

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

Case Number: FAIS 05595/10-11/NW(1)

In the matter between:-

FRIKKIE LOOTS

Complainant

and

CHRISTO BOTHMA FINANSIËLE DIENSTE BK

1ST Respondent

CORNELIUS CHRISTOFFEL BOTHMA

2ND Respondent

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

A. THE PARTIES

[1] The complainant is Frikkie Loots, an adult male of Doringkruin, Klerksdorp, Gauteng Province.

[2] First respondent is Christo Bothma Finansiële Dienste BK (Registration no. 1999/18637/23), a closed corporation duly incorporated in terms of South African law, with its principal place of business at 12 Hardekool Avenue, Doringkruin, Klerksdorp, 2571. At all material times, 1st respondent was an authorised financial services provider in terms of the FAIS Act, with license number 10986. The license was withdrawn on 02 November 2012.

[3] Second respondent is Cornelius Christoffel Bothma, an adult male, a key individual and authorised representative of the 1st respondent. For the purposes of convenience, and where appropriate, I refer to 1st and 2nd respondents collectively as respondent.

B. INTRODUCTION

[4] The complaint relates to an allegation that the respondent, contrary to complainant's instruction made his Retirement Annuity policies (RAs) paid-up. The respondent is said to have also set up a new RA without authorisation from the complainant. The respondent's conduct led to the complainant paying unnecessary penalties to Sanlam as well as commission to the respondent.

[5] During the investigation of this complaint the FSB informed this Office of their inspection of the affairs of the respondent. The inspection was triggered by an application by Sanlam to the Registrar to debar the respondent from rendering financial services. The application was accompanied by a forensic report from Sanlam which contained allegations of misconduct by the respondent whilst rendering financial services to clients. In order to assist with their inspection, the FSB requested the Office to provide them with copies of all of complaints lodged against the respondent.

[6] Upon finalising the inspection, the FSB provided the Office with a copy of their inspection report ('the Report'). According to the Report information was requested from various parties. A number of the respondent's clients were interviewed in order to establish whether the respondent complied with the

General Code of Conduct ('the Code') when he rendered financial services to the said clients. According to the Report various clients informed the FSB that Bothma advised them to replace their existing policies with new ones on the basis that the new policy is a better option for them. Bothma is also said to have failed to advise the clients interviewed of possible penalties or financial losses when a policy was replaced.

[7] The FSB's inspection ultimately led to several findings being made in the Report. These include various contraventions of the Act and the Code by the respondent¹. As a result of the findings, the Registrar debarred 2nd respondent from rendering financial services on 02 November 2012.² The Registrar also withdrew the 1st respondent's license on the same day. The foregoing is in any event merely background information.

C. COMPLAINT

[8] The complainant's complaint is drafted in Afrikaans. What follows is a summarised translation thereof:

- a. The complainant alleges that the respondent advised him in 2007 to transfer three old generation Sanlam retirement annuities ('old RAs')³ to a Sanlam Stratus platform. The respondent recommended the transfer on the basis that the transfer would financially benefit the complainant.

¹ One of the findings was that the respondent 'acted without due care, dishonestly and not in the best interest of clients.'

² According to the Registrar the reason for the debarment was that the respondent does not comply with personal character qualities of honesty and integrity.

³ Policy 17966482x6, policy 18168031x5 and policy 3681685x8

- b. The complainant was under the impression that the transfer of the old RAs would result in them continuing individually on the new platform. Furthermore, that their terms would end in 2011, 2012 and 2021 - as was the case before the transfer.
- c. The complainant subsequently learnt that as opposed to transferring the old RAs to a new platform, the respondent had in fact made the RAs paid-up. He then diverted monthly premiums that were payable under the old policies to a new Sanlam Stratus Retirement Annuity ('Stratus RA')⁴ which will mature in year 2020.
- d. The complainant contends that his instruction to the respondent was to transfer the old RAs to the Stratus platform, following respondent's persuasion that the new RA type would be of more benefit to him. He did not agree to a new RA. The complainant contends that he was prejudiced by the respondent's advice in that:
- Due to penalties, the values of the old RAs decreased considerably when they were made paid-up;
 - He has since established that he could have transferred the old RAs to the Stratus platform at a cost of R550 per RA.
 - He could have retired from two of the old RAs in 2011. He now has to wait until 2020 to retire from the new RA, a wait he can hardly afford.
 - The commission received by the respondent on the new RA was not disclosed.

⁴ Sanlam policy no. 042046204x6

[9] The complainant asserts that the respondent did not act in his interest and was only interested in commission.

D. RELIEF SOUGHT

[10] The complainant wants the respondent to refund the penalties paid to Sanlam when the old RAs were made paid up. He also wants the respondent to refund the commission he received on the Stratus RA.

E. RESPONDENTS RESPONSE:

[11] In terms of the Rules on Proceedings of the Office, the complaint was referred to the respondent to resolve. As the complainant could not be resolved, the respondent was requested in terms of Section 27(4) of the FAIS Act to provide his response as well as a copy of his file of papers to the Office. What follows is a summarised translation of the respondent's response:

11.1. According to the respondent he made two of his own Sanlam RAs paid up in 2000. Not having to pay further premiums on the paid up RAs, he utilised the premiums to fund a new Stratus RA. The respondent's RA portfolio now consisted of two paid up RAs and a new Stratus RA.

11.2. The respondent asserts that he showed his RA portfolio to the complainant as an example of an investment portfolio. Based on the example and because the Stratus RA outperformed older generation RAs, the complainant agreed to make his old RAs paid up and replace them with a Stratus RA.

11.3. The complainant confirmed the acceptance of the said changes to his portfolio by signing an Advice Process Statement ('APS'), which contains *inter alia* the following statements:⁵

- i. I confirm that I understand the proposed recommendations and that sufficient information was given to me in order to make an informed decision.
- ii. The quotation for the chosen products was shown to me and the terms and conditions were explained to me. I was notified and understand all costs, levies, penalties, liquidity limitations and tax implications where applicable.
- iii. I fully understand that there might be limitations on the appropriateness of the advice provided.

11.4 The complainant also signed a Sanlam replacement record to effect the replacement of his three old RAs with a new Stratus RA. By placing his signature on the replacement record the complainant affirmed that he made an informed decision when the financial service was rendered to him.

Sanlam's response

[12] According to the complainant he only learnt that his old RAs were paid up after being informed by another FSP. The FSP also informed him that he could have transferred his old RAs to the Stratus platform at a minimal cost.

⁵ Translated from Afrikaans.

[13] To establish whether this was indeed the case, the Office requested Sanlam to confirm:

13.1 Whether complainant could have transferred his old RAs to the Stratus platform. If so, at what cost?

13.2 Whether any penalties were levied when the complainant's three RAs were made paid-up.

13.3 Whether the respondent received commission on the Stratus policy.

[14] Sanlam's response was that:

14.1 The transfer of complainants old RAs to the Stratus platform was possible;

14.2 Each policy needed to be transferred separately, which means that the member cannot combine the three older policies into one Stratus policy;

14.3 Cost of transfer amounts to R550 per policy;

14.4 The penalty levied in respect of policy 17966482x6 was R2 794.10;

14.5 Policy 18168031x5 attracted a penalty of R1 256.93;

14.6 No penalty was levied on policy 3681685x8;

14.7 The respondent was paid commission of R14 043.90 on the Stratus policy 042046204x6.

F. DETERMINATION AND REASONS

[15] The pertinent issue to decide is whether the respondent acted in the interests of the complainant when he made complainant's three old generation RAs paid up.

[16] According to the respondent he recommended the Stratus RA as it provided better investment returns than old generation RAs. Furthermore, new generation RAs offer various benefits which cannot be accessed through old generation RAs. These benefits include a wide range of underlying unit trust portfolios to choose from, active management of portfolios, switching between portfolios and many more. Given the benefits, I am persuaded that the respondent had compelling reasons to invest in the Stratus RA.

[17] Although the product chosen by the respondent cannot be faulted, the same cannot be said for the modus he chose to effect his recommendation. As mentioned in paragraph 14, Sanlam confirmed that the complainant could have migrated to the Stratus platform at minimal cost. The Office requested the respondent to provide reasons for making the complainant's old generation RAs paid up as opposed to transferring them to the Stratus platform. The respondent resorted to providing evasive answers and to ultimately avoiding questions. With the option to transfer the old RAs to the Stratus platform being an option, the respondent simply had no acceptable reason for making the old RAs paid up. That being said, the respondent knew that by making the old RAs paid up he could use the premiums payable on them to fund a new Stratus RA. In so doing, he would be paid commission.

Cause of loss

[18] Given the evidence, I am compelled to find that the respondent failed to act in the interests of the complainant. This resulted in the complainant having to pay penalties of R4 051.03 and commission of R14 043.90 on the Stratus

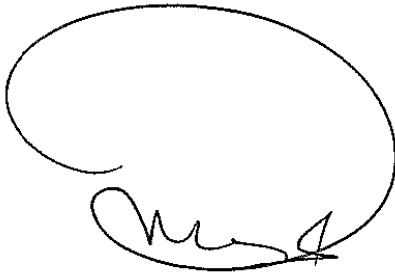
policy. Had it not been for the conduct of the respondent, the complainant would have been financially better off to the tune of R18 094.93.⁶ I therefore intend to award damages in the amount of R18 094.93.

G. ORDER

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

1. The complaint is upheld;
2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay complainant the amount of R18 094.93;
3. Interest at the rate of 15.5 %, per annum, seven (7) days from date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 17th DAY OF MAY 2013



NOLUNTU N BAM

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⁶ R4 051.93 + R14 043.90 = R18 094.93