

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

HELD AT PRETORIA

CASE NO: FOC 1159/05/FS (1)

In the matter between:

CHRISTIAAN WILLEM BARNARD

Complainant

And

ABSA BROKERS

Respondent

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

[1] Pursuant to the Recommendation made by this Office, the Respondent offered to pay:

[1.1] The difference between the R450 000.00 and the surrender value amounting to R38 997.10; and

[1.2] Interest at the fixed deposit rate of 6.98% on the R450 000.00 amounting to R23 557.50

Complainant accepted the amount of R62 554.60 (sixty two thousand five hundred and fifty four rand and sixty cents only) in full and final settlement of his claim.

[2] Kindly Take Notice that the Ombud hereby makes the following order:

[2.1] That the Recommendation dated 29 November 2005 and accepted by both parties, becomes a final determination of this Office as contemplated in section 27 (5) (c) of the FAIS Act; and

[2.2] Respondent pay the case fee of this Office in the sum of R1 000.00 plus Value Added Tax thereon.

DATED AT PRETORIA ON THIS 1ST DAY OF DECEMBER 2005.



CHARLES PILLAI
OMBUDSMAN FOR FINANCIAL SERVICES

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

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(1)

CASE NO: FOC 1159/05/FS

In the matter between:

CHRISTIAAN
Complainant

WILLEM

BARNARD

and

ABSA BROKERS (PTY) LTD
Respondent

**RECOMMEDATION IN TERMS OF SECTION 27(5) (c) OF THE FINANCIAL
ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS Act')**

Introduction

[1] Respondent rendered certain financial services, namely the sale of an investment, to the Complainant. The financial services were rendered against the following factual background.

Background

- [2] On or about 31 January 2005, Complainant resigned from Spoornet and as part of his pension payout received an amount of R450 000.00.
- [3] On 25 February 2005 Complainant went to the Brandwag Branch of ABSA Bank to invest the R450 000.00 in a fixed deposit. Complainant then met with one Ms Natasha Botes ('Botes'), ostensibly an employee and authorised representative of the Respondent. Botes was known to Complainant as an 'Absa Finansiële Beplanner'(ABSA Financial Planner) as reflected on the business card given to him at this meeting.
- [4] Complainant signed certain forms which were presented to him and at all material times laboured under the impression that a fixed deposit had been effected with ABSA.
- [5] Some time after 25 February 2005 Complainant enquired from ABSA as to when he will be receiving his investment documents and statements. It was at this stage that he was informed by an ABSA Bank staff member that he in fact had no investment with ABSA and that Botes was no longer employed with Respondent.
- [5] Complainant contacted Botes on her mobile phone which was advertised on the business card. A meeting was set for 2 July 2005 but Botes failed to honour the appointment. The investment documents were given to Complainant on 4 July 2005 by a person unknown to him.

- [6] It was at this stage that Complainant discovered that a 5 year endowment policy had been sold to him.
- [7] Complainant as a result of the time lapse could not exercise his 30 day cooling off rights.
- [7] In a letter dated 9 September 2005, Respondent stated that no client file exists and that the transaction was done by Botes during her termination of service period. Respondent further stated that the complaint must be addressed to Botes as she transacted with Complainant in her personal capacity.
- [8] This Office, in an e-mail dated 8 November 2005, then requested Respondent's view on why they should not take responsibility as the transaction was completed when Botes was ostensibly still in their employment.
- [9] Respondent conceded that Botes was still in their employ when the financial service was rendered.

Contravention or Non-Compliance with the FAIS Act

[10] In rendering the financial services as set out above, the Respondent acted in contravention of the FAIS Act and the General Code of Conduct ('the Code').

[11] The Respondent failed to comply with the FAIS Act and the Code in the following respects, in that *inter alia*:

[11.1] It failed to take into account Complainant's financial needs in order to identify an appropriate financial product or products;

[11.2] It failed to make relevant and material disclosures to the Complainant prior to selling the financial product to him, so that Complainant can make an informed decision as required in Part II, Section 3 (1) (a) (iv) and Part VI, Section 7 (1) (a) of the General Code.

[11.4] It further failed to act honestly, fairly, with due skill, care and diligence and in the interests of clients and the integrity of the financial services industry as required in terms of Part II section 2 of the Code.

[11.5] It further failed to maintain a record of advice as required in terms of section 9 of the Code.

[11.6] It further failed to ensure compliance with Part IX section 11 of the Code.

Conclusion

[12] It is this Office's view that Complainant placed his trust in the institution with whom he had banked with for more than 20 years and was obviously disillusioned when he enquired from his bank about his investment and only to discover that the money was not invested with them.

[13] Complainant was further informed that Botes was no longer in Respondent's employ and that they cannot be held responsible for Complainant's loss.

[14] The situation was aggravated when no records of transaction could be found.

[15] When Complainant effected this transaction he did so, secure in the knowledge that he was transacting within the regulatory, security and safeguard of a large financial institution of which Respondent is a part.

[16] As Respondent eventually conceded, they should take responsibility for the conduct of their representative who was allowed to continue to operate in the regulated, security and safeguard of their institution. It

cannot reasonably be expected from a member of the public, that in the given circumstances, they were dealing with a person who was no longer a representative of the Respondent.

[17] Having eventually accepted responsibility for their conduct, Respondent has offered to settle this complaint by paying the difference between the surrender value and the R450 000.00. This offer was communicated to Complainant and who has rejected the same. In the circumstances the following recommendation is made.

Recommendation

[17] In order to resolve this matter in terms of Section 27 (5) (b) of the FAIS Act, it is recommended that:

[17.1] Respondent pay Complainant the difference between the R450 000.00 and the surrender value;

[17.2] Respondent pay interest at the fixed deposit rate paid by ABSA on the R450 000.00 from 25 February 2005 to date of payment;
and

[17.3] The Respondent pay the case fees of the Office of the Ombud for Financial Services Providers in the sum of R1 000,00 plus Value Added Tax thereon.

KINDLY TAKE NOTICE that in terms of Section 27 (4) (c) of the Financial Advisory and Intermediary Services Act 37 of 2002, the parties are required to confirm by close of business on 8 December 2005 whether or not they accept the recommendation contained in paragraphs 17.1, 17.2 & 17.3 hereof.

TAKE NOTICE FURTHER that any party not accepting this recommendation is required to give reasons therefore in writing, such reasons to reach the Office of the Ombud for Financial Services Providers, by close of business on 8 December 2005.

DATED AT PRETORIA ON THIS THE 29TH DAY OF NOVEMBER 2005



CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES
PROVIDERS