

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 05659/11-12/ WC1

In the matter between:-

CHARLES SPENCER GRIFFITHS

Complainant

and

ALWYN SMIT FINANSIËLE DIENSTE BK

1st Respondent

ALWYN BERNARDUS SMIT

2nd Respondent

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

A. THE PARTIES

[1] Complainant is Charles Spencer Griffiths, a retired male of Porterville, Western Cape Province.

[2] First respondent is Alwyn Smit Finansiële Dienste BK, a close corporation (registration number 2002/011260/23), duly incorporated in terms of South African law, with its principal place of business at Unit 5 Riverside Place, South Gate, Carel Cronjé Drive, Tygerwaterfront. At all material times, 1st respondent

was an authorised financial services provider in terms of the FAIS Act, with license number 5399. The license was issued on 28 June 2004.

[3] Second respondent is Alwyn Bernardus Smit, a male of adult age, an authorised representative and key individual of the 1st respondent. For convenience, and where appropriate I refer to 1st and 2nd respondents collectively as respondent.

B. COMPLAINT

[4] The complainant's complaint was drafted in Afrikaans. What follows is a summarised translation thereof.

4.1 According to the complainant he worked as motor mechanic throughout his career. In 2002, he suffered a back injury, lost his job and was forced to work for his own account to make ends meet.

4.2 Whilst still working he realised he had not made sufficient provision for his retirement, which he aimed to take at age 65. He knew that he needed to do something; and when respondent¹ offered to assist him with financial advice, he accepted.

4.3 The respondent advised him to replace his Discovery life assurance policy with an Old Mutual policy. He was also advised to surrender three savings plans and invest the proceeds in an existing Galaxy investment plan (no. 15170623). He was further advised to make a further investment in a Max

¹ His financial advisor at the time.

investment plan (no. 15508165) at a monthly premium of R10 445. The latter Max investment plan would mature when the complainant reached the age 65.

- 4.4 Not long after he invested in the Max investment plan (no. 15508165), the respondent recommended that the monthly premium be increased to R15 445 p.m.
- 4.5 The respondent suggested that the higher premium of R15 445, which automatically increased by 10% per annum, be partially funded by income withdrawals of R7 000 from the Galaxy investment plan (no. 15170623).
- 4.6 The complainant agreed with respondent's suggestion after being assured that he would not lose any money.
- 4.7 After a number of automatic premium increases, the complainant became concerned about affordability of the premiums.
- 4.8 Complainant avers that his wife invited the respondent to a meeting at their residence in order to sort out the premium issue.
- 4.9 Complainant says he was concerned about the respondent's reaction when he realised that a representative from Old Mutual was present at the meeting. It was at that meeting that complainant learnt that too much money from the Galaxy investment plan (no. 15170623) was used to fund the ever increasing premiums of the Max investment plan (no. 15508165). So much so that the Galaxy investment (no. 15170623) would be depleted by the time complainant reached age 65.

- 4.10 It was during that same meeting that complainant learnt that the Max investment plan (no 15508165) would not mature at age 65 as he had agreed with the respondent, but when he reached age 75.
- 4.11 The complainant asserts that respondent persuaded him that he was no worse off with an investment plan maturing when he turned 75 as opposed to 65. This he says he later learnt was not true.
- 4.12 He sought assistance from Old Mutual in connection with the premiums on the Max investment plan (no. 15508165). He says he understood that Old Mutual conducted an investigation into the respondent's conduct. However, he did not receive any feedback in that regard.
- 4.13 In July 2011, the complainant was compelled to make the Max investment plan (no. 15508165) paid up as he could no longer afford the premiums. He also stopped drawing income from the Galaxy investment plan (no. 15170623). He says he was very distressed when he realised that of the R461 000 he invested in the Galaxy investment plan only R77 492 was left. He was even more distressed when he realised that the Max investment plan (no. 15508165) which he believed was worth R526 000 was worth only R304 969 after penalties had been deducted.
- 4.14 The complainant contends that he had made it clear to the respondent that he wanted to retire at age 65. He therefore would never have agreed to an investment that would mature when he turns 75. He further alleges that the respondent failed to disclose the penalties payable in the event that the investments were prematurely stopped.
- 4.15 The respondent's failure to resolve the complainant's complaints led to the present complaint being lodged with this Office.

C. THE RELIEF SOUGHT

[5] The complainant wants the respondents to repay him the full amount of penalties paid when his investments were surrendered and made paid up.

D. RESPONDENT'S VERSION

[6] What follows is a summary of the respondents' response to the complaint:

6.1 The respondent asserts that he assisted the complainant with retirement planning in 2008. The complainant had expressed a desire to have income of R15000 per month when he retires at the age of 65, which is equal to his current gross income.. He would supplement this amount by renting out his house when he retired. The complainant also expressed a need for access to his investment capital.

6.2 The respondent recommended that the complainant surrender three savings plans² and invest the proceeds in an existing Galaxy plan (no. 15170623).³ The recommendation was informed by the complainant's need for liquidity that could not be met by the savings plans which limited access to one loan and one withdrawal. Furthermore, by surrendering the savings plans the complainant reduced his monthly premiums by R12 863.29.

² Sanlam endowment policy no. 041147673x2, Old Mutual Max endowment policy no's 13822715 & 15139962.

³ The investments will be discussed in more detail later in this determination.

- 6.3 According to the respondent, the complainant needed to put away approximately R20 000 per month to save the requisite lump sum that would generate the monthly income of R15 000 at retirement. As it was clear that the complainant could not afford R20 000 per month, it was agreed that he would make a smaller monthly contribution of R10 445 to a Max Investment Plan⁴ which incepted on 01 November 2008. The contribution of R10 445 was increased to R15 445 effective 01 April 2009. As the complainant realised that a retirement at age 65 would not be possible, it was decided to invest in a 15 year Max Investment Plan. This would result in investment costs being spread over a longer period.
- 6.4 The respondent asserts that he warned the complainant that he would lose money in the event he made the Max Investment Plan paid up. He suggested that the complainant reduce the premium amount. Contrary to his advice, the complainant made the investment paid-up.
- 6.5 The respondent states that the complainant's financial obligations necessitated a monthly withdrawal of R7 000 from the Galaxy Investment Plan. However, on 27 August 2008, the complainant increased the monthly withdrawal of R7 000 to R14 000 in order to fund the premium of the Max Investment Plan (15508165). The suggestion here is that complainant on his own accord without any advice from respondent made the decision to increase his withdrawals from the Galaxy investment plan in order to fund the Max investment. The respondent contends that the complainant saved R12 863.29 per month when he surrendered his three

⁴ Old Mutual Max investment - committed investment plan no. 15508165.

savings plans,⁵ which money should have been used to fund the premium of the Max Investment Plan (15508165).

6.6 He asserts that if one considers the growth achieved on the Max investment before the penalties, the loss suffered by the complainant was not much.

E. DETERMINATION AND REASONS

The investments

[7] The Office requested Sanlam and Old Mutual to provide information on the investments central to this complaint. What follows is a breakdown of the investments:

i. **Sanlam endowment (no. 041147673x2)**

Inception date - 05 April 2006

Initial premium - R2 000

Annual increase - 10%

Term - 10 Years

Surrendered - 05 April 2009

Proceeds - R66 363.86

Penalty - R6 302.91

ii. **Old Mutual Max endowment (no. 13822715)**

Inception date - 01 September 2004

⁵ Endowment policies mentioned in footnote 2.

Initial premium - R2 587
Annual increase - 10%
Term - 12 years
Surrendered - 18 August 2008
Proceeds - R134 115.08
Penalty - R28 747.71

iii. **Old Mutual Max endowment (no. 15139962)**

Inception date - 01 July 2007
Initial premium - R7 000
Annual increase - 10
Term - 8 years
Surrendered - September 2009
Proceeds - R131 511.40
Penalty - R17 635.40

Following the surrender of the above mentioned three endowments, the proceeds were channelled to the following investment -

iv. **Old Mutual Galaxy Investment Plan (no. 15170623)**

Inception date - 01 July 2007
Initial withdrawal - R7 000
Term - No term (LISP)
Surrendered - April 2013
Proceeds - R73 082.84
Penalty - R0

The complainant initially withdrew an amount of R7 000 per month from this investment to fund the premiums of Max Investment Plan (15508165). The amount was subsequently increased to R14 000.

v. Old Mutual Max Investment Plan (no. 15508165)

Inception date - 01 November 2008

Initial premium - R10 445

Term - 15 years

Date paid up - 01 July 2011

Premium payable at the time the investment was made paid up – R15 445

Total premiums paid - R495 033.15

Termination value - R327 225.42

Penalty - R158 756.54

Appropriateness of advice

[8] According to the respondent, when he assisted the complainant with retirement planning, the complainant indicated that he needed R15 000 per month at retirement. The respondent calculated that the complainant needed to invest R20 000 per month until the age of 65 in order to save sufficient capital that would produce R15 000 income per month. The respondent suggested that a Max investment plan⁶ would be the most appropriate investment vehicle. The

⁶ Old Mutual Max committed investment plan.

investment would not only meet the complainant's need to save for retirement, but would also be accessible in case of financial emergencies. The respondent contends that due its limitations a Retirement Annuity (RA) was not considered.

[9] The respondent further contends that the complainant's need for liquidity could not be met by endowment policies. Therefore, it was decided to surrender the endowments. By surrendering the endowments, it freed-up R12 863.29 per month in premiums. This amount plus income drawn from the Galaxy investment plan (no. 15170623) could be used to fund the premiums of the Max Investment Plan (no. 15508165)

[10] On the surface of it, the respondent's reasons for his advice appear to be valid. On closer scrutiny however, it is clear that the advice is flawed and could never have achieved the desired outcome. The respondent surrendered the three endowments⁷ on the basis that access to funds was limited to one withdrawal and one loan during the first five years of the investments.⁸ However, it was the respondent himself who advised the complainant to invest in the three endowments. He was also paid very handsome upfront commission for his advice. Not surprisingly, the endowments were surrendered after the claw back period expired⁹, leaving the complainant to foot the bill for the penalties levied by Sanlam and Old Mutual.

⁷ See footnote 2.

⁸ See Section 54 of the Long Term Insurance Act.

⁹ Insurers claw back commission during the first 2 years of the investment.

- [11] When the proceeds of the three endowments were channelled to the Galaxy Plan (no 15170623) the respondent was paid upfront commission. When the respondent advised the complainant to invest R10 445 per month in the Max investment plan (no. 15508165) he was again paid upfront commission. I could not find any evidence that the commission was disclosed to the complainant as is required by Section 3(1)(a)(vii) of the General Code of Conduct for Authorised Financial Services Providers ('the Code').
- [12] In my view, the respondent's argument that he invested in the Max investment plan (no. 15508165) on the basis that it satisfied the complainant's need for liquidity is disingenuous. The respondent knew that the recommended investment could never meet complainant's need of liquidity. He was well aware that any plan amendments¹⁰ made to the Max investment plan (no. 15508165) during its fifteen year term would be met with severe penalties. I could not find any evidence that the consequences of amending the plan and the concomitant penalties were disclosed to the complainant. Given the complainant's need for an accessible investment, it is doubtful he would have agreed to an investment which would be subjected to huge penalties should it be accessed during its fifteen year term.
- [13] There is a further factor to be considered here and that is the respondent's failure to satisfy himself as to the complainant's means to meet the premiums of the investments recommended. I point in this regard to the premium of R10 445 that was payable on the Max Investment Plan (no. 15508165) which

¹⁰ Such as the reducing premiums, withdrawals, making the policy paid up and surrendering the policy.

had a 10% premium update. Having regard to complainant's total circumstances, it should have been clear to the respondent that the high annual premium increases would make the premiums unaffordable in a relatively short space of time. This is exactly what happened. As a result the complainant was compelled to make the Max investment plan (no. 15508165) paid up in July 2011 barely three years from the date of its inception.

Causation

[14] The respondent advised the complainant to surrender three endowments and invest in a fifteen Max Investment Plan. The respondent's advice was inappropriate and not in complainant's interest as the General Code demands. It is fair to conclude that the advice was calculated to maximise commission. Had it not been for the respondent's inappropriate advice, the complainant would not have been saddled with the huge penalties.

F. QUANTUM

[15] The complainant paid a total of R52 686.02 in penalties when he surrendered his three endowments¹¹ and a further penalty of R158 756.54 when he was forced to make the Max Investment Plan (no.) paid-up. Therefore, I intend to make an order in the amount of R211 442.56

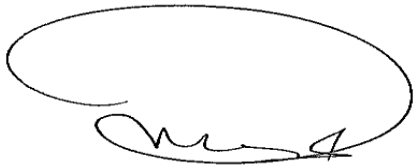
¹¹ See footnote 2

G. ORDER

[16] In the premises the following order is made:

1. The complaint is upheld;
2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to complainant the amount of R211 442.56;
3. Interest at the rate of 15.5 % , per annum, seven (7) days from date of this order to date of final payment;

DATED AT PRETORIA ON THIS THE 16th DAY OF APRIL 2014.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS