

**IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS
PRETORIA**

Case Number: FOC 3883/06-07/KZN (4)

In the matter between:-

PAMELA MARY SHORT

Complainant

and

NIGEL HENSON & ASSOCIATES CC

1st Respondent

NIGEL HENSON

2nd Respondent

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

A. PARTIES

- [1] The complainant is Pamela Mary Short a retired female residing in KwaZulu-Natal.
- [2] The 1st respondent is Nigel Henson & Associates CC, a close corporation and registered financial services provider with FSP number 9327, with its principal place of business at 8 Henwood Road, Morningside, Durban.

[3] The 2nd respondent is Mr Nigel Henson, a key individual of 1st respondent. At all material times, 1st respondent was represented by the 2nd respondent; hence I will hereafter refer to them as respondent.

B. THE COMPLAINT'S VERSION

[4] Complainant had since 1992 lived with a Miss Marilyn Jacobs, in what she refers to as an 'a common law wife (same sex relationship)'.

[5] Miss Jacobs was the financial provider, and complainant at her suggestion relinquished her career and assumed the role of housewife on the understanding that Miss Jacobs would support her financially.

[6] In May of 2005 Miss Jacobs, who at age 55 suffered from end stage terminal cancer retired from her Metropolitan Odyssey retirement annuity.

[7] Having taken the allowable one third in cash, and acting on the advice of respondent she invested the balance thereof in a single life Metropolitan Odyssey annuity. This annuity provided a monthly income of R347, 05 for the remainder of her limited life expectancy.

[8] Upon her death about one year later on the 12th June 2006, the policy which did not have any death benefits, ceased having paid out R3, 817.55. Complainant pointed out the stark contrast with the R48 884.47 originally invested.

[9] This led complainant to question, whether the advice rendered by respondent was appropriate given the circumstances.

[10] In essence she avers that as there was no death pay-out, it was of little benefit to either Ms Jacobs or herself as the beneficiary of her estate.

C. THE ISSUES IN DISPUTE

An examination of the papers reveals that the issues can essentially be broken up into two areas. The first being a preliminary defence relating to whether the complainant has locus standi; in layman's terms the legal capacity to bring the complaint. The second relates to the merits of the advice itself.

D. LOCUS STANDI

[11] Locus Standi requires that the complainant fall within the definition of a complainant as defined in terms of the FAIS Act. The definition of a complainant being:

'a specific person....who is or may become the subject to whom a financial service is rendered intentionally, or is the successor in title of such person or the beneficiary of such service.....'

[12] This definition is effectively extended in terms of the rules governing the proceedings of the office in that it includes a person nominated as a beneficiary in terms of the financial product.

[13] Respondent argues that complainant is neither a client of his, nor beneficiary under the policy and accordingly has no locus standi to bring the complaint.

[14] The question then arises as to whether complainant falls within the term 'successor in title of such person'

[15] If the first area is answered in the affirmative, this leads onto whether respondent in rendering the financial service complied with the provisions of the FAIS Act and General Code of Conduct for Authorised Financial Services Providers and Representatives (Board Notice 80 of 2003) (General Code). In particular the issues here are whether:-

15.1 Respondent took into account Ms Jacobs particular circumstances and as such rendered appropriate advice.

15.2 Should it in fact be confirmed that the advice was inappropriate, whether this in fact led to the complainant suffering financial prejudice and if so the quantum thereof.

15.3 Respondent's version is that Ms Jacobs 'with full knowledge of all the circumstances, elected not to have a death benefit payable under the policy and to receive the maximum monthly income...'

- [16] One cannot put the cart before the horse; similarly there cannot be a complaint as defined without complainant first having the necessary locus standi.
- [17] Prior to proceeding it is necessary to sketch the background to the relationship between the deceased (Ms Jacobs) and complainant.
- [18] Complainant alleges that she and Ms Jacobs had existed together in every respect as a same sex couple since 1992. They were accepted as such by both family and friends.
- [19] Ms Jacobs was the sole breadwinner and complainant assumed what could be referred to as the role of housewife.
- [20] Upon the passing of Ms Jacobs, her entire estate was left to complainant in terms of a will dated 24th May 2006.
- [21] Copies of this will and an earlier one dated 5th April 2005 were provided by complainant. The earlier will is not materially different in that whilst it makes several bequests, the majority and balance of Ms Jacob's estate is left to complainant.
- [22] The preceding facts are not in dispute.

[23] Indeed the liquidation and distribution account of the estate refers to complainant as a major partner. In the circumstances I am satisfied that this is indeed the case.

[24] Turning now to the definition of 'complainant' and the question as to whether any of the aforesaid assists complainant to fall within the definition thereof.

[25] As previously mentioned the definition of a complainant being:
'a specific person....who is or may become the subject to whom a financial service is rendered intentionally, or is the successor in title of such person or the beneficiary of such service'.

[26] This definition is expanded within the rules of proceedings of the office as follows; 'complainant includes the complainant's lawful successor in title or a person nominated as beneficiary in terms of the financial product which is the subject of the relevant complaint'.

[27] Given that the policy contained no death benefit, and nor was complainant a client of respondent, this effectively excludes both 'the subject to whom a financial service is rendered intentionally' and any beneficiary of such service or beneficiary nomination.

[28] What remains then, and a question rightly posed by respondent, is whether complainant falls within the meaning of a 'successor in title of such person.'

- [29] No definition of a successor in title is contained within the Act and as such no specific restriction placed on the term. The term beneficiary of such service and beneficiary nomination already make more than adequate provision in respect of a financial product that continues in existence.
- [30] That is to say a beneficiary for ownership or proceeds.
- [31] As such it is self-evident that the inclusion of the term successor in title was intended to broaden the definition of complainant beyond the existence of the financial product itself. In the rules of proceedings of the office the phrase is 'complainant's lawful successor in title.'
- [32] For to be able to contend that a claim is extinguished simply because in consequence of poor advice neither a beneficiary for ownership or proceeds still existed on the death of the deceased would be to deny a fundamental principle of financial planning and in doing so defeat an objective of the Act.
- [33] I believe that the legislature in its wisdom had this in mind when it included the term 'complainant's lawful successor in title.'
- [34] In the absence of appropriate advice and the consequential financial prejudice it is the heirs of the estate that have been prejudiced. They are well within their rights to bring a claim. In the matter at hand, complainant as sole beneficiary of the Ms Jacobs estate in terms of the will is in just such a position.

[35] For the reasons already elucidated, I find that complainant is indeed a successor in title, and as such in falling within the definition has locus standi to submit a complaint.

Whether the advice was appropriate

[36] Complainant has every right to question why out of R48 884,47 originally invested, the policy only paid out R3, 817.55 before ceasing on the death of Ms Jacobs.

[37] This was a life annuity policy into which one places a certain sum and in turn the issuing insurer guarantees to pay a set sum for so long as you shall live. It stands to reason that the longer one lives, the greater the benefit therefrom and vice versa.

[38] In the case of Ms Jacobs her very short lifespan resulted in a considerably diminished payout, and effective loss of capital.

[39] Respondent was aware of her position, namely that Ms Jacob's illness was terminal and at an advanced stage when she signed the application forms in May 2005.

[40] As an experienced adviser respondent would have understood the impact of Ms Jacobs illness on the policy pay-out, and yet he proceeded to recommend a policy that had neither death benefit nor extended term.

[41] The General Code in section 3 (1) (iii) requires that information provided to a client must be adequate and appropriate in the circumstances. In this respect I would expect respondent to inform Ms Jacobs that to put it quite bluntly she was throwing her capital away. The consequential loss of capital given the circumstances and advice rendered by respondent was as certain as night follows day.

[42] Had Ms Jacobs been so informed I have no doubt that she would have enquired as to alternative options and not have made this particular investment, given that as will become evident there were other more appropriate options.

[43] Respondent provided a copy of a document purporting to be the minutes of a meeting held between respondent and Ms Jacobs on 18th May 2005.

[44] The document contains the following :

‘Marilyn was adamant that she wanted one third paid to her in cash, and the maximum possible pension from the balance. Nigel explained to her that unfortunately, the amount available to purchase an annuity in the sum of R48, 884.47 was not sufficient to purchase a living annuity from which she could draw 20% and leave the balance on her death to friends or relations. Marilyn stated that she had no one, who was financially dependent on her and therefore agreed to purchase an annuity with a nil guarantee, which would pay her the maximum monthly income.’

[45] This document stands as the only evidence of an attempt at compliance with sections 8 and 9 of the General Code. It however falls far short of meeting the requirements thereof.

[48] Section 8.(1) requires that a provider 'take reasonable steps to seek from the client appropriate and available information regarding the clients financial situation.....and objectives to enable the provider to provide the client with appropriate advice. Yet on the evidence this was not complied with. Fleeting reference is made to friends and relations in terms of an inability to purchase a living annuity, yet no proper enquiries appear to have been made. There did not appear to have been as much as a copy of a will in respondent's file and yet given the circumstances such enquires were of particular import.

[46] Despite Ms Jacobs long standing relationship with complainant not a single mention is made of her. When queried on this respondent's reply was that whilst he knew that they were close friends, it was neither necessary nor appropriate to question the deceased about her relationship with her friends. This answer cannot suffice; whilst I appreciate that a degree of sensitivity may be required respondent could not have been blinded to the fact that at the very least a close bond existed between Ms Jacobs and complainant.

[47] It is quite simply inconceivable that had Ms Jacobs been appropriately advised, that she would not have wished some benefit to devolve upon those she cared for. Section 8. (1) (c) requires that a provider identify the financial product or products that will be appropriate to the client's risk profile and

financial needs. The provision as to appropriateness as might be expected falls under the sub heading 'Suitability' within part VII of the Code.

[48] Given the guaranteed loss of capital I am convinced that the single product proffered was inappropriate. The above mentioned section also speaks to products in the plural and in the circumstances there were certainly a number of appropriate and in many respects standard, available options, better suited to the circumstances. This would include joint and survivorship annuities, capital preservation or guaranteed term annuity options which were potentially suitable. There is even the option of an enhanced annuity which specifically caters for individuals in Ms Jacobs position in that it allows for a person in poor health to apply for a higher monthly pension, as the insurance company will be aware that it will only be paying out for a reduced period.

[49] I am confident in stating that any experienced financial service provider would be very familiar with such options.

[50] Yet no documentation on file indicates that any of these additional options were put on the table so as to allow Ms Jacobs to make an informed decision. Respondent contends that he knew his client, and knew that she would never have accepted the drastically lower income with by a capital preservation scheme. If anything and on the contrary the evidence points to respondent's knowledge of Ms Short as patently lacking, however if for a moment one assumes that respondent is correct that a capital preservation option would not have been accepted by Ms Jacobs, this still fails to account for the failure

to mention the joint and survivorship, guaranteed term or enhanced annuity options.

[51] With these options not having been disclosed or even considered there is no question that Ms Jacobs was uninformed and in no position to make an appropriate decision.

[52] I am well aware that in considering what option would have been the most appropriate for Ms Jacobs I am posthumously attempting to anticipate her decision, a decision which may well have chosen any one of the additional options already mentioned. I am however guided by section 28.(1) (b) (i) of the FAIS Act which provides for me to award fair compensation for any financial prejudice or damage suffered.

[53] To this end I have taken note of the fact that earlier attempts between the parties to settle this matter centred on a guaranteed ten year term and then for life annuity. For the reasons which follow I would be comfortable with this as a having been a suitable option.

[54] Quite simply the annuity will pay out, to the maximum of either the guaranteed term or the life of the annuitant.

[55] Probably the most common guaranteed term is 10 year but can be extended to 20. Whilst as might be expected the longer the guaranteed term the greater the reduction in the monthly annuity; a 10 year guarantee term has a relatively insignificant impact on the monthly annuity.

[56] In fact based on information provided by respondent it would have amounted to a mere R6.11 per month, which accords with what I would have expected.

[57] This option as much as anything illustrates the lack of due skill care and diligence expected of respondent. Quite simply why would anyone in an informed position opt for a single life annuity without any guaranteed term, when but for the miniscule diminution of the annuity by six rands and eleven cents, the monthly amount could be guaranteed for ten years thereby ensuring a much greater pay-out for Ms Jacobs beneficiaries.

E. CONCLUSION

[58] As per paragraph 28, it is respondent's version that although he knew that Ms Jacobs and Ms Short were close friends it was not his place to enquire further into their relationship. On the contrary it is exactly this which is required of advisers. By all accounts they openly lived together and at the very least there was an indication of some form of interdependency.

[59] In *Lenaerts v JSN Motors (Pty) Ltd and Another*, the court cited with approval the case of *Mc Nealy v The Penine Insurance Co. Limited, West Lanc Insurance Brokers Ltd and Cornell* [1978] 2 Lloyd's Rep 18 CA, where a broker was held not to have done his duty to use all reasonable care to establish whether an exclusion as to occupation applied to the insured. He failed to do all that was reasonable to elicit relevant and material information from the insured as to his occupation. Part-time musicians were excluded from cover under the particular policy. The broker failed to both inform the

insured of this fact and to ask whether the insured was a part-time musician. He simply asked the insured what his occupation was, to which the insured answered “property repairer”. But in addition to his occupation of “property repairer” the insured was also a part-time musician. The court held , inter alia, that:-

‘if more precise and direct questions had been addressed to the proposer, an answer would have been elicited which at least would have put the broker on enquiry and so led to the revealing of the plaintiff’s part-time profession.’ (my italics)

[60] Whilst the facts may differ the principle remain. In the circumstances I am quite frankly surprised that the adviser did not have a better understanding of Ms Jacobs circumstances. To say that it was not his place to ask will not suffice.

[61] I therefore find that on the facts as set out in this determination that respondent’s conduct violated the General Code and as a result complainant has indeed suffered a loss.

[62] As such it remains to determine quantum.

F. QUANTUM

[63] The single life Metropolitan Odyssey annuity having paid out an amount of R347.05 for 11 months then ceased.

[64] As part of his papers respondent submitted an example of the income which would have been provided by a 10 year guaranteed Metropolitan Odyssey

annuity. Had this been selected as an option it would have meant a monthly pay-out of R340.94, continuing for a further 109 months and amounting to a total of R37 162. 46.

[65] Bringing this monthly annuity back to present value utilising an interest rate of 8 % results in a present value of R26, 353.70.

[66] The complaint is therefore upheld and the monetary value of fair compensation for any financial prejudice or damage suffered that I am prepared to award in terms of Section 28 (1) (b) (i) is the R26, 353.70.

G. THE ORDER

I make the following order:

1. The complaint is upheld;
2. Respondents are ordered to pay, jointly and severally, the one paying the other to be absolved the sum of R26, 353.70;
3. Interest at the rate of 15.5 %, from a date seven (7) days from date of this order to date of final payment;

DATED AT PRETORIA ON THIS 29TH DAY OF NOVEMBER 2012.

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by several smaller, connected letters. The signature is contained within a thin black rectangular border.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS