

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

HELD IN PRETORIA

CASE NO: FOC 543/05/KZN/(1)

In the matter between:

DR COLIN HATCHMAN

Complainant

and

OLD MUTUAL LIFE ASSURANCE
COMPANY SOUTH AFRICA LIMITED

Respondent

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

PARTIES

[1] The Complainant is Dr Colin Hatchman, an adult male, residing at 36 Howson Road, Warrington, WA29UB, Cheshire, UNITED KINGDOM. (Hereinafter referred to as 'Complainant')

[2] The Respondent is Old Mutual Life Assurance Company South Africa Limited, a duly registered company in terms of the laws of the Republic

and an authorised financial services provider with its principal place of business at Mutual Park, Jan Smuts drive, Pinelands, CAPE TOWN. (Hereinafter referred to as 'Respondent')

CONTEXT

- [3] The Complainant has according to the papers before me, a blocked rand account with Absa Bank. Funds belonging to the Complainant which form part of the blocked rand account were invested with Absa Bank in the money market fund.
- [4] On or about the 19th of January 2005, in Mayville, Durban, the Complainant effected an investment for the amount of R400 000.00 with the Respondent through one Mr. Morris Rai ('Rai'), a representative of the Respondent.
- [5] After concluding the investment contract with the Respondent, the Complainant gave written instructions to a Mr Keith Dunn ('Dunn'), the Manager of the Foreign Exchange Control department at Absa Bank, Durban City branch to make available funds for a debit order which was to be presented by the Respondent in the immediate future.
- [6] On the 3rd February, the debit order was duly launched by the Respondent. However, it was dishonoured by Absa Bank.
- [7] On the 17th of February 2005, Rai telephoned Dunn to inform him that the debit order had been dishonoured.
- [8] Subsequent to the aforesaid telephonic conversation, Rai faxed through to Absa Bank for the attention of Dunn, the Respondent's banking details as

well as a reference number to enable Absa Bank to deposit the money directly into the Respondent's Investment Horizon Account.

[9] This was not done. Instead, ABSA bank deposited the money into the Respondent's Main Account, contrary to the written instructions sent by Rai. On the same day, proof of this deposit was faxed through to the Respondent for the attention of Rai.

[10] Respondent maintains that it was not able to trace the funds as the funds had not been deposited into the designated account.

[11] The funds were traced and were eventually found in the Respondent's Main Account.

[12] The Respondent then acted with all due speed to transfer the funds into the Investment Horizons Account.

[13] In order to obtain clarity as to the reasons for the dishonour of the debit order which had been launched initially by the Respondent and the circumstances surrounding the deposit of the 17th February 2005, this Office investigated the conduct of the Respondent and in the process became aware of certain conduct which involved Absa Bank.

[14] Information was requested as part of the investigation process from Absa Bank. However, in its letter of response, Absa simply reiterated information which, had already been provided by the Respondent and the Complainant.

[15] During its investigation and after numerous telephonic conversations from various parties within the Absa Bank and the Respondent, this Office was able to establish what had really transpired.

[16] It would appear that the delay in purchasing the units was as a result of:-

[16.1] the dishonour of the debit order launched by the Respondent on the 3rd February 2005;

[16.2] the subsequent deposit of the funds into the Respondent's main account by Absa Bank, contrary to the written instructions by Rai, which clearly identified the account into which the funds had to be deposited.

[17] As a result of the delay, the Complainant alleges that he suffered damages amounting to R5 225.98 plus interest. He alleges that such damages were as a result of the conduct of Respondent.

ISSUES

[18] The issues for determination are:-

[18.1] whether the Respondent rendered the financial service in accordance with the contractual relationship and reasonable requests or instructions of the Complainant;

[18.2] whether the Respondent executed the Complainant's instructions as soon as reasonably possible and with due regard to the interests of the Complainant;

[18.3] whether the Respondent was negligent in any manner in carrying out the Complainant's instructions.

DETERMINATION AND REASONS THEREFOR

[19] The version of the Respondent is that it launched the debit order on the 3rd February 2005. It is common cause that this debit order was dishonoured by Absa Bank. An explanation as to the reasons for the dishonour was sought from Absa Bank but the response thereto was unclear. Absa Bank stated that the account held by the Complainant is a blocked rand account. Funds, which formed part of this account, were invested in a money market fund. It was not possible to run a debit order against the money market fund.

[20] Upon discovery of the dishonour, a note carrying written instructions as to where exactly the funds had to be deposited was subsequently faxed through by Rai to Absa Bank for the attention of Dunn.

[20.1] The instructions sent by Rai were not followed;

[20.2] The funds were deposited into the Respondent's main account instead of the Investments Horizons Account as requested;

[20.3] After the funds were traced, they were transferred into the correct account to enable the purchase of the units. This was done without undue delay on the part of the Respondent.

[21] I am further satisfied that despite the seemingly long time it took to actually purchase the units as instructed by the Complainant from the date of the initial instruction to the date of the actual purchase, the Respondent had difficulties in accessing the Complainant's funds, which difficulties are set out in the preceding paragraphs.

[22] I accordingly find that the Respondent executed the Complainant's mandate as soon as it was reasonably possible to do so with due regard to the Complainant's interests.

[23] It is, unfortunately, outside the jurisdiction of this office to investigate Absa's role in this complaint. Whatever their conduct and its consequences, it would not qualify as the rendering of a financial service in terms of the FAIS Act. A separate inquiry would have to be undertaken to establish what effect Absa's conduct had in the alleged loss by the Complainant. Such inquiry, however, cannot be undertaken by this Office.

[24] The complaint is levelled against the Respondent. My enquiry is confined to the conduct of the Respondent in rendering the financial service. For the reasons stated above, I find no basis to hold the Respondent liable for Complainant's alleged loss.

[25] In terms of section 27(3)(c) of the FAIS Act, I am referring the complaint to the Ombud for the Banking Services as it might be more appropriate that the matter be dealt with in that forum.

ORDER

It is ordered that the complaint be dismissed and be referred to Ombud for Banking Services.

DATED AT PRETORIA ON THIS THE 30th DAY OF September 2005



CHARLES PILLAI

OMBUD FOR FINANCIAL SERVICES PROVIDERS