IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICE PROVIDERS
HELD AT PRETORIA

CASE NO: FOC/600/05/EC

In the matter between:

GARY LE VATTE	1st Complainant
JEANETTE LE VATTE	2nd Complainant
and	
ROBERT STEVEN SPENDLEY	1st Respondent
ROSSPEN FINANCIAL SERVICES CC	2nd Respondent

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

The Parties

[1] 1st Complainant is Gary Le Vatte an adult male, married out of community of property and currently residing at Plot 44 Quarry House, Chelsea Mount, Kragga Kamma Road, Port Elizabeth.

[2] 2nd Complainant is Jeanette Le Vatte an adult female, married out of community of property and currently residing at Plot 44 Quarry House, Chelsea Mount, Kragga Kamma Road, Port Elizabeth.

[3] 1st Respondent is Robert Steven Spendley, adult male, key individual, a duly authorised representative and member of the 2nd Respondent, of 11 Hurd Street, Newton Park, Port Elizabeth.

[4] 2nd Respondent is Rosspen Financial Services CC, a close corporation, duly registered in terms of the laws of the Republic of South Africa, an authorised financial services provider, with its principal place of business at 11 Hurd Street, Newton Park, Port Elizabeth.

The Context

[5] The issues *in limine* and in the main action arise against the background of the following facts, stated briefly:-

[6] On 22nd September 2004 1st Respondent and Complainants met with a view to discussing certain financial matters.

[7] Arising out of this meeting, 1st Respondent gave advice and made certain recommendations to the Complainants.

[8] One of the recommendations 1st Respondent made was that 1st Complainant replace his existing life policies with another life policy ('the replacement policy') to be taken through the Liberty Group Limited.

[9] A proposal form for the replacement policy was completed with the principal life assured being the 1st Complainant and the owner thereof being the 2nd Complainant and the proposed premium payer being

Wonder Pack CC in which the 1st Complainant is the member. The proposal form was apparently signed by Complainants on the 28 October 2004.

[10] The 1st Complainant, however, did not attend to any of the medical requirements to enable the replacement policy to be underwritten.

[11] It would appear that the Complainants then met with their broker with whom they allege they have a long standing relationship and based on her recommendations secured a policy in which both Complainants lives were covered. This policy was also taken through the Liberty Group Limited. This occurred on or about 22 November 2004.

[12] When the 1st Respondent discovered this, he produced an invoice on 23 November 2004 in which he claimed the sum of R5 158,50 from Complainants for various services alleged to have been rendered.

[13] The Complainants and the Respondents then fell into disfavour with each other. The 2nd Respondent issued summons against the Complainants in the Magistrate's Court, Port Elizabeth for recovery of the sum claimed in its invoice and the Complainant lodged a complaint pertaining to this matter with the Office of the Ombud for Financial Services Providers ('Office') on the 29 March 2005.

<u>Is this a complaint in terms of the FAIS Act?</u>

[14] In order to answer this question in the affirmative, one must look at the definition of complaint as set out in the FAIS Act.

[15] A complaint in terms of Section 1 of the FAIS Act is defined as 'a specific complaint relating to a financial service rendered by a financial services

provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative -

a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;

b) has wilfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or

c) has treated the complainant unfairly;'

[16] Although the parties met prior to 30 September 2005, being the date on which this Office was vested with jurisdiction, the rendering of the financial service took place after 30 September 2004 and the complaint relates to that service and the subsequent conduct of the 1st Respondent.

[17] The Respondents failed to address the complaint satisfactorily within the six week period prescribed in Rule 4 (a) (iv) of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers as promulgated in Board Notice 81 of 2003 and published in Government Gazette 25299 of 8 August 2003 ('Rules on Proceedings of the Office').

[18] The amount complained of is the sum of R5158, 50, which is within the jurisdictional limits of this office;

[19] In the circumstances, I am satisfied that the Complaint is the one that qualifies as a complaint in terms of the FAIS Act.

The Issues between the Parties

[20] *In limine*, whether the Office is precluded from adjudicating a matter where a Respondent has instituted legal proceedings against the Complainant.

[21] In the main action, the issues in this dispute are the following:

21.1 Whether the 2nd Respondent is entitled to charge fees of R5158, 50 in respect of services allegedly rendered by Respondents to Complainants;

21.2 Non-compliance with the provisions of the FAIS Act by the Respondents;

21.3 The wilful or negligent rendering of a financial service to complainants as a result of which the Complainants have suffered or potentially will suffer financial prejudice or damage;

21.4 The unfair treatment of the Complainants by the Respondents.

Respondents' point *in limine:* Is the FAIS Ombud precluded from adjudicating this complaint because the 2nd Respondent issued summons against Complainants?

[22] Upon receipt of the complaint, the Office on the 31 March 2005 despatched a letter giving Respondents details of the complaint and advising them to resolve the complaint with its client within a period of six weeks as required in Rule 6(b) of the Rules on Proceedings of the Office. One of the suggestions in the letter was that the 2nd Respondent holds court proceedings in abeyance pending resolution of the matter.

[23] An issue raised by the Respondents, when it became clear that the Office was proceeding to investigate the matter and to that end required statements and documents from them, was that Section 27 (3) (b) (i) and (ii) precluded the Office from doing this. Reliance was also placed on Rule 7(b) (v) of the Rules on Proceedings of the Office.

[24] It therefore becomes necessary to deal with this preliminary issue before dealing with the main issues in this dispute.

[25] The FAIS Act through the establishment of the Ombud for Financial Services Providers was intended to provide a cost effective, procedurally fair and expeditious dispute resolution mechanism that is easily accessible to all potential users. The potential users are all consumers of financial services in this country, who could readily bring their complaints to the Office, provided it falls within the jurisdictional limits of the Office.

[26] The Office is part of the enforcement mechanism contemplated in the FAIS Act. In resolving any dispute between a client and a financial services provider, the Office will, apart from anything else, rely on the provisions of the FAIS Act. The FAIS Act has built into it, subordinate measures, including codes of conduct, which give important guidance on whether a financial service that has been rendered accords with the principles set out in Section 16 of the FAIS Act.

[27] In particular the Office will have regard to whether the financial services provider or representative has acted ‘honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry’ as required in Section 16 (1) (a) of the FAIS Act.

[28] Of seminal importance is that Section 20 (3) provides that the Office can resolve a complaint 'by reference to what is equitable in all the circumstances', with due regard to the contractual or other legal relationship between the parties and the provisions of the FAIS Act. Thus, apart from anything else, it becomes important that there must be a contractual or other legal relationship on the basis of which the 2nd Respondent is entitled to claim fees from the Complainants.

[29] It is necessary to consider the provisions of the FAIS Act relied on by the Respondents in maintaining that the Office is precluded from dealing with this matter. Section 27 (b) (i) provides that:

'The Ombud must decline to investigate any complaint if, before the date of official receipt of the complaint, proceedings have been instituted *by the complainant* in any Court in respect of a matter which would constitute the subject of the investigation.' (own italics)

[30] Clearly Section 27 (3) (b) (i) envisages that the proceedings in any Court must have been instituted by the Complainant and not by the Respondent. The Respondents cannot therefore place reliance on this section to support any argument that the Office is precluded from investigating the complaint once the Respondent has started court proceedings. The plain language of the section therefore does not support the argument raised by the Respondents.

[31] Rule 7 (b) (v) of the Rules on Proceedings of the Office, on which the Respondents also rely, provides:

'The Ombud may dismiss a complaint without referral to any other party if on the facts provided by the complainant it appears to the Ombud that-
(i) …

(ii) …

(iii) …

(iv) …

(v) the subject of the complaint is pending in court proceedings; or

(vi) …'

Rule 7 (b) (v) must be interpreted intra-textually by reading the section with interrelated provisions dealing with the same subject matter.

[32] In this respect, there is yet another provision in the Rules on Proceedings of the Office that deal with the same subject matter. Rule 11 (a) of the Rules on Proceedings of the Office states that-

'The Ombud may decline to investigate a complaint, or may suspend the investigation, when to the knowledge of the Ombud *the complainant* intends proceeding to or has already embarked on litigation.' (own italics)

[33] In following the intra-textual, systematic interpretation, one can take guidance from the strategy adopted in the context of constitutional interpretation. In *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA; Executive Council of KwaZulu-Natal v President of the RSA* 1999 12 BCLR 1360 (CC), Ngcobo J. had this to say about this method of interpretation.

'It is an accepted principle of interpretation that where two sub-sections deal with the same subject matter these are usually read together. This rule of construction is applicable in constitutional interpretation. It is consistent with the purposive interpretation of the Constitution.'

[34] This intra-textual, systematic approach is in keeping with the purposive or teleological interpretation of statutes. This was the approach followed in

the case of *Olitski Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA) at paragraph 12 where it was said that statutory interpretation 'requires consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent'.

[35] Applying these principles to the case in point, it is clear that the legislature would not have intended that potential and actual Respondents can avoid the jurisdiction of this Office by simply instituting court proceedings against Complainants. This would defeat the very purpose for which this Office was established.

[36] An ancillary ground on which the Respondent relied was that the complaint form prepared by the Office to assist complainants to formulate their complaints was 'misleading', in that it stipulated that 'IF THE MATTER IS PENDING BEFORE A COURT OF LAW, PLEASE BE ADVISED THAT THE FAIS OMBUD IS PRECLUDED FROM LOOKING AT IT.' This note is not intended to override the clear language of the FAIS Act. It is intended to convey to the Complainant what the FAIS Act envisages, namely that if the Complainant has instituted such proceedings, then the FAIS Ombud is precluded from looking at it.

[37] A final point on this issue which may open the door to the Office declining to investigate a matter where court proceedings have been instituted is the use of the word 'may' in both Rules 7 (b) (v) and 11(a) of the Rules on Proceedings of the Office. Clearly this vests discretion on the FAIS Ombud on whether to decline to investigate a complaint where such proceedings have been instituted. In the particular circumstances of this case, I am not prepared to exercise such discretion in favour of the Respondent.

[38] In the result, I do not accept the argument by the Respondent that this Office is precluded from investigating this matter because the 2nd Respondent has issued summons against the Complainants.

DETERMINATION AND REASONS

The fees charged by the Respondent

[39] In order to decide whether the 2nd Respondent is entitled to charge fees to the Complainants in these circumstances one would have to consider the nature of the relationship between the parties in the light of all the statements and documentary evidence available. In the result one would have to weigh the probabilities of each of the versions that have been submitted and consider these in the light of the provisions of the FAIS Act. In particular it would be important to establish whether there existed some contractual or other legal relationship between the parties, which entitled the 2nd Respondent to claim fees.

[40] It is common cause that the first consultation between the parties took place on 22 September 2004. Whilst it is clear that this was at a time when the FAIS Ombud did not enjoy jurisdiction –jurisdiction only having come into effect on the 30 September 2004- it is nevertheless relevant to set the factual basis for what eventually took place, when this Office was indeed vested with jurisdiction.

[41] The call that led to this consultation was, according to the Complainants, initiated by the 1st Respondent, who indicated that he wanted to see them with regard to advice on small businesses. Complainants maintain that they were assured that the service was free and agreed to see 1st Respondent in order to address certain issues relating to a secondary

business, Wonda Events CC, which was putting a financial strain on their main business, Wonder Pack CC.

[42] 1st Respondent's version contained in a comprehensive statement with numerous annexures is that he met Complainants whom he describes as 'successful business owners' to discuss how he might be of service to them as a financial advisor.

[43] The description of events, completion of documents and alleged signatures thereon on the 22 September 2004 is critical to an appreciation of the probabilities that would lead one to the conclusion as to whose version is to be accepted as the truth. The 1st Respondent maintains that he made disclosures relating to the fee structure and method of payment, whilst the Complainants maintain that no such disclosure was made.

[44] 1st Respondent maintains that at the meeting on the 22 September 2004, the 1st Complainant left the meeting leaving the 1st Respondent to continue his discussion with the 2nd Complainant.

[45] In the ensuing discussion with the 2nd Complainant alone, 1st Respondent maintains that he provided 2nd Complainant with 'all the necessary FAIS and PPR requirements' along with his business card and contact details 'explaining that under current legislation I would need her to sign confirmation of receipt, such confirmation being part of my brokers note that would allow me to draw certain information I might need to conduct my analysis.'

[46] It is clear from 1st Respondent's statement that he viewed Complainants' signatures on the brokers note as both an acceptance of the terms of his contract to provide financial services and a mandate to allow him to draw certain information on the basis of which he would conduct his analysis.

[47] A short analysis of what the 1st Respondent refers to as 'the necessary FAIS and PPR requirements' and the broker's note will reveal why it was crucial for 1st Respondent to have the broker's note signed by the Complainants.

[48] The document that the 1st Respondent refers to as 'the necessary FAIS and PPR requirements' is a two page document which sets out the various services that the 2nd Respondent offers and attached thereto is another document setting out, *inter alia,* fees and charges. This document is annexed to the 1st Respondent's statement as annexure 'E'.

[49] The document referred to as the broker's note is a one page document titled 'Broker Appointment/Information Request'. The first paragraph thereof contains an authority to the 2nd Respondent to be supplied with all relevant documentation and information and the last paragraph contains, *inter alia,* an acknowledgement in the following terms:

'I confirm that I have been informed of and given documentation on the Policy Holder Protection rules as well as Rosspens rates and charges and confirm they have met the requirements of the FAIS act.'

This broker's note is apparently dated 22 September 2004 and apparently signed by each of the Complainants.

[50] The difficulty the Respondents face is that the Complainants have denied that they ever signed this broker's note or that they were advised of fees and charges as maintained by the 1st Respondent.

[51] Based on this apparent dispute of fact on a crucial aspect of this case, I turn now to examine the probabilities of the versions given by the Complainants and the Respondents and the investigations conducted by

this Office in terms of the FAIS Act into the authenticity of this broker's note.

The authenticity of the broker's note

[52] Among the documents attached to the complaint form was an unsigned broker's note. Close to where the signatures of the parties are to be appended, the words 'await signatures' appear. Just above that appears some numbers which appear to be a telephone number '3635041' and above that the name 'M Morris' appears. According to the Complainants they obtained a copy of this unsigned broker's note from the offices of Discovery Life. Proof that this was indeed obtained from Discovery Life is contained in a copy of a letter dated 25 February 2005 written by 1st Complainant to a Chantelle Pagel at Discovery Life, Port Elizabeth branch. This unsigned broker's note, it would appear was furnished by the 1st Respondent to Discovery Life in order to draw certain information. This Office confirmed on the 15 July 2005 with Chantelle Pagel that no information was released to the Respondents on account of the unsigned broker's note and that up to that date no signed broker's note was ever produced.

[53] The broker's note attached to 1st Respondent's statement as annexure 'G' is a copy of the same document which the Complainants allege they obtained from Discovery Life, except that the inscriptions 'await signatures', the telephone number '3635041' and the name 'M Morris' do not appear on this annexure 'G'. However, the signatures of both Complainants appear thereon.

[54] Bearing in mind that the 1st Respondent, in his statement maintains that he dealt with the 2nd Complainant only at this crucial stage of the meeting on the 22nd September 2004, one wonders how the 1st Complainant could

have appended his signature to this document when he was not there. This curiosity led to many others as regards the authenticity of the broker's note.

[55] A critical question is this. Why would the 1st Respondent send an unsigned broker's note to Discovery Life when he was, since 22 September 2004, in possession of a signed broker's note?

[56] The only document that Complainants say they did sign was the proposal form for the replacement policy on the 28 October 2004. This is the replacement policy that the Complainants cancelled after the proposal was submitted to Liberty Life through the Respondents.

[57] A careful scrutiny and comparison between the signatures on this proposal form for the replacement policy and that which appeared on the signed broker's note, annexure 'G' to the Respondent's statement revealed an uncanny similarity between the two sets of signatures.

[58] Based on the authority granted to this Office in terms of Sections 20 (3) and 27 of the FAIS Act to investigate and expeditiously resolve this apparent dispute of fact, the Office engaged the services of a forensic document examiner, Jannie Viljoen Bester ('Bester') of Pro Scripto Document Examination CC.

[59] According to credentials presented to this Office, Bester is a qualified handwriting expert and document examiner who received his training at the Forensic Science Laboratory of the South African Police Service. He was trained in various aspects of document examination, including documentation produced by computer printers, fax machines and photocopiers, the identification of forgeries, erasures and additions.

[60] Bester was supplied with the following documents:

[60.1] The unsigned ‘brokers note’ supplied by Complainants;

[60.2] The signed ‘brokers note’ supplied by the Respondents; and

[60.3] The seven page proposal form for the replacement policy with the collected specimen signatures of the Complainants.

[61] Bester was requested to:

[61.1] examine and compare the disputed signatures on the broker’s note referred to as annexure ‘G’ on Respondent’s statement with the collected specimen signatures of the Complainants on the proposal form for the replacement policy; and

[61.2] examine and compare the written contents of the unsigned broker’s note with that of the signed broker’s note to ascertain whether the written contents of the one document is a copy of the other.

[62] In his report, Bester examined and compared the disputed signatures on the signed broker’s note with those of the collected specimen signatures of the Complainants. He found:

[62.1] Peculiar writing similarities between the disputed signatures and the collected specimen signatures. These included, *inter alia* the commencing point of both signatures, the final stroke ending in relation to the rest of the signature, exact same line crossings, identical placement of upward and downward strokes and the maintenance of the imaginary writing line;

[62.2] That the disputed signature differed in size to the collected specimen signatures of the Complainants;

[62.3] That through experimentation with photocopying process the collected specimen signatures of the Complainants was increased in size by photocopying process to 141% and they then formed an exact physical fit with the disputed signatures on the document supplied by the 1st Respondent as annexure 'G' to his statement.

[63] Bester was therefore of the opinion that the signatures on annexure 'G' to the 1st Respondent's statement was placed on the document by an electronic transfer process and were therefore not authentic.

[64] Bester also concluded in so far as the comparison of the signed and unsigned broker's note was concerned that either one of them might have been the master copy or there may be another master copy, but that the two sets he examined were copies of each other.

[65] Bester's report, coupled with an e-mail from 1st Respondent, dated 17 June 2005 where he raised the following caveat; 'I trust that all documentation and statements forwarded to you will be held in confidence and not disclosed to the complainant', led me to believe that 1st Respondent had something to hide. This clearly is not what is envisaged in the FAIS Act as the manner in which complaints are investigated and resolved.

[66] The Respondents were requested by the Office in a letter dated 2 August 2005 to supply the Office with the original file of papers. A file containing some original documents was indeed received by the Office on 8 August 2005. However, conspicuous by its absence was the original of the broker's note dated 22 September 2004. Instead the same copy that had

accompanied 1st Respondent's statement was once again furnished by Respondents. No explanation for the absence of the original broker's note was tendered by the Respondents.

[67] The Office gave Respondents an opportunity to respond to the report furnished by Bester. This was done by way of a letter dated 5 September 2005 pointing out that the original broker's note was not furnished to the Office and further enclosing a copy of Bester's report. The Respondents were requested to provide a response to the Office, at the latest by close of business on 14 September 2005.

[68] 1st Respondent, in a response to the letter dated 5th September 2005 for the first time suggested a possible explanation as to the whereabouts of the original broker's note. In short his response was that he had no explanation and suggested that there were several changes of staff and 'there could have been a mix up with files that are essentially not active'. The Office responded to this letter by reminding the Respondents that they had until the 14 September 2005 to respond fully.

[69] 1st Respondent provided a further response to the Office by way of a letter dated 12 September 2005 sent under facsimile cover on the 14 September 2005. In this lengthy response 1st Respondent raises numerous reasons as to why his version of events relating to the complaint should be accepted. However, he once again is unable to give any cogent reasons for his failure to provide the original broker's note. He does, however, accept that the life offices involved will not provide information without a signed broker's note. This was precisely the response given by at least one such life office – Discovery Life – when he attempted to obtain information from it without a signed broker's note.

[70] Once again, in this more detailed response, 1st Respondent speculates that one of several secretaries that he claims worked for the 2nd Respondent could have 'misplaced the original of the broker's note'. The 1st Respondent in this letter requested the Office to supply him with a copy of the unsigned broker's note. The Office supplied the Respondents with a copy of the unsigned broker's note. This unsigned broker's note, is the same note that the 1st Respondent had supplied to Discovery Life in order to draw information. The 1st Respondent was, once again given a period of time in which to fully respond to the allegations regarding the broker's note. He was given until close of business on 27 September 2005, in which to do so.

[71] On 26 September 2005 1st Respondent, once again sought a further indulgence until 3 October 2005 in which to respond to this matter. The Office, however, did not grant any further extensions in view of the particular circumstances of this case and on this aspect, I am satisfied that no further extension was warranted. On a balance of probabilities, it is logical for me to conclude that the original broker's note never existed. 1st Respondent's request for a further indulgence from this Office is calculated to delay finalisation of this matter.

[72] Notwithstanding that the 1st Respondent was not granted the extension as set out in the paragraph above, he on the evening of the 27 September 2005 sent a further detailed response in which he further argues his case and attaches to his letter a report by a hand writing expert. Whilst he concedes that the signature of the 2nd Complainant was placed on the broker's note, by electronic transfer, he denies that the 1st Complainant's signature was done in this way. I find this improbable to say the least.

[73] In his response, 1st Respondent, whilst accepting that there existed a contract between him and the 1st Complainant, does not provide any

reasons as to why then the action instituted to claim fees was against both Complainants. He further acknowledges that even if there was any unprofessional conduct on his part, such conduct is a matter between himself and the FAIS Ombud and has nothing to do with the 1st & 2nd Complainants.

In this regard I refer to subparagraph 5.2 of his letter where he states, 'I am however prepared to accept that if the Ombud is prepared to accept that a member of my staff and not me may have performed this act, that I understand that I am ultimately the person responsible for the act and in that regard some form of discipline might be issued by the Ombud however that is between myself and the Ombud vis a vie Mr and Mrs Le Vatte I have performed no unprofessional act since I have obtained Mr Le Vatte's signature on the documentation…..'

I find this difficult to accept for obvious reasons.

[74] Further, the letter is fraught with inconsistencies and bristles with improbabilities when reconciled with the 1st Respondent's earlier version of events. In this letter, the 1st Respondent puts it beyond doubt that the 2nd Complainant's signature was indeed electronically placed on the broker's note as he continuously acknowledges that a member of his staff may have done the placing. In this regard I refer to subparagraph 3.2 of the letter where the 1st Respondent states, 'Therefore the electronic placing of the signature of Mrs Le Vatte was not done by me. It is not impossible nor unthinkable that it may have been done by someone in my office who, having seen that only one signature was on there may have thought that that is not sufficient and had electronically placed Mrs Le Vatte's signature on the document. ….I can only speculate that it may have been a member of my staff who thinking that it was necessary then somehow placed the signature on the document.'

[75] The 1st Respondent further argues that it would not have been necessary to obtain the 2nd Complainant's signature in any event as the 2nd Respondent did not have any policies. I disagree with this contention for the simple reason that both policies, namely the Discovery Life and Sanlam are reflected on the documents provided by the Respondents to this office as being owned by the 2nd Complainant.

[76] Most importantly, the 1st Respondent still fails to offer any cogent explanation as to the whereabouts of the original broker's note.

[77] I am satisfied that the probabilities overwhelmingly point to the fact that the 1st Respondent has produced a broker's note containing forged signatures and bases his entitlement to claim charges and fees on a false premise. As I have stated earlier, it was important for the 1st Respondent to show that the Complainants had agreed to his fees and charges. The broker's note, in the 1st Respondent's mind at least, formed a contractual basis on which he could claim his entitlement to fees.

[78] However, in view of my finding, I do not believe that the offer to do business on the terms as recorded on the broker's note and the accompanying two page disclosure document referred to in paragraph 49 above was ever accepted by the Complainants.

[79] The probabilities therefore lead me to conclude that there was no disclosure of fees and that the signed broker's note was merely an afterthought calculated to extract fees from the Complainants at whatever costs and to frustrate their assertions that no disclosure about fees were ever made.

[80] In all the circumstances, I am satisfied that 2nd Respondent, for these reasons alone is not entitled to any fees and charges as Complainants did

not agree to the same. It will become apparent when I deal with the issue of the financial service and the appropriateness of the advice that the 2nd Respondent should, in any event, not be entitled to any fees. I proceed to deal with that aspect of the case.

The wilful or negligent rendering of the financial service; non-compliance and unfair treatment of the Complainants

[81] Before I begin my comments regarding these aspects of the complaint, I point out that the FAIS Ombud's Office is not mandated to give advice and I am certainly not attempting to do so in the analysis which follows. What follows is an interrogation of the appropriateness of the advice furnished to the Complainants.

[82] Pursuant to the financial needs analysis that the 1st Respondent purported to conduct for the Complainants, he made certain recommendations. These recommendations are set out in a letter to Complainants dated 27 October 2004. In the main the recommendations are that the 1st Complainant secure additional life cover of R2,5 million 'for an additional premium of R298,00' and that he replace his existing Discovery and Sanlam life policies with a Liberty Life policy.

[83] 1st Respondent also notes that the 1st Complainant would need approximately R2 million cover in the event of disability. He then recommends that the 1st Complainant obtain disability cover of R1,7 million, which, according to 1st Respondent would leave a small deficit. The cost of the disability cover is included in the premium for life cover.

[84] A standard letter dated 28 October 2004 was amongst the documents sent to the Office by the 1st Complainant. This letter contains the name and address of the 1st Complainant on the top right hand corner. It is

addressed to the 2nd Respondent and is to the effect that the 1st Complainant has been furnished with an analysis and has accepted the recommendations based on the analysis. The instructions written in hand are to 'Replace my Discovery Life and Sanlam Policies with one Liberty Life Policy (R2.5 mill Life and Disab)' A cross indicating where the 1st Complainant is to sign appears at the left hand bottom corner of this letter. The letter is, however, not signed.

[85] It is apposite to mention that the 1st Complainants monthly premium on his existing Discovery Life policy is R1022, 55. It was incepted on 1st January 2002. This policy would provide life cover in an amount of R798 000,00 as well as disability cover in the same amount. The Sanlam policy carries a monthly premium of R159, 80. This policy was incepted on the 1st September 1988. The policy would provide life cover of R204 604, 00 as well as disability cover of the same amount.

[86] As the policy recommended was to be a replacement policy, a detailed questionnaire had to be completed. This questionnaire is contained in the body of the proposal form for the replacement policy. Amongst the information to be provided on this questionnaire are the following:

Part 4 of the proposal form seeks information as to the reasons for the change of contracts. The section is set out as follows:

'Please provide a brief explanation of:

4.1 The main differences between the terminated and replacement contracts that have been taken into account in deciding to effect a replacement.

4.2 Reasons why the replacement contract/s is/are considered more appropriate to the contract holder's needs and objectives.

4.3 Reasons why a replacement was considered preferable to amending the terminated contracts/s.'

The answers provided by the 1st Respondent to each of the questions are as follows:

'4.1 Higher levels of cover

4.2 Requirement for more cover

4.3 Cost'

[87] It does not appear that the terms and provisions of existing policies and those of the proposed replacement were analysed any further than on the basis of cover and the premium payable. This is reflected in the scant answers provided to each of the questions asked. It is also clear that there was no consideration whatsoever of any other options.

[88] The information set out in paragraph 81 and a great deal more are required, not only to ensure that the application form is correctly completed in all material respects, but also to ensure that clients whose policies are being replaced understand fully the implications of doing so and to be able to appreciate whether the replacement is in their interest or that of the provider. It is not possible to make this judgment solely on the basis of the cover and the premium payable.

[89] The nature and extent of the benefits provided, the definition of the risk covered, the exclusions, limitations and waiting periods in respect of the existing policies and the proposed replacement policy do not appear to

have been discussed. Certainly the documentation before me supports the view that none of these aspects were ever discussed. In any event it is the 1st Respondent's version that the 1st Complainant (the insured in the existing policies and the life to be insured in the proposed replacement policy) was not present during any of these discussions.

[90] Whilst it is accepted that human circumstances may change, rendering some of the policies taken out by clients in their early lives inadequate to their present circumstances, it is not acceptable that providers simply churn policies without making disclosures that will place clients in a position where they are able to make informed decisions. It is for this reason that the legislature saw it fit to put in place measures which have to be followed when advising clients about what financial products are appropriate for their needs and circumstances. Thus, if and when a replacement of a policy becomes necessary the steps prescribed in Section 8 of the General Code of Conduct for Authorised Financial Services Providers and Representatives as promulgated in terms of Board Notice 80 of 2003 by means of Government Gazette 25299 of the 8th August 2003 ('the Code') have to be to be followed. In particular section 8 (1) (d) (ii) & (iii), provide that special terms and conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions, or circumstances in which benefits will not be provided and the impact of age and health changes on the premium be disclosed. This was not done in this case.

[91] There is yet another concern which, had the proposed replacement policy been issued, would have seriously prejudiced the Complainants in the event of a claim. The data capture sheet, which formed annexure 'F' to the 1st Respondent's statement, indicates that the 1st Complainant's income is R240 000, 00 per annum. However, on the quotation from Liberty Life the 1st Complainant's income is reflected as R360 000, 00 per annum. On the

proposal form for the replacement policy, which according to the 1st Respondent was completed by him with the assistance of the 2nd Complainant (as the 1st Complainant was not there) the 1st Complainant's income is reflected as R2.4 million per annum. This is the signed proposal, which had already been submitted to Liberty Life. Whatever the reason or the justification, the potential prejudice in the event of a claim can be quite frightening.

Establishing the complainants needs

[92] A 17 page document titled 'INTRODUCTION TO ANALYSIS' is attached to 1st Respondent's statement. This document is reflected as having been prepared on 21 June 2005; some eight months after the recommendations were made to the Complainants. No explanation has been presented to me from the Respondents as to why recommendations, as contained in the 1st Respondents letter dated 27 October 2004 precede the needs analysis. In any event, I shall not labour this point as there are other unanswered questions surrounding the basis on which the recommendations were made, which warrant comment.

[92.1] From the data capture sheet dated 22 September 2004, it is recorded that the that the Complainants are married out of community of property, without application of the accrual system. Immovable property estimated to be valued at some R2.4 million is reflected as the property of the 2nd Complainant. Yet the same property is used to do an analysis for estate duty liability for the 1st Complainant. It seems to me that the Respondents erred in this respect as this will clearly lead to an incorrect conclusion in so far as estate duty liability is concerned. As this is part and parcel of the information on which the Respondents base their

recommendation for the need for more life cover, it is a matter of serious concern.

[92.2] On pages 8, 10, 12 and 13 of the same document (the needs analysis) shortfalls in the event of death, disability and retirement are said to have been established. The data capture form contains no evidence that this information was ever sought or extracted from the Complainants. There is indeed no other document or evidence to suggest that the capital and income needs of the Complainants was ever sought. Yet, once again, the recommendation to purchase assurance cover is supposedly based on these shortfalls having been established. It is difficult for me to escape the conclusion that the shortfalls are baseless.

[93] Section 9 (1) of the Code stipulates that:

‘ A provider must, subject to and in addition to the duties imposed by section 18 of the Act and section 3 (2) of the Code maintain a record of advice furnished to a client as contemplated in section 8, which record mu reflect the basis on which the advice was given, and in particular –

(a) a brief summary of information and material on which advice was based;
(b) …
(c) …’

To my mind, it would not make sense to make recommendations without reflecting the information and material on which the recommendations are based. Respondents’ conduct in this regard certainly violates the Code in this respect.

Advice relating to Wonda Events CC

[94] Bearing in mind that the Complainants version is that the only reason they agreed to see the 1st Respondent was in order that he advises them on this business which was putting a considerable strain on the Complainants main business, WonderPack CC. I accept on a balance of probabilities that this was indeed the position, although the 1st Respondent was on a somewhat different mission.

[95] On the papers before me, it is clear that the Respondents did undertake at some point to provide some advice relating to this business entity. On the 2nd Respondent's statement of account, a charge for this service is levied at R250, 00 plus Value Added Tax thereon. However the only reference to the business on the documents submitted by the 1st Respondent to this Office is in terms of his letter dated 27 October 2004 to which he attaches what he calls an income and expenditure account. This last paragraph of his letter reads:

'WONDERPACK EL CC'
I have purely attached a spreadsheet of income and expenditure of this company and will confine my comments to the fact the company has run at a loss of approximately R10 000, 00 per month since inception and unless there is a strong possibility of huge growth in the immediate future, it may be necessary to re-assess this as a business venture.'

[96] The income and expenditure statement is an elementary one page document that says nothing which the Complainants did not already know. Although, this could have been an error, reference is made to Wonderpack CC, the business that is running well according to the Complainants, whereas the 1st Respondent was requested to advise on

Wonda Events CC, the failing business, it is nonetheless indicative of a lack of focus on the concerns and interests of the Complainants.

[97] Clearly the focus of the Respondents had nothing to do with addressing the interests of the Complainants and the service they sought. Instead the Respondents were hell-bent on selling policies to the Complainants whether a need for such policies existed or not.

[98] At best and considering the totality of the evidence before me, the 1st Respondent's conduct evidences a lack of integrity, lack of diligence and skill, and an inability to provide the advice that the Complainants were really seeking, whilst claiming and advertising otherwise.

[99] On the 1st Respondent's own version, his professed level of skill is that of an expert in the field of financial planning. I refer, once again, to his letter to Complainant's dated 27 October 2004. In the introduction, he says:

'Rosspen Financial Services provides long term financial advice to individuals and small businesses. This advice is based on the results of the attached financial needs analysis produced from information received from you. Rosspen represents several of the country's leading services providers and assurors (*sic)* and any solutions that we recommend are based on affordability and suitability to your needs. As we are not tied to any one service provider or assuror, the products we recommend in our solutions are chosen as they are most cost effective (not necessarily cheapest) products we can source. You will find our recommendation unbiased and backed by our 13 year experience in the industry.'

[100] 1st Respondent further advertises in his communications his expertise within the field of financial planning and his position as Vice President of LUASA, an Association of Professional Financial Planners. Clearly then,

clients in position of Complainants would expect service from Respondents of the standard of expert financial planners.

[101] The record, however, despite 1st Respondent's professed level of expertise indicates otherwise. As is evident from just some of the aspects of 1st Respondent's conduct detailed above, his, was nothing more than a cavalier approach to rendering a financial service with the focus on selling financial products without exhibiting any skill in financial planning and without any concern for the interests of the client.

[102] In the celebrated judgment of the Supreme Court of Appeal in *Durr vs ABSA Bank Limited and Another* 1997 (3) SA 448 SCA the court set out the test for the level of skill that is required before one can say that someone is negligent. At page 468 (E & F), the court set out the basic rule as stated by Joubert: *The Law of South Africa* Vol 8 First Reissue para 94, as follows:

'The reasonable person has no special skills and lack of skill or knowledge is not *per se* negligent. It is, however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity.'

In deciding what is reasonable, the court adopted the dicta in *Van Wyk v Lewis* 1924 AD 438 at 444**:**

'(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', but that 'the decision of what is reasonable under the circumstances is for the Court; it will pay high regard to the views of the

profession, but it is not bound to adopt them.' (emphasis added) (At 460H-J)

[103] Applying the reasoning set out in *Durr* and the authorities quoted therein, it is clear that the evidence suggests that the Respondents set themselves out to be experts in the field of financial services backed by 13 years of experience in the industry and with its key individual, the 1st Respondent holding a position as Vice President of a large professional body representing financial intermediaries. Clearly then, the level of service and conduct one would expect from Respondents would be that of expert professional financial services providers. However, the evidence on record indicates a singular lack of such expertise, even if one were to apply a standard much lower than that professed by the Respondents.

[104] The Respondents' conduct undermines the Code in several respects. It certainly undermines the general duty of a provider as envisaged in Part II, Section 2 of the Code, which provides:

'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.'

[105] I am satisfied that the Complainants have a valid complaint which is justiciable before this Office. As a result of the Respondents' conduct the Complainants are likely to suffer financial prejudice or damage. The Respondents pursuit of fees in the Magistrate's Court will continue to cause financial prejudice and damage to the Complainants. I am further satisfied that Respondents have failed to comply with the provisions of the FAIS Act in the respects I have set out in this determination. Finally, I am satisfied that the Complainants have been treated unfairly.

[106] In terms of Section 28 (4) (a) of the FAIS Act, this Office will send a copy of this determination to the Registrar of the Financial Services Board. I have no doubt that certain of the findings I have made may have a bearing on the fit and proper status of the Respondents to render financial services as specified in the FAIS Act.

The determination, I therefore make is the following:

1 The Respondents are not entitled to claim any fees and charges from the Complainants relating to the services alleged to have been provided;

2 The 1st and 2nd Respondents are ordered to pay to this Office, jointly and severally, the one paying the other to be absolved, the sum of R2 394,00 which sum is inclusive of Value Added Tax being the costs incurred by the Office in procuring the handwriting expert's report;

3 That the 1st and 2nd Respondents, jointly and severally, the one paying the other to be absolved pay the case fees of the this Office in the sum of R1 000,00 plus Value Added Tax thereon.

DATED AT PRETORIA ON THIS THE 29th DAY OF SEPTEMBER 2005.

Charles Pillai
Ombud For Financial Services Providers