

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FOC 1091/06-07WC (1)

In the matter between:

ELIZABETH PENZHORN

Complainant

and

POINT BROKER SERVICES CC

Respondent

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

A. PARTIES

[1] The Complainant is Elizabeth Penzhorn, a teacher who resides at A 605 Emeraldene, Aliwal Road, Wynberg, Western Cape Province.

[2] The Respondent is Point Broker Services CC, a close corporation duly incorporated in terms of law, an authorised financial services provider of 7

Main Drive, Three Anchor Bay, Cape Town, Western Cape Province. The Respondent is represented by its member, Mr Seppo J Ranta ('Ranta').

B. THE COMPLAINT

[3] This is a complaint relating to the alleged failure by Respondent to disclose the costs involved in a financial service rendered by it to Complainant. Complainant alleges that when she specifically asked the Respondent what the costs would be, she was told they are 'nominal'. She further alleges that it is only when she received her contract documents from the product supplier- Momentum- in April 2006 that she realised that the costs were in fact R31 920.00 for the one contract and R5574.27 for another contract. She then complained to the Respondent about these costs, which, she maintains was never disclosed in any of the consultations she had with the Respondent. The Complaint could not be resolved between the parties. Thus the complaint was referred to this Office for resolution.

C. BACKGROUND AND UNDISPUTED FACTS

[4] During January 2006, Complainant approached Respondent requesting certain financial services. A meeting between the parties was scheduled for 18 January 2006. At this meeting Respondent obtained a broker's note

from Complainant. This office however was not furnished with a copy of this document. A further meeting took place on 1 February 2006, where Respondent made certain recommendations to Complainant. Another meeting took place on 16 February 2006 where further discussions took place regarding Complainant's investments. Following these various discussions between the parties, two annuity contracts were purchased with lump sums of R560 000.00 ('Investo Linked Investment') and R188 337.20 ('Investo Designer Annuity') respectively. Complainant received copies of these contracts during April 2006.

It is at this point that complainant discovered that the initial fees for the

Investo Linked Investment were as follows:

'Initial advice fee	R28, 000.00
VAT on Initial advice fee	R 3, 920.00'

The actual amount allocated to the investment was thus R528 080.00.

In respect of the Investo Designer Annuity, the initial fees were as follows:

'Initial advice fee	R2, 825.05
VAT on initial advice fee	R 395.50
Tiered Initial fee	R2, 354.22'

The total fee levied against the capital was an amount of R5574.27 and the eventual allocation toward the investment was thus R182 762.41.

Complainant's case

[5] Complainant's case is that when she discovered these fees levied against the capital amounts invested, she on 11 April 2006 addressed an e-mail to Respondent complaining about the costs. The relevant aspects of the e-mail are that:

'The initial outline prepared and presented for my investments makes no reference to Tax/Fees/Commission. According to the contracts received these issues were to be negotiated on presentation. The covering letter attached to both contracts states the investments can be cancelled within 30 days. I refer to my email of Friday the 7th April. Could you please reply to me in writing via e-mail as soon as possible'

Incidentally, the e-mail of the 7 April 2006 refers to a request to the Respondent to cancel the investments with Momentum, presumably because of the delays.

In response to the e-mail, Respondent replied on the 12 April 2006 stating the following:

'You initial reaction wanting to cancel is a surprise after all our negotiations and detailed explanations on my part regarding your previous disadvantaged position and the need to reorganize.

Whilst the initial Tax fees/commission may seem highly relevant to yourself initially they are of a minor consequence to your past position and the huge advantage to be obtained by yourself by implementing my planed (sic) financial model in order to gain financial independence.'

Respondent concludes by requesting a meeting with Complainant before any action is taken by the latter.

- [6] On 12 April 2006, Complainant responds by e-mail to Respondent stating that the essence of her complaint is about the commission and advice fees shown on the contracts received from Momentum. In this e-mail, complainant indicates that the non disclosure of costs had led her to lodge a formal complaint and request a cancellation of the investments. On 13 April 2006, exercising her right to cancel the contracts within 30 days, complainant lodged a complaint with Momentum in respect of the costs which she claims were not disclosed and also stating that she had requested the Respondent to cancel the investments. I note, however, that the investments were not cancelled after all.

Respondent's case

- [7] Following the e-mail of the 12 April 2006, Respondent wrote to Complainant on 18 April pointing to a misunderstanding regarding the implementation of the investments. In this letter Respondent makes the

point that during their meeting on 1st February, being their second meeting, along with the initial summary and recommendations, costs and fee structure were explained. Respondent, once again advises Complainant that it would be extremely poor judgment on her part to cancel the investments. Further correspondence is exchanged between the parties but the complaint is not resolved.

Investigation by the Office

[8] On 11 September 2006, the complaint was directed to Respondent in terms of Rule 6 (b) giving Respondent a further opportunity to resolve the matter with Complainant. The letter is addressed for the attention of Ranta. The letter specifically points out that the Complainant had tried on numerous occasions to resolve the matter of costs but without success. The said letter also requested details of compliance with the Codes of Conduct promulgated under the FAIS Act, as well as a statement setting out Respondent's version of events.

[9] In response Respondent merely confirmed in a short letter by Ranta dated 26 September 2006, that it complied with the provisions of the FAIS Act whilst rendering the financial service to complainant. A further letter dated 8 December 2006 was sent to Respondent for the attention of Ranta

specifically calling for a copy of the record of advice, a full statement of its version of events as well a copy of Respondent's entire file of papers.

[10] Respondent forwarded, under cover of a letter dated 20 January 2007 documents that are described as:

- '1. Copy of Advice record
2. Full statement of version of events
3. Relevant papers'

Apart from the foregoing, there are no further documents provided by Respondent where the issue of costs or the disclosure thereof are pertinently dealt with.

[11] During the course of the investigation of this matter, the Office obtained the quotations relating to the two investments. These quotations were obtained from the product supplier directly as they did not accompany the documents supplied by Respondent. The quotations are unsigned. The significance of this will appear later in this determination.

D. DETERMINATION AND REASONS

[12] The sole issue to be decided in this case is whether Respondent as alleged by Complainant failed to disclose costs. According to Complainant costs were not disclosed. She was told that fees would be

nominal. Respondent's answer to the complaint is a simple statement that he disclosed costs. The only piece of evidence furnished to this Office by Respondent is a three page typed report which purports to set out an account of what happened on the 18 January, 1 February and 16 February respectively in 2006. I attach hereto the said document, marked Annexure A 1-3.

[13] The three page report makes reference to two fund fact sheets referred to by Respondent as Exhibits 'B' and 'C'. I attach hereto the said documents, marked Annexures 'B' and 'C'. Annexure 'B' is a fund fact sheet dated 31 December 2005 relating to a Momentum product described as 'INVESTO RMB Bond', whilst Annexure 'C' refers to a Momentum product described as 'INVESTO RMB Money Market Fund'.

[14] Each of the documents set out details under various headings.

They are:

- 'Investment objective'
- 'Segment description'
- 'Risk classification'
- 'Top holdings as at 30 September 2005'
- 'Calendar year performance as at 31 December 2005'
- 'Cumulative performance to 31 December 2005'
- 'Performance as at 31 December 2005'
- 'Asset Allocation as at 30 September 2005'.

[15] It will be noted that in Annexure A 1-3, referred to above, Respondent refers to Annexures B & C, to justify his assertion that he disclosed costs to Complainant.

He says the following:

In Annexure A2

'USING THIS DOCUMENT (EXHIBIT B) AS A BASE IT WAS THEN EXPLAINED TO THE CLIENT THE MECHANISMS OF THE ACTUAL CONTRACT TO BE ISSUED:

- ...
- ...
- FUND COST STRUCTURE WITH BENCHMARK IMPLICATIONS (Sic)
COMMISSIONS/FEE STRUCTURE APPLICABLE

'USING THIS DOCUMENT (EXHIBIT C) AS A BASE IT WAS THEN EXPLAINED TO THE CLIENT THE MECHANISMS OF THE ACTUAL CONTRACT TO BE ISSUED.

- ...
- ...
- FUND COST STRUCTURE WITH BENCHMARK IMPLICATIONS
COMMISSION/FEE STRUCTURE APPLICABLE'

[16] The difficulty that I have with both Annexures B & C is that neither of them makes any reference to the costs that would be levied in respect of investments in the products concerned. Respondent relies throughout on this as compliance with the requirements of disclosure. When it was pointed out to Respondent in an e-mail wherein attempts were made to settle the matter that on the available evidence:

'the conclusion is inescapable that there no disclosure of fees at all',

Respondent once again refers to his report wherein he maintains that:

‘FUND COST STRUCTURE WITH BENCHMARK IMPLICATIONS
COMMISSION/FEE STRUCTURE APPLICABLE

As stated the Commission/Fee structure was disclosed’

[17] It is therefore clear that as far as the Respondent is concerned he disclosed costs by reference to Annexures B and C.

[18] As indicated, the Office obtained the quotations from the product supplier. These quotations clearly reflect costs which are eventually incorporated into the contracts. However, it is an undisputed fact that the Respondent does not rely on these quotations to assert that he disclosed costs. Indeed, it is the Complainant’s version that no quotations were ever presented to her. This is borne out by the fact that Respondent relies on Annexures B & C, which Ranta claims to have used to disclose costs. Annexures B & C have no bearing whatsoever on the costs of the investment and cannot assist Respondent in its assertion.

[19] This brings me to another aspect of the complaint, which Respondent has not addressed at all. Complainant has also alleged that Respondent had requested her to sign a number of incomplete forms. She specifically states in her letter to Respondent, dated 24 May 2006:

'I object to the process you adopted in obtaining my signature on the application form as none of the provisions were explained to me, instead I was requested to sign in specific areas and the document was incomplete'

[20] An examination of the two application forms which this Office obtained, from the product supplier, reveal that both application forms are signed on the last page only. The details are filled in by Ranta. None of the other pages of the application forms are either signed or initialled by the Complainant. Pertinently, Section 16 of the application form which reflects costs as percentages is neither initialled nor signed by Complainant.

Percentages are reflected as follows:

In respect of the Investo Linked Investment:

'Initial Advice fee/commission	5, 0%
Trail fee/commission	1, 0%'

In respect of the Investo Designer Annuity:

'Initial Advice fee/commission	1, 5%
Trail fee/commission	1, 0%'

I now proceed to deal with some areas of violation of the FAIS Act and the relevant codes of conduct.

Violations of the FAIS Act and the Code of Conduct

[21] Section 16 (1) of the FAIS Act which deals with Principles of the code of conduct, is premised on the principle that the client being rendered financial services will be able to make informed decisions. To this end, Section 16 (2) provides that the code of conduct must in particular contain provisions relating to –

‘(a) the making of adequate disclosures of relevant material information ...

It is clear that the disclosure of costs is material information on the basis of which a potential client will be able to make an informed decision about a proposed transaction. It is clear that disclosures in relation thereto, must be made in clear and unambiguous terms. Bearing in mind the version of events provided by Respondent it is clear that Respondent failed to make adequate disclosures of the costs.

[22] Section 3 (1) (a) vii of the General Code of Conduct for Authorised Financial Services Providers and Representatives (‘the General Code’) drafted on the basis of the principles set out in Section 16 of the FAIS Act, provides specifically that when a provider renders a financial service –

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

- (vii) must, as regards all amounts, sums, values, charges, fees, remuneration or monetary obligations mentioned or referred to therein and payable to the product supplier or the provider, be reflected in specific monetary terms: Provided that where any such amount, sum value charge, fee, remuneration or monetary; obligations is not reasonably predeterminable, its basis of calculation must be adequately described;..'

I can find no evidence on the basis of the version of events provided by Respondent that Ranta took any steps to ensure that charges and fees levied against the investments were brought to the attention of the Complainant, either in specific monetary terms or in a manner where they could be reasonably calculated. Indeed, it would have been a simple matter to do so, but it is clear that Respondent did not do so. Instead Complainant discovers those costs for the first time, when she sees her contract from the product supplier. There is nothing on the available evidence to dispute that this would not have been the case.

[23] In keeping with the theme that a provider rendering a financial service must provide such information that the client being rendered the service is able to make an informed decision, Part VI section 7 (1) (c) (iii) (bb) provides that:-

'where the financial product is marketed or positioned as an investment or as having an investment component-

(bb) separate disclosures of any charges and fees to be levied against the product, including the amount and frequency thereof and, where the specific structure of the product entails other underlying financial products, in such a manner as to enable the client to determine the net investment amount ultimately invested for the benefit of the client;

[24] From the respondent's own version I have no hesitation in concluding that no evidence of compliance with these provisions exists. I therefore find that the Respondent failed to disclose the costs.

[25] Complainant alleges that when she pertinently asked Ranta about costs, he said that they would be 'nominal'. Ranta has not challenged this, but has been satisfied in simply saying that he disclosed costs. I have already set out, in some detail, what Ranta's version was in relation to disclosure of costs and my views thereon.

[26] I am satisfied, on probabilities, that Ranta would have advised Complainant that costs would be nominal. I say so for the following reasons:

26.1 he has not pertinently refuted the allegation;

26.2 there is no evidence before me that he disclosed the costs that were eventually charged, and importantly;

26.3 If one has sight of the charges levied, it will be noted that Respondent chose to charge the full commission of 5% on the Investo Linked Investment and what can be considered a nominal charge of 1, 5% on the Investo Designer Annuity.

[27] In terms of Section 20 (3) (a) of the FAIS Act, when considering a complaint I am required *inter alia* to have 'due regard to'.

(a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint;

One of the essentials of a contract is that the price must be certain. However, contracts are not void for vagueness simply because a price has not been agreed. See in this regard, *Lombard v Pongola Sugar Milling Co. Ltd.*, 1963 (4) S.A. 119 (D) at p.127 where Henning, J., in dealing with the question of the basis on which a price is to be estimated where there has been no express agreement, said:

'a (person), under a contract which does not expressly mention the charge which he may make, is entitled to be paid a reasonable remuneration or a remuneration at the rates usually charged by him.'

[28] As I have indicated already, I find that Respondent would have agreed to charge Complainant nominal fees for the services that it rendered. What that nominal fee would have been is something that Respondent itself has

provided some guidance on. It is apparent that Respondent has chosen to charge a fee expressed as a percentage in respect of the Investo Designer Annuity of 1, 5%. This indicates that Respondent would have had an idea of what a 'nominal' fee in the circumstances of this transaction would have been. Applying the same principle to the Investo Linked Investment, it is my view, that a nominal fee would have been the same percentage as well.

CONCLUSION

[29] It is common cause that Complainant has retained the investments recommended by Respondent. Respondent's conduct, however as indicated falls short of compliance in the respects mentioned. This non-compliance resulted in financial loss in that what Complainant expected to be nominal costs were in fact the full costs on at least the Investo Linked Investment.

[30] I have applied a nominal fee to the Investo Linked Investment and the resultant loss in financial terms is the following:

Full Costs Charged including VAT	R31 920.00
Nominal Costs (1.5%) including VAT	R9 576.00
Loss	R22 344.00

[31] In granting relief to the Complainant I have had due regard to the contractual relationship between the parties and have also applied what I consider to be fair and reasonable in all the circumstances.

The complaint is upheld. I grant the following order:-

ORDER

[1] Respondent is hereby ordered to refund complainant the sum of R22 344.00 in respect of fees within SEVEN (7) days from date of this order;

[2] Interest shall accrue on the said sum of R22 344.00 at the rate of 15.5% p.a. effective SEVEN (7) days from the date of this order to date of final payment;

[3] Respondent is ordered pay the case fees of R1000 to this Office.

DATED AT PRETORIA ON THIS THE 4 DAY OF FEBRUARY 2008



CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS