	OPTIMUM CONSULTANTS (Pty) Ltd and JANNIE R VAN DER MERWE	20161122
2016/17	Investments	MARIA MAGDALENA ELIZABETH BLANCHÉ	HUIS VAN ORANJE FINANSIËLE DIENSTE BPK; BAREND PETRUS GELDENHUYS & STEPHANUS JOHANNES VAN DER WALT	20161020
2016/17	Investments	JOSEPH PETRUS HERMANUS ROBBERTSE	MOF VAN NIEKERK MAKELAARS BK & OCKERT VAN NIEKERK	20161020
2016/17	Investments	ELIZABETHA THERON & RICHARD ALEXANDER THERON	HUIS VAN ORANJE FINANSIËLE DIENSTE BPK & HUIS VAN ORANJE FINANSIËLE DIENSTE BPK	20161018
2016/17	Investments	JACOBUS JOHANNES CARSTENS & GERTRUIDA HENDRIKA CARSTENS	PAARL FINANCIAL ADVISORS CC & JOHANN ANTON BARTMAN	20161012

OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

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Anyone who has a complaint about the service delivery of this office must kindly email their complaint to hestie@faisombud.co.za