

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FSOS 00192/17-18/WC 2

In the matter between

NTOMBEKHAYA CECILIA TSUPE

Complainant

and

ZWELONKE BURIAL ASSOCIATION

First Respondent

MLONDOLOZI PATRICK MASETI

Second Respondent

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

A. INTRODUCTION

[1] The complaint relates to an unpaid claim made by complainant against a funeral policy, following the death of her adult son who was a life assured under the policy. The complainant's son passed away in November 2016 and following what the complainant perceived to be a delay in settling the claim prior to her son's funeral, the complainant approached the second respondent to enquire about the perceived delay. The complainant asked the second respondent when the claim process would be finalized and her claim settled. In response to the complainant's enquiry, the second respondent advised that the burial society was unable to settle the claim due to a lack of funds but assured the complainant that the claim would be paid. To date, the claim remains unpaid.

B. THE PARTIES

- [2] Complainant is Miss Ntombekhaya Cecelia Tsupe, an adult female whose full details are on record with this Office.
- [3] The first respondent is Zwelonke Funeral Association, a close corporation duly incorporated in terms of South African laws with registration number K2015161056 and with its business address noted in the records of the Companies and Intellectual Properties Commission as 30 Saturn Crescent, Kwezi Park, Khayelitsha, Western Cape 7784. Second respondent's license number 9564 was withdrawn on 12 May 2015. The regulators records however reveal that the respondent has never been registered as a financial services provider.
- [4] The second respondent is Mlondolozzi Patrick Maseti, an adult male who acted as a director of the first respondent at all times material hereto and whose address is the same as that of the first respondent. At all times material hereto, the complainant dealt with the second respondent or a duly appointed member of his staff.
- [5] Reference in this determination to 'respondent' or 'respondents' should be read to be a reference to the first and second respondent. Where necessary, I specify which respondent is being referred to.

C. THE COMPLAINT

- [6] The complainant entered into a life assurance contract with the respondent on 4 October 2015. Complainant was the principle life assured and premium payer of the policy and had also named 8 other members of her family as co-life assureds. One of the life assureds on complainant's policy was her son, Terence Sibulelo Tsupe who was unemployed and was wholly dependent on the complainant at the time of being added as a life assured. The premium payable by complainant on inception of the policy

was R200 and premiums, according to the terms and conditions set out in the policy schedule, would increase annually by R200.

[7] On 5 November 2016, one of the life assureds on the policy, the complainant's son, died and the complainant duly lodged a claim with the respondent. At the time the complainant lodged the claim, her premiums were up to date. Notwithstanding this, the complainant's claim went unpaid even after the complainant followed up on payment up to the day prior to the funeral which was conducted on 11 November 2016. As a result, the complainant was forced to fund the costs of the funeral from her own pocket.

[8] The complainant alleges that she was advised by the respondent that her claim could not be settled because there were no funds available to do so. The complainant further alleges that the respondent increased the premiums payable by all its members on an ad hoc basis in a bid to try and raise the funds needed to settle what appears to have been a number of unpaid claims, including the complainant's claim. Despite this, the complainant's claim remains unpaid and the complainant alleges that from February 2017 to July 2017, the respondent held five meetings, one in each month, during which the members of the burial society were apprised of the alleged financial difficulties that the respondent found itself in. The complainant, following the last meeting she attended which she states was held on 2 July 2017, lodged the present complaint with this Office.

[9] The complainant indicated that the resolution she seeks for her complaint is for this Office to assist her receive the benefit which was promised to her in exchange for the premiums she paid for the subsistence of her policy.

D. RESPONDENT'S VERSION

[10] On receipt of the complaint, this Office, in accordance with Rule 6(c) of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers (the Rules), brought the complaint to the respondent's attention. The respondent was afforded an opportunity to either resolve the complaint with the complainant or to respond to the

allegations raised therein. The respondent was advised that in the event it elected to respond to the complaint, that it was required to revert to this Office with its full version of events as well as copies of the complete file of papers relating to the complaint. The respondent was afforded a period of four (4) weeks within which to attend to the above.

[11] On expiry of the time afforded to the respondent to either resolve or respond to the complaint, neither was done. As a courtesy, and in a bid to ensure that the normal rules of justice which dictate that a party be afforded an opportunity to defend any action against it, this Office, on 13 October 2017, sent an email to the respondent reminding it that its response had been due on 14 August 2017. Still, no response was received from the respondent.

E. INVESTIGATION OF THE COMPLAINT

[12] Since this office had received no response from the respondent disputing any of the allegations levelled against it by the complainant, this Office proceeded to investigate the complaint, after due notice had been sent to the respondent advising it that this would be done. The aforementioned notice was sent to the respondent in accordance with section 27(4) of the Financial Advisory and Intermediary Services Act, 37 of 2002 (FAS Act). In this notice, the respondent was advised that the matter had been accepted for formal investigation and was called on to answer to the allegations levelled against it by the complainant. This notice is dated 22 February 2018 and the respondent was afforded two weeks to respond thereto.

[13] Again, no response was received from the respondent.

[14] In light of the respondent's failure to respond to the complaint, this determination is made solely on the strength of the complainant's uncontested version.

F. DETERMINATION

- [15] The issue that falls to be decided in this determination is whether the respondent is obligated in law to honour the complainant's claim and therefore whether the complainant is entitled to the relief sought. While there is much to say about the legal requirements that the second respondent was required to comply with before operating the first respondent as an insurer and provider of financial services, since this has no effect on the right granted to this Office to entertain a complaint against a party not authorised to render a financial service and has no effect on the issue before this Office, this Office will not delve into the issue of legality and will look only at the identified issue.
- [16] The complainant wants this Office to order the respondent to pay her R10 000, being the value of the benefit promised to her. In support of her claim, the complainant submitted proof that she paid the premiums she was obligated to be pay in exchange for the benefit so promised to her. The complainant also provided this Office with a copy of the receipt book, received from the respondent when her application for cover was accepted, on which the terms and conditions of the contract concluded between herself and the respondent are set out.
- [17] From a reading of the terms and conditions of the contract, it appears plainly that the benefit payable to the complainant in the event of the death of one of the co-life assureds, which the respondent defined as 'dependents', that the benefit payable to the complainant would be R10 000. The condition to which this benefit was subject is that a claim would be rejected where a policyholder, or member, failed to pay the premiums or paid any missed premium or premiums only after the death of an assured. This seems to be the only condition to which payment of the benefit was subject, and it seems that there are no other exclusions or circumstances under which the benefit would not be paid, since these were not recorded.

[18] Since the complainant seeks to remedy a breach in respect of a contract that created reciprocal obligations, the complainant must show that the principles of claiming counter performance have been met by her. The principles of counter performance are well established and state that the first party, to a contract that creates reciprocal obligations, is not entitled to demand counter-performance from the other party unless the first party has himself or herself performed or is prepared to perform¹. As indicate, the complainant has shown, through deposit slips submitted to this Office, that she has not missed any payments since inception of the policy. The complainant thus proved not only that there is a *prima facie* case for breach of contract by the respondent but it seems also that she is entitled to claim performance from the respondent in accordance with the terms of the contract.

[19] It is a trite legal principle that a contracting party, in the event of a breach by the other party with whom such a contract has been concluded, has various remedies available to him or her in order remedy the breach. The Supreme Court of Appeal in *Basson and Another v Hanna*², quoting Christie's *Law of Contract in South Africa* 7 ed³ identified that these remedies include specific performance, an interdict, declaration of rights, cancellation and damages. *'The choice among these remedies rests primarily with the injured party, the plaintiff, who may choose more than one of the remedies, either in the alternative or together, subject to the overriding principles that the plaintiff must not entertain inconsistent remedies and must not be overcompensated.'*⁴

[20] While the respondent had indicated to the complainant that it will honour the claim as soon as money to do so became available, the respondent has not done so. The

¹ *Smith v van den Heever NO and 2 Others* (136/10) [2011] ZASCA 5 (4 March 2011) at para 14.

² *Basson v Hanna* (37/2016) [2016] ZASCA 198 (6 December 2016) at para 22.

³ G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 616.

⁴ *Supra*.

complainant has quite simply asked for the claim to be honoured and I do not see why, in light of the foregoing principles that exist in law, this cannot be granted to her.

[21] In view of the above, I find that the complainant is entitled to claim specific performance from the respondent and that she must be compensated in the manner she has demanded.

G. THE ORDER

[22] In the instance, I make the following order:

1. The complaint is upheld.
2. The respondents are ordered, to pay to the complainant, the one paying the other to be absolved, the amount of R10 000.
3. Interest on this amount at a rate of 10% per annum from the date when the claim was lodged to date of final payment.
4. Should any party be aggrieved with the decision, leave to appeal is granted in terms of section 28 (5) (b) (i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 29th DAY OF MARCH 2019.



NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS