

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

HELD IN PRETORIA

CASE NO: FOC 035 / 06 / KZN / 2

In the matter between:

SAROJA NAIDOO

COMPLAINANT

and

SOUTH AFRICAN HOME LOANS (PTY) LTD

RESPONDENT

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

PARTIES

1. Complainant is Saroja Naidoo, an unemployed widow residing at 51 Jacaranda Crescent, Isipingo Hills, Kwazulu Natal. Complainant was married in community of property to Subramoney Naidoo ('the deceased'). She complains in her capacity as the surviving spouse and the joint life assured under the policy referred to more fully hereunder.
2. Respondent is S A Home Loans Proprietary Limited, an authorized Financial Services Provider in terms of the FAIS Act and a duly registered company in terms of the company laws of the Republic of

South Africa with its principal place of business at 1 The Glades,78
Armstrong Avenue, La Lucia, Durban.

BACKGROUND

3. The complaint arises against the following background:-
 - 3.1 This complaint concerns the rejection of a claim made by Complainant in terms of a bond protection plan ('policy') in which her life and that of the deceased were insured. The policy was sold on the back of a mortgage loan issued by Respondent to Complainant and her husband. According to the Terms and Conditions of the policy, its purpose was to provide 'credit protection cover for S A Home Loans for those of its clients who have a valid mortgage loan agreement with S A Home Loans and wish to be covered'. In terms of the policy in the event of a successful claim the proceeds of the policy will be credited towards the outstanding balance of mortgage loan with the Respondent, as at the date of death of the assured. The policy is what is commonly referred to as 'credit life'. It is a form of risk cover put in place to secure the creditor's interests.
 - 3.2 Complainant and the deceased had borrowed the sum of R100 000, 00 from the Respondent. This sum was secured by way of a further mortgage bond over the immovable property

owned jointly by the deceased and Complainant. The policy was put in place to cover the outstanding liability due to Respondent in the event of the death of either Complainant or the deceased.

3.3 The policy was sold on 26 April 2005 through telephonic direct marketing.

3.4 The policy documents include the following schedules:

- Policy Schedule
- Basis of Agreement
- Terms and Conditions
- Illustrative Benefits & Premiums
- Important Information

3.5 The Basis of Agreement includes the following pertinent terms, indicated as follows:-

3.5.1 'This policy has been issued based upon and in confirmation of the telephone conversation between you Saroja Naidoo and Priyadharshni Naicker as recorded on 26 April 2005. A transcript of this recording is available on request. In this conversation you agreed and where applicable declared that:

3.5.2 '1. All information supplied or to be supplied in connection with this policy is true and complete and forms the basis of the policy. SAHL Life has relied on the information and disclosures which you have made in assessing its risk and premium in terms of this policy.'

3.5.2 '2. The terms and conditions of the policy were explained and you understand and accept that certain events and medical conditions are excluded from the policy. These exclusions are detailed in the "Terms and Conditions" section of the policy.'

3.

3.5.3 '4. You were notified of your freedom of choice in terms of section 44 (1) of the Long-term Insurance act (sic), 52 of 1998 and confirm that you exercised that choice without any coercion or inducement.'

4. The policy also includes the following material terms and conditions as evidenced in the Policy Schedule and Terms and Conditions Schedule:-

4.1 The initial sum assured is R199 436.63 and the sum assured would gradually decrease in line with the

outstanding balance due on the mortgage loan agreement.

4.2 The term of the policy is 16 years which is equal to the mortgage loan agreement with SA Home Loans.

4.3 The illustrative monthly premium payable is R463.74 and this sum is said to be included in the mortgage loan installment on the Policy Schedule;

4.4 Clause 13 of the Terms and Conditions Schedule deals with exclusions and pre-existing conditions. It is clause 13.4 on which the insurer relied in rejecting the claim and it reads as follows:-

‘13.4 Pre Existing Conditons (sic)

If a Life Assured

13.4.1 dies within 24 months of commencement of the policy

13.4.2 becomes disabled at any time during the duration of the policy,

due to any condition, physical defect, illness, bodily injury or disability which the insured was aware of and/or received medical advice or treatment for prior to the commencement date or date of any reinstatement, no claim will be paid and all premiums paid will be forfeited.'

I shall refer to this clause as the 'pre-existing conditions clause' in this determination.

5. The deceased died on 20 October 2005, six months after the policy was incepted. According to Respondent, the deceased died as a result of a pre - existing heart condition.
6. Shortly after the death of the deceased, Complainant claimed in terms of the policy from Respondent. The claim was rejected by the insurer, S A Home Loans ('SAHL') Life. SAHL Life relied on the pre-existing conditions clause in rejecting the claim.
7. In her letter of complaint to this Office, Complainant alleges that she was not clearly informed of the pre-existing conditions clause in the policy. In her letter to SAHL Life dated 09 December 2005, she advises *inter alia* that the pre-existing conditions clause was not discussed with her or her husband, the deceased. She further alleges in the said letter to SAHL Life that she did not receive the policy document and that had she and her husband been aware of the pre-existing conditions clause they would have queried it. She further makes the point that had she

known this she would not have taken the policy from Respondent but would have sought another policy more suited to her needs.

THE RESPONSE

8. In a three page letter dated 10 February 2006, Respondent maintains that during the telephone call when the policy was sold, Complainant was informed about the pre-existing conditions clause.

9. Respondent also advises that on or about 06 December 2005, Complainant and her brother met with the managing director of S A Home Loans Life, one Mr Tim Bean to discuss her complaint.

10. During the said meeting, Respondent alleges that Complainant produced her copy of the policy document which she had in her possession and Mr Bean then showed her the pre-existing conditions clause in the policy document.

11. Respondent further states that during the meeting, Mr Bean played the recording of Complainant's conversation with Respondent's consultant wherein she was advised of the pre-existing conditions clause. In Respondent's view, she had accepted the clause. Complainant, according to Respondent, was also given an example of how the pre-existing conditions clause operated.

12. According to Respondent, after the meeting Complainant sent them a letter dated 09 December 2005 in which she alleged *inter alia* that she did not receive a policy document and that the pre-existing conditions clause was not explained to her. In its letter dated 12 December 2005, a copy of which has been made available to this office, Respondent repudiated the Complainant's claim in terms of the policy conditions.

13. Respondent further states that Complainant in her complaint sent to this Office dated 04 January 2006 was no longer disputing receipt of the policy document but seemed to be alleging that it was not her voice on the recorded telephonic conversation; alternatively that she wanted to discuss the policy with her husband, the deceased, before she decided on it.

14. Respondent maintains that from its investigation, it is clear that the pre-existing conditions clause was explained to Complainant and that she did receive the policy document.

15. In conclusion Respondent states that Complainant never queried the terms and conditions of the policy until after the claim had been repudiated. Respondent maintains that they are 'not guilty' of providing any incorrect information to Complainant in respect of the policy sold to her.

DETERMINATION

DISPUTED FACTS

16. There are some areas of dispute between Complainant's and Respondent's version, as evidenced on the papers. In particular there seems to be two disputes; the one relates to the authenticity of the voice recording and the other relates to whether Complainant received the policy document or not.

17. Respondent asserts that Complainant, after her meeting with Mr. Bean disputed receipt of the policy document notwithstanding that she had produced it during her meeting with Mr Bean. She once again maintained in her letter of 09 December 2005 that she had not received her policy document. However, in her complaint to this Office, she no longer maintained that she had not received the policy document, but according to Respondent 'seems to be alleging that it was not her voice on the recorded telephone conversation provided to her'. Respondent relies on these alleged discrepancies to draw the conclusion that 'It appears that as one fact is disproved Mrs Naidoo responds by changing her allegations'. Essentially Respondent challenges the credibility of Complainant. I shall deal with these apparent discrepancies and its materiality hereunder.

18. It is clear on Respondent's version that the policy document was produced during the meeting on 06 December 2005. Why Complainant maintained that she had not received the policy document at the meeting and in her subsequent letter to the Respondent is unclear. Why she no longer maintained that she did not receive the policy document in her complaint to this Office is also unclear. When questioned about this during the investigation of this matter Complainant's explanation was that it was a mistake and she did not understand what the document was.

19. With regard to the dispute regarding the voice recording, Respondent has interpreted Complainant's challenging the authenticity thereof as an indication that she seems to be disputing that the voice is hers. This, in my view is not entirely correct. Complainant does not dispute that she spoke to the consultant. She raises a number of issues relating to the recorded conversation, including the fact that it was not a 'fully recorded conversation' and that there was an 'initial conversation'. Indeed the voice recording provided to this Office indicates a previous conversation.

20. Whatever Respondent's interpretation of the discrepancies evident in Complainant's version, whether justified or not, is however not material to the determination of this complaint. The essence of the complaint relates to the rendering of the financial service and the duties attendant

on Respondent during that process. This is what I am called upon to adjudicate and this is the area where I shall focus my attention.

21. What is important is that there was a conversation between Complainant and a representative of Respondent. A copy of that recording has been made available to this Office. It is this conversation which will lead me to the answers which are decisive of the issues in this case.

THE ISSUES

22. This determination turns on whether:

- 22.1 There was proper disclosure to the appropriate parties of the terms and conditions of the policy during the rendering of the financial service. In particular was the pre-existing conditions clause on which the insurer relies properly explained to the appropriate parties in line with the applicable codes of conduct as set out in the FAIS Act; and whether

- 22.2 Sufficient information was disclosed during the rendering of the financial service by Respondent to enable Complainant and the deceased to have made an informed decision about the proposed transaction.

23. In order to establish whether appropriate disclosures were made to the relevant parties, in terms of the FAIS Act during the rendering of the financial service, I deem it appropriate to comment on the material aspects of the exchange between the said Priyadharshni Naicker and Complainant.

24. The following extract of the conversation relates directly to the advice regarding the pre-existing conditions clause. It goes as follows:-

Consultant: *"There are some exclusions ...*

If you suffer from a pre existing condition then you won't be covered for that condition in the first two years , meaning lets say if you have had cancer in the past, for the first two years you won't be covered for cancer ,that kind of thing... but you sound very healthy to me?

Complainant: *'Yes ,yes ,yes.....'*

25. It is an undisputed fact that Respondent spoke to only one of the life assured, namely Complainant. No conversation was ever held with the deceased who was also a party to the policy. It is common cause that both Complainant and the deceased were joint life assureds.

26. An analysis of the conversation between Priyadharshni Naicker and Complainant relating to the critical exchange wherein Respondent

alleges that it made the disclosures of the pre-existing conditions clause on which the insurer relied, it is material to mention that even though the policy covered the lives of both Complainant and the deceased, the disclosures were made to Complainant alone and not to the deceased. It is important to highlight the fact that the basis of the agreement, as cited in paragraph 3.5.1 above, is the conversation between Complainant and the said Priyadharshni Naicker. That conversation did not include the deceased.

27. Nowhere on the undisputed facts is there any reference to any disclosures or warnings or discussions regarding the pre-existing conditions clause, or any other terms and conditions for that matter, in relation to the deceased. He was a crucial party to the policy being the 1st Life Assured, described in the Policy Schedule. I question how Respondent can reasonably expect that whatever it advised Complainant will apply with equal force to the deceased.
28. Logic would demand that any discussion relating to the pre existing conditions of the deceased ought to have been discussed with the deceased himself and not with his surviving spouse. In any event there is no record on the available evidence that there was even a reference to the deceased in relation to pre-existing conditions.
29. Respondent's case is that the claim was repudiated based on a term of the contract. In terms of the FAIS Act, material disclosures must be

made to the client to whom the financial service is rendered. In this case, we have two clients, the Complainant and the deceased. The responsibility to disclose those terms would have rested on Respondent. That responsibility entails appropriate communication to both parties to the contract. It cannot reasonably be accepted that some vague disclosures to Complainant must be seen to be automatically applicable to the deceased.

30. I turn now to highlight some specific areas of the General Code that was violated during the rendering of the financial service in this case.

31. Sections 3(1) (a) (ii) - (iii) of the General Code provides that:

(1) when a provider renders a financial service –

(a) representations made and information provided to a client by the provider –

- (i) ...
- (ii) must be provided in plain language, avoid uncertainty or confusion and not be misleading;
- (iii) must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client;'
- (iv)

32. In the light of the provisions detailed above and reverting to the conversation detailed in paragraph 24 above, which forms the basis of the agreement, it is important to note the following:-

32.1. The conversation does not seek any information or disclosures on which the insurer can rely. Bearing in mind that the agreement contains a term that 'SAHL Life has relied on the information and disclosures which you have made in assessing its risk and premium in terms of this policy' (see paragraph 3.5.2 above) there is nothing in the conversation to indicate that any information was sought;

32.2. The disclosure regarding the pre-existing conditions clause is confusing, creates uncertainty and is misleading. The conversation ending as it does with the statement: *'but you sound very healthy to me'* does not invite Complainant to make any disclosures about pre-existing conditions, rather it compliments her on her state of health which, to a person of Complainant's circumstances, would communicate a very different message to that which is intended.

32.3. A further question that needs to be answered is whether the disclosure about the pre-existing conditions clause was adequate and appropriate in the circumstances of the financial service, taking into account the factually established or

reasonably assumed level of knowledge of the client. In the course of the investigation, Complainant and her brother, a Mr Morgan Iyer were interviewed on Saturday 18 November 2006. Having interviewed Complainant it became quite clear that she is an unsophisticated woman with only basic education. Since the death of her husband, she has been relying heavily on her brother and daughter with regard to her financial matters. Her daughter writes all her letters. Whilst this may not have been known to the Respondent at the time of the rendering of the financial service, some simple questions would have led Respondent to understand that this is a vulnerable consumer. Financial services and financial products are by their very nature complex. A consumer in the position of Complainant can generally be considered to be a vulnerable consumer. This Office has pronounced on this type of consumer. See in this regard the remarks made in the case of Grobler v Direct Axis FOC 1434/05 NP 2 paragraph 22. I believe that, with this type of consumer, more than cursory attention should have been paid to explaining terms, conditions, exclusions, limitations and other restrictions on the policy sold in order for Complainant to make an informed decision. Complainant is certainly not the type of person who would understand the intricacies involved in a financial service or the fine print in the financial product.

- 32.4. Most importantly, as I have already mentioned, this conversation is held with Complainant alone and does not include the deceased.
33. I note that in the document entitled 'Basis of Agreement', there is a provision which stipulates that Complainant was notified of her freedom of choice in terms of Section 44 (1) of the Long-term Insurance Act 52 of 1998. It is important to mention that had pertinent questions been asked, Respondent would have established that Complainant had an existing life policy which could have been ceded as security for this debt. I question therefore the relevance of this provision as to me it is meaningless if no explanation of the provision was given during the telephone conversation as is evident from the recording.
34. Similarly I question the relevance of the provision in paragraph 1 of the Basis of Agreement wherein it is stated that the insurer 'SAHL Life has relied on the information and disclosures which you have made in assessing its risk and premium in terms of this policy'. Nowhere in the telephonic conversation is there any invitation to the Complainant to disclose any information which would be relevant to the assessment of risk and premium. The only reference to issues of health is the rather confusing one by Priyadharshni Naicker as detailed above.
35. There are other disturbing features of the financial service that was rendered in this case which I feel compelled to mention. They are:-

35.1 Whilst this has not been raised by the Complainant, I find it necessary to point out that nowhere in the telephonic conversation is there any reference or indication of the amount of commission that was to be charged on this transaction. It is material to mention that considering the shoddy service and minimal advice given, the commission charged is totally out of proportion to the service rendered. The non-disclosure is in violation of Section 15 (3) (f) of the General Code of Conduct.

35.2 The commission charged is some 21.75% of the monthly premium. This is close to the maximum legislated commission of 22.5% for group credit schemes where the intermediary also does administrative work. It is also interesting to note that no mention is made of commission anywhere in the policy documents, except in the Illustrative Benefits and Premiums Schedule. The level of commission is, in any event, high relative to the type of policy, the sales channel and the level of financial advice that was in fact provided in this case.

35.3 What emerges from this exercise is that notwithstanding that Respondent was not prepared to provide that quality of service that would have warranted the commission charged, it was nevertheless prepared to charge close on to the maximum legislated commission. The quality of service provided, bearing in mind that Respondent did not bother to speak to both parties

to the contract, provided the barest minimum by way of disclosures and took a mere 14 seconds to provide a pertinent disclosure on which the insurer relies, leads me to conclude that the last thing on the mind of the Respondent was to place the interests of the client before its own, as required in the FAIS Act.

35.4 At no stage during the conversation was there any reference that the policy provides decreasing life cover. People familiar with financial products may understand the nature of the product. However many consumers, particularly those in a similar position to Complainant, labour under the mistaken belief that they enjoy life cover once provided, when all they have is a decreasing life cover. Consumer protection demands that material features of the product must be communicated to the client. These aspects are clearly indicated and warrant compliance under Section 15 (2) (a) and (iii) (bb).

Conclusion

36. Clearly the disclosures relating to the exclusion was not properly communicated to Complainant. Critically no communication was made to the deceased who, as the 1st Assured on the policy was a party to the contract. The disclosures made to the Complainant were in any event, not provided in plain language, created uncertainty and was

certainly not comprehensive enough. Additionally, it was confusing and misleading.

37. It is clear that Complainant has and continues to suffer financial loss, as result of the failure on the part of the Respondent to render a financial service compliant with the FAIS Act.

Order

The complaint is upheld and Respondent is ordered as follows:

- a. to pay the outstanding indebtedness on the bond with effect from the date of death of the deceased;
- b. to refund all the bond installments paid by Complainant since the date of death of the deceased until settlement of the claim by Respondent;
- c. Interest to run on the order under (b) at 15.5% p.a within 14 days from date of this order;
- d. To pay the case fee to this Office in the sum of R1000.00.

DATED AT PRETORIA ON THIS 21st DAY OF DECEMBER 2006



CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS

