

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 05054/13-14/ GP2

In the matter between:

DAWID MARTINUS ADLEN

Complainant

and

HERMAN COERTZEN BROKERS CC

1st Respondent

HERMAN BERNARDUS COERTZEN

2nd Respondent

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

A. INTRODUCTION

- [1] Complainant, on the advice of Respondent applied for a Matrix Topdekking, life assurance policy with Sanlam. Complainant was the contracting party, with the lives assured being himself and his spouse.
- [2] Notification of acceptance of this Sanlam policy was sent to Complainant in correspondence dated the 16th November 2012. The commencement date thereof was to be the 1st January 2013.
- [3] The Sanlam policy was to replace an existing Old Mutual Greenlight policy, which had been previously recommended by Respondent. This Old Mutual Greenlight

policy had commenced on the 14th April 2010. As with the Sanlam policy, Complainant was the contracting party with the lives assured being himself and his spouse.

- [4] As facilitated by Respondent, the Old Mutual policy was cancelled with immediate effect by notice dated the 6th December 2012.
- [5] Tragically, Complainant's spouse passed away on the 21st December 2012. Complainant submitted a claim to Sanlam, which claim was unsuccessful on the basis that cover had not yet commenced.
- [6] With the Old Mutual policy having been cancelled and the new Sanlam policy not yet having begun, Complainant's spouse was uninsured at the time.
- [7] Complainant then submitted a complaint to the office of the Ombudsman for Long-Term Insurance, (OLTI).
- [8] Having upheld the reasons for Sanlam's rejection of the claim, the OLTI, in turn referred the complainant to this Office. At the heart of complainant's allegations is the appropriateness of advice dispensed by Respondent.
- [9] This Office, is therefore faced with the question as to whether Respondent's advice or conduct breached the FAIS Act, in turn leading to Complainant's spouse being uninsured under either policy at the material time.
- [10] As the contracting party and beneficiary, Complainant sustained a loss. In this regard, Complainant's claim against Respondent is thus, the amount which would have paid out, had his spouse been insured, but for Respondent's breach of the FAIS Act.

B. THE PARTIES

- [11] Complainant is Dawid Martinus Adlen, an adult male whose full details are on file in this Office.
- [12] First Respondent is Herman Coertzen Brokers CC, a duly registered close corporation and authorised financial services provider, number FSP 11883, its registered address being 685 Tanya Street, Moreletapark, Pretoria.
- [13] Second Respondent is Herman Bernardus Coertzen, (Coertzen), key individual and member of first Respondent. Coertzen at all relevant times rendered financial advice to Complainant on behalf of first Respondent. In this determination respondent or respondents are used interchangeably.

C. THE COMPLAINT

- [14] For over two years, Complainant and his spouse had an Old Mutual policy¹. Complainant's financial adviser, Respondent herein, had recommended that this policy be replaced by a Sanlam policy with purportedly, better cover and benefits, for approximately the same premium.
- [15] Respondent's advice and recommendations were accepted, and the necessary Sanlam paperwork completed.
- [16] Complainant specifically states that Respondent cancelled the existing Old Mutual Policy on the 6th December 2012. The premium deduction for the 7th December however, did take place and was subsequently refunded on the 8th January 2013.
- [17] As for the inception date of the Sanlam policy, Complainant states that this was decided by Respondent who later filled in this date, on the proposal form, at his

¹ In terms of the policy documentation provided to this Office by Old Mutual, the Complainant was the contracting party, and beneficiary on his spouse's passing.

office.

[18] Complainant states that there were sufficient funds in his account for the policies for December and January, therefore both debits should have gone off. He follows this up by stating that he took out the life cover to ensure that there was at all times cover, irrespective of the company involved. Now he faces a situation where a claim has been disallowed.

[19] In his opinion, one policy should have replaced another. Complainant therefore feels that in the circumstances, he was not given appropriate or correct advice, and as such requests that his case be investigated.

D. RESPONDENT'S REPLY

[20] In compliance with Rule 6 (b) of the Rules on Proceedings of the FAIS Ombud's Office, (the Rules), the complaint was referred to Respondent to resolve it with their client. Having failed to resolve the matter within the six weeks period allowed in terms of Rule 6 (b), Respondent was then required in terms of section 27 (4) of the FAIS Act to revert to this office with a full version of events, including a copy of the file of papers relating to the complaint in order for the investigation to begin. Respondent's reply is summarised hereunder:

- 20.1 At an appointment with Complainant and his spouse at their residence on the 7th November 2012, the necessary Sanlam application forms, 'together with all the relevant applicable forms, i.e. broker note, client information sheet, financial needs analysis, copies of ID, replacement advice records and letters of introduction' were completed.
- 20.2 At this appointment, Complainant and his spouse informed Respondent that should the Sanlam policy be accepted, the existing debit order in favour of Old

Mutual be cancelled in time. They were planning on going to the coast for their annual leave and did not want to pay two premiums.

- 20.3 In cancelling the Old Mutual policy on the 6th December 2012, Respondent was merely carrying out Complainant's written instructions to ensure that premiums were not paid on both policies.
- 20.4 Key to Respondent's defence is the assertion that Complainant's usual debit order date for all policies was the 1st day of each month. Respondent argues that Complainant amended the date to the 7th day of each month in respect of the Old Mutual policy without informing him.
- 20.5 Had Complainant informed Respondent of this change, the recommendation would most definitely not have been made to cancel the policy a day before the premium was to come off on the 7th day of the month.
- 20.6 As such, Respondent contends that Complainant must take responsibility for the written instructions to cancel the Old Mutual policy, given his knowledge of the amended debit order date.
- 20.7 In support thereof, Respondent submits that had the debit order date not been amended, the cancellation of the policy on the 6th December would have been of no consequence. The December premium would then have deducted on the 1st December, thereby allowing the policy to remain in force until the end of the December, with the premium having been paid in advance.
- 20.8 As to the reason for the new policy Respondent stated that as set out in the 'Advice Record' Complainant wanted a low premium with good benefits. In this regard the Sanlam policy was a new generation product with better non-smoking rates and benefits, than the old generation Old Mutual Policy, so claims Respondent.

E. DETERMINATION

- [21] As pointed out to Respondent, the central issue pertains to the appropriateness of Respondent's advice, which effectively brought about the cancellation of the Old Mutual Policy on 6 December 2012, while the new policy only incepted on 1 January 2013.
- [22] Respondent's principal defence, as detailed under section D above, is founded on the argument that Complainant's usual debit orders went off on the 1st of each month. In amending the debit order to the 7th day of the month without so informing Respondent, and then compounding this by signing the letter of cancellation, whilst being aware of the debit order's amended date, Complainant caused his own loss, so argues Respondent.
- [23] Respondent's argument is that had the policy deducted on the 1st day of the month, the premium would have deducted normally and the cancellation on the 6th December 2012 would have been of no consequence, given that the policy would run until the end of the month.
- [24] In fact, Respondent asserts that he merely carried out Complainant's instructions in cancelling the Old Mutual policy, claiming that Complainant did not want a double premium to be debited as they were going on holiday.
- [25] Aside from effectively admitting to a failure to check the debit order date, Respondent's reply is nothing short of an abdication of the responsibilities required of a licensed financial services provider. In particular the duty to act in the interests of the client and ensure as required by section 3 (1) (a) (iii) that representations made and information provided to the client by the provider are:

'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'

[26] It is not in question that Respondent was the architect of the replacement. Respondent arranged the forms and was required to make adequate and appropriate representations to Complainant in order to ensure that the complainant was in a position to make an informed decision.

[27] Clearly, from his own version, Respondent neither satisfied himself as to the actual date of the debit order of the Old Mutual policy, nor did he advise his client on the appropriate way of cancelling the policy.

[28] As a professional, Respondent ought to have been aware that merely acting as a conduit and cancelling complainant's Old Mutual policy without ascertaining the facts round the debit order would be detrimental to Complainant's interests.

[29] In rendering appropriate advice in terms of the FAIS Act, Respondent was obliged to alert Complainant to any risks that might arise. In particular as required by section 8 (1) (d) of the Code, to fully disclose:

'the actual and potential financial implications, costs and consequences of such a replacement...'

[30] Section 8 (2) of the Code requires that:

'The provider must take reasonable steps to ensure that the client understands the advice and that the client is in a position to make an informed decision.'

[31] Critical to making an informed decision about the replacement of a life policy is the need to be imbued with the knowledge as to the risks of cancelling the old prior to the start of the new policy. One would expect any competent financial services provider to be well alert to such risk. There was a duty on Respondent

to not only discuss this with Complainant, but additionally to guide him on how to avoid such risks.

[32] Given the significance of this risk one would expect it to be recorded in Respondent's record of advice along with the advice dispensed. There is no evidence of such a discussion or advice. Section 9 of the Code requires that a record of advice be maintained.

[33] What is evident throughout Respondent's reply is that he never checked the debit order date; he merely assumed, based on past practice. The letter was imprudent, in that it requested an immediate cancellation. No communication was entered into with Old Mutual in order to ensure or request that the cover run until the end of December. In short Respondent did not appear to have taken any precautions to ensure that cover was provided during the month of December. This despite the potential ramifications of just such an event occurring. This is clearly indicative of a lack of due skill, care and diligence.

[34] Instead, and despite Respondent being the financial adviser of record, having recommended the replacement, and orchestrated the entire process, Respondent now attempts to shift responsibility onto Complainant. Complainant is an administrative manager, with no indication of any particular knowledge of the workings of an insurance policy. To now shift the blame to Complainant is unfair.

[35] Further, Respondent's version that Complainant altered the debit order date without informing him was investigated. In response to queries directed to Old Mutual by this Office, a Mr Brent Sellidon, 'Complaints Assessor' from their 'Complaints Management' division, informed the Office as follows:

'The deduction date was changed on 10th May 2010 as a result of a call into

our Call Centre from Mr H Coertzen's office. Mr Coertzen should therefore have been aware that the payment date was the seventh of each month since 2010.'

[36] Respondent refuted this version and as such a copy of the recording was requested from Old Mutual. In attaching the recordings the same Mr Sellidon advised as follows:

'The first call was received on the 06 May 2010. The call centre agent confirmed that the date cannot be changed to the 7th as it is one day before the 7th and suggested that she call back on Monday (10 May 2010).

She called back on 10th May 210 and spoke to Marsh. After 2 minutes and 30 seconds she requests that the debit order date for policies 15933019 + 15658995 be amended to the 7th of the month.'

[37] Even if this office were to accept the point that Respondent made in reply to the recordings, namely, that the debit order may have been changed at Complainant's request via an interaction, with a member of Respondents staff, and as such without the knowledge of Mr Coertzen, this in no way excuses the failure to verify the debit order date, which would, in any event, have been available from Respondent's own records.

[38] It must be emphasised again that the responsibility lies on Respondent as the adviser to verify information as opposed to making an assumption. There is no indication whatsoever that the date or the implications were ever mentioned or discussed with Complainant.

[39] I again mention that section 9 of the General Code places a duty on the provider to maintain a record of advice as contemplated in section 8, which record must reflect the basis of his recommendations.

[40] Without the date being brought to his attention or the significance thereof being discussed, Complainant was in no position whatsoever to grasp the implications thereof; all the more so that the entire process was handled by Respondent.

[41] The Respondent on the other hand by the very nature of his position would have been well aware of the potential risks.

F. CONCLUSION

[42] Respondent's failure to exercise due skill, care and diligence in rendering financial services to complainant directly led to Complainant sustaining a loss, as the policy failed to pay out on the passing of his spouse.

[43] Complainant's Old Mutual policy incepted on the 14th April 2010, with a life cover in excess of R800 000. As alluded to earlier on, Complainant was the contracting party, and relevant beneficiary.

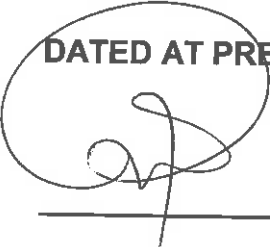
[44] In that the cover amount exceeds the R800 000 jurisdictional limit of the Office, Complainant has agreed, to waive the amount in excess of R800 000.

G. ORDER

Accordingly the following order is made:

1. The complaint is upheld;
2. Respondents are hereby ordered jointly and severally, the one paying for the other to be absolved, to pay to Complainant the amount of R800 000;
3. Interest thereon at the rate of 9%, per annum, seven (7) days from date of this order to date of final payment;

DATED AT PRETORIA ON THIS THE 2ND DAY OF SEPTEMBER 2015

A handwritten signature in black ink, consisting of a large, stylized 'N' followed by a vertical line and a horizontal stroke, all enclosed within a hand-drawn oval.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS

