IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA **Case Number: FOC 1208/06-07/NC (1)**

In the matter between:-

CORNELIUS J DE VRIES **Complainant**

and

JAN ADRIAAN LOUW **Respondent**

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

A. THE PARTIES

[1] The Complainant is Mr Cornelius J de Vries, an adult male presently residing at 5, Van Eycksingel, De La Hey Landgoed, Belville, Cape Province.

[2] The Respondent is Mr Jan Adriaan Louw, who was previously an authorised financial services provider with his place of business at 9 Silverbeeck Singel, Vredekloof, Cape Province. Respondent's authorisation number was 5902 before it lapsed on 21 September, 2007.

B. THE BACKGROUND

[3] The complainant lodged a complaint with this Office alleging that contrary to his explicit instructions, the respondent replaced an existing endowment policy which was to mature in 2011 with another that he later found out would mature only in fifteen years' time.

The relief sought by complainant

[4] By the time he surrendered the policy the complainant had paid R6 000, 00 in premiums. The cash value was only R1 606, 00 after deduction of the commission paid to the respondent and other costs. He says he was paid out a surrender value of R1 056, 00. He therefore claims the difference of R4 944, 00 plus interest from the respondent.

Investigation by this Office

[5] The complainant lodged two complaints with this Office regarding the respondent. However, the first complaint relates to the rendering of a financial service prior to the coming into force of the FAIS Act and is therefore outside my jurisdiction. This determination therefore deals with the second complaint only. Reference will be made to the first complaint only insofar as it may be relevant to the adjudication of the second complaint.

[6] According to the complainant, during June 2005 the respondent contacted him and made an appointment to see him regarding his insurance portfolio. During the meeting the respondent suggested that he make his existing

Sanlam endowment policy (which he had previously sold to complainant in 2001) paid up. A new policy could then be issued by Metropolitan – a so-called Contego B5 Bomber policy - which would give him better returns than the Sanlam one. Complainant agreed and also decided to increase the premium from the R350, 00 (it was in fact R465, 85) he was paying toward the Sanlam policy to R500, 00 for the new one.

[7] Complainant further alleges that respondent had told him that he could cash up the Metropolitan policy at any time and he would be paid out the premiums together with the growth ("plus wat ek verdien het").

[8] Complainant says he told respondent that as the Sanlam policy was to mature in July, 2011, he wanted the term of the proposed new Metropolitan policy not to exceed that term, i.e. that the premiums should only be payable up to and including July, 2011 – a term of 5 years. (The term would actually have been 6 years from July 2005 to July, 2011 but nothing hinges on that, as will be apparent later.)

[9] During March 2006 complainant received his retrenchment package and, he says, he decided to consolidate all his premiums with a view to doing financial planning. On 20 June 2006 he met a Mr Doug Meyer at Metropolitan Odyssey to obtain the current value of the Contego B5 Bomber policy. He then found out that the term of the policy was 15 years and not 5 years as he had requested. The cash value of the policy was only R1 606, 00 even though he had paid R6 000, 00 in premiums over the previous 12 months.

[10] It was also during this time (March 2006) that he perused an earlier policy he took out through Louw in 2001. He found that the policy had a term of 24 years when it should have been 10 years. He also found out that the policy had no cash value for the first 5 years. He eventually cancelled that policy. As I said earlier, this Office does not have jurisdiction to entertain that complaint.

[11] The respondent was licensed in accordance with the FAIS Act when he rendered the financial service to the complainant. He was initially asked to resolve the matter directly with his client and when that failed he was requested to respond to the complaint and provide this Office with copies of any relevant documentation in accordance with the FAIS Act.

The response

[12] In a letter dated 14 September 2006 the respondent provided this Office with his version of events.

[13] Respondent says the complainant's wife, who was a housewife, had a Sanlam life policy for which complainant was paying a monthly premium of R766, 72. Since complainant was the breadwinner, he suggested that it would be better that complainant have life cover over his own life in favour of his wife. Complainant's wife's policy had built up some value over the years and it was decided that the policy be surrendered and the proceeds used by her towards a business she wanted to start up. The premium saved was utilised for two new policies for the complainant – one a ten year endowment and the

other, life, disability and trauma cover – also with Sanlam. That was in 2001. Over the years the parties met each other a number of times and, says respondent, the complainant never indicated any dissatisfaction with his portfolio.

[14] In June, 2005, when complainant expressed his dissatisfaction with the growth of the Sanlam endowment policy, respondent suggested a Metropolitan Odyssey endowment product called 'Contego B52 Bomber'. He says the term of the policy – 15 years - was expressly discussed with complainant, who had agreed to it. The Sanlam endowment policy was made paid-up and the new Metropolitan policy came into force.

[15] Respondent mentions several factual inaccuracies in the complaint. I accept that they are incorrect but I am of the view that they were genuine errors and not made by complainant with the intent to mislead this Office. Nothing further will be said about them as they are in any event immaterial to the adjudication of this complaint.

The issues

[16] The issues to be decided regarding the second complaint are:

16.1 Whether the respondent complied with the requirements of the FAIS Act and the General Code for Authorised Financial Services Providers ('the General Code') when he advised complainant to replace the one investment product with another;

16.2 If he did not comply, whether such failure caused the complainant any loss; and

16.3 If he did cause the complainant loss, the quantum thereof.

Determination and reasons therefore

[17] It is clear that the complaint is about advice relating to replacement of one investment product with another and whether such advice was appropriate. The subject of replacement products enjoys specific attention in section 8 of the General Code where it is dealt with at some length.

[18] Respondent explains the reason for the very long term (15 years) of the Metropolitan Odysssey endowment policy as follows:

> *"Ek en meneer de Vries het saam besluit dat polisnommer . . . van Odyssey se termyn 15 jaar sou wees om op 'n latere stadium, nadat meneer de Vries sy skeidingspakket ontvang het, vir hom nog 'n substantiewe opbrengs sou verskaf vir latere behoeftes."*

This is translated into English as follows:

Mr de Vries and I decided together that the term of the Odyssey policy should be 15 years so that at a later stage, after Mr de Vries had received his retrenchment package, it would provide him with a substantial return for later requirements.

This explanation is vague and does not bear scrutiny for several reasons.

18.1 The Odyssey policy incepted from 1 July 2005 after the parties met in June of that year. Complainant received his retrenchment package only in March 2006.

18.2 Respondent has not provided this Office with copies of the record of advice record nor a copy of the Replacement Advice Record ('RPAR') which would have cast light on what exactly transpired at the time the advice was given. (He said he did not keep any.) Instead, all we have is the respondent's *ex post facto* explanation. Failure to keep these records is a contravention of section 9(1) of the General Code, which provides:

> " A provider must, subject to and in addition to the duties imposed by section 18 of the Act and section 3(2) of this Code, maintain a record of the advice furnished to a client as contemplated in section 8, which record must reflect the basis on which the advice was given, and in particular –
>
> (a) a brief summary of the information and material on which the advice was based;
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> (b) the financial product which were [sic] considered;
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> (c) the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the client's identified needs and objectives;

(d) where the financial product or products recommended is a replacement product as contemplated in section 8(1)(d) –

(aa) the comparison of fees, charges, special terms and conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided, between the terminated product and the replacement product; and

(bb) the reasons why the replacement product was considered to be more suitable to the client's need than retaining or modifying the terminated product:

Provided that such record of advice is only required to be maintained where, to the knowledge of the provider, a transaction or contract in respect of a financial product is concluded by or on behalf of the client as a result of the advice furnished to the client in accordance with section 8.

18.3 Respondent says the Sanlam 10 year endowment policy was not providing an adequate return. A probable option in that case would have been to switch the portfolios in which it was invested – at minimal cost to the complainant. But the switch to a new product - with the looming retrenchment of the complainant – to a 15 year term could not have been prudent in the given circumstances and seems in all probability to have been commission driven.

18.4 Respondent says he has full confidence in the Odyssey investments because a former Sanlam fund manager was heading the investment team at Metropolitan and he has a good track record. No doubt a good track record may be taken cognisance of – but in the circumstances of the complainant still did not justify such a long term of investment.

18.5 Respondent's assertion that the 15 year term was decided jointly by him and the complainant is at variance with what complainant says, i.e. that he had expressly told respondent that the term of the Odyssey policy should not exceed the unexpired period of the Sanlam policy which was made paid up. The latter policy had an unexpired term of about 6 years when it was made paid up. Again, there is a dearth of information from the respondent on this point. Proper record-keeping as required by the FAIS Act and Code would no doubt have been extremely useful in determining the issue. I have to then determine it on the probabilities. A 15 year term (bearing in mind that this was not a lump sum investment but a recurring premium one) in the light of complainant's then looming retrenchment, does not make sense. A 15 year term means a much larger upfront commission for the respondent. The probabilities therefore favour the view that such a long term investment in the given circumstances was nothing other than commission driven.

18.6 Finally, the respondent does not say that he advised complainant against a very long term investment, but rather that they both decided

on it jointly. Respondent was therefore in favour of it. Section 8(1) of the General Code imposes a duty on a financial services provider:

> "prior to providing a client with advice - (to)
>
> (a) identify 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 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, . . ."

[19] As I said, respondent was negligent in this regard. But for his conduct, the respondent would not have been invested in such a long-term product. Nor would there have been a deduction of upfront commission for a 15 year term rather than a (probably more appropriate) 5 year term. Complainant surrendered the policy after one year. His loss in this instance (which is what he is claiming) is the difference between what he received on surrender and the premiums he paid until then. That amount is, as I said earlier, R4 944, 00.

[20] It falls to be mentioned that whilst the complaint was being investigated the complainant informed this Office that respondent had offered to pay him R4 000, 00 in settlement of the matter but then failed to do so.

THE ORDER

I make the following order:

1. The complaint is upheld.

2. The respondent is ordered to pay the complainant the amount of R4 994, 00 together with interest on the said amount at 15.5 per cent per annum from the date which is seven (7) days after the date of this order, to date of payment.

3. The Respondent is ordered to pay the case fee of R1 000, 00 to this Office.

Dated at PRETORIA this 23 day of September 2009.

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CHARLES PILLAI

OMBUD FOR FINANCIAL SERVICES PROVIDERS