

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

**PRETORIA**

**Case No. FOC 4838/07-08/WC/2**

In the matter between:

**MICHAEL LE ROUX (Executor)**

In his capacity as executor of

**ESTATE OF LATE IVAN NIGEL GRANT LEIGHTON**

Complainant

and

**BARONS BELLVILLE**

**A DIVISION OF BARLOWORLD SOUTH AFRICA (PTY) LTD**

Respondent

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

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**A. THE PARTIES**

[1] The complainant is Mr. Michael Le Roux, in his capacity as Executor of the Estate of Ivan Nigel Grant Leighton (Mr. Leighton), of 22, 9<sup>th</sup> Avenue,

Boston, Bellville in the Western Cape Province of South Africa. The events relating to this complaint were related by Mrs. Brenda Margaret Leighton (Mrs. Leighton), the widow. She was present at all material times when the financial service was rendered.

- [2] The respondent is Barons Bellville, a motor vehicle dealership wholly owned by Barloworld South Africa (Pty) Ltd (Barloworld). Barloworld is a private company duly incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business at 6 Anvil Road, Isando, Gauteng. Barloworld and its dealerships render financial services under licence number 11338. At all times material hereto, the respondent was represented by Ms. Denise Redelinghuys (Redelinghuys) an authorised representative of the respondent, and Ms Margot Williams (Williams).

**B. THE COMPLAINT**

- [3] The late Mr. Leighton purchased a new Volkswagen Chico (the vehicle) from the respondent dealership on 20 October 2004. The transaction was financed through an instalment sale agreement with Wesbank. The total amount financed was R79 492.32. The vehicle was delivered to his business premises by Redelinghuys and Williams, on the same day. As the vehicle had been ordered telephonically and all information captured

telephonically, this was the first time that Mr. Leighton met Redelinghuys and Williams. Mrs Leighton and their son, Adam, joined Mr. Leighton at this meeting.

[4] Mrs. Leighton alleges that during this meeting Redelinghuys presented Mr. Leighton with the finance agreement, bringing to his attention the portion dealing with “freedom of choice.” Redelinghuys indicated that the financier, Wesbank required a cession of any of Mr. Leighton’s life policies to cover the outstanding debt in the event of his death. Mr. Leighton informed Redelinghuys that he had two long standing policies with an estimated value of R200 000, 00, more than enough to cover the outstanding debt..

[5] Redelinghuys then allegedly informed Mr. Leighton that the respondent “could offer him a product that would cover Mr. Leighton in the same manner” and in the event of his death, would pay out the sum assured. This policy was the Optimum Personal Debt Protection policy, underwritten by Guardrisk Insurance Company and administered through International Cover Administrators. Mr. Leighton was then presented with a one page Optimum proposal form which was already completed and typed out by the Barons Quotemaster system and had all the relevant information pertaining to Mr. Leighton. The premium as reflected on the proposal form was R5528.12 made up as follows:

Personal Debt Protection with Death & Disability cover	= R 2 926, 26
Paint Protector	= R 990, 00
Policy Fee	= R 932, 97
VAT	= R <u>678, 89</u>
	<u>R 5 528, 12</u>

[6] Redelinghuys then allegedly requested Mr. Leighton to sign the proposal form thereby “confirming that his personal information on the proposal form was correct and that he [understood] that the policy would be ceded to Wesbank as form of security....” Mr. Leighton then signed the proposal form and the finance agreement. After Redelinghuys confirmed that “everything was in order” Mr. Leighton took possession of his new vehicle. According to Mrs. Leighton, no copies of the signed documentation or any other record of the transaction were left for Mr. Leighton. No further communication was received by Mr. Leighton from Redelinghuys or Williams regarding the transaction.

[7] Mr. Leighton passed away on 30 November 2007. The cause of death, as reflected on the death certificate, was “Carcinoma Thyroid.” Mr Leighton had previously been diagnosed with thyroid cancer in July 1997 and after surgery and treatment, had been clear since February 1998. Mr Leighton had been re-diagnosed with thyroid cancer in October 2005 and was declared “medically disabled with no recovery.”

[8] Mr. Leighton's son, Adam called Wesbank in order to cancel the debit order so that the ceded policy could settle the debt. Wesbank advised they had no record of such a policy and that Adam should contact the respondent directly. Adam then called the respondent and requested to speak to either Redelinghuys or Williams but was informed that they had since left the employ of the dealership. The respondent's finance department then confirmed the existence of the policy and faxed a copy of the proposal form to Adam. The respondent also referred Adam to the administrators, International Cover Administrators, (ICA) for the documents necessary to lodge a claim.

[9] The claim was forwarded to ICA on 10 December 2007. On 14 December 2007, Mrs. Leighton enquired from ICA when she could expect settlement of the outstanding debt owed to Wesbank. Mrs. Leighton also enquired when the balance of the insured amount would be paid into her bank account. Mrs. Leighton was informed that if the claim was honoured, ICA would only settle the outstanding debt and that there would be no other amount paid to her. Mrs. Leighton was then referred to the terms and conditions and declarations of the policy. When she informed ICA that they had not received these documents, ICA emailed an internet link for her to download same. Upon perusal of the downloaded document, Mrs. Leighton realized that Mr. Leighton would have not qualified for cover under Clauses 2 and 4 of the policy.

[10] Clause 2 states:

“I have not received any treatment from any doctor during the past 12 months nor been hospitalised or undergone hospital treatment and, save for routine checkups, have had no specialist investigation during the past 5 years and have never suffered from any form of disability or heart disease, stroke, cancer or kidney disease.”

[11] As stated previously Mr. Leighton had previously been diagnosed with thyroid cancer in July 1997.

[12] Clause 4 states:

“I am aware that a redundancy/retrenchment claim will not be paid during temporary or part-time employment and that self employment is excluded from cover under the policy.

[13] At the time the vehicle was purchased, Mr. Leighton was self – employed.

[14] On 11 January 2008, Mrs. Leighton was informed that the claim had been rejected on the basis that Clause 2 had not been complied with and that “an appropriate return of premium [would] be refunded.” Nothing was said about clause 4, which, according to complainant would also have rendered the policy inappropriate to Mr. Leighton’s circumstances.

[15] A complaint was then lodged with this Office in February 2008.

**C. RELIEF SOUGHT**

[16] Complainant is claiming R66 270, 00 being the total sum assured, on the basis that the respondent had failed to inform Mr. Leighton that this policy would only settle the amount owed to Wesbank. The complainant avers that the respondent had led Mr. Leighton to believe that the sum insured would be paid out to settle any monies owed to Wesbank and that the surplus would in fact be paid out to his estate.

**D. INVESTIGATION**

[17] The complaint was forwarded to the respondent on 7 April 2008, requesting it to resolve the complaint directly with the complainant, alternatively to furnish us with a response to the complaint.

[18] The respondent furnished its response on 22 April 2008 stating *inter alia*:

18.1 Barloworld's procedures are system driven and have been designed to accommodate a variety of transactions to satisfy the requirements of all customers. Comprehensive internal training

covers use and management of the system as well as the manner in which products must be described.

- 18.2 Where a transaction takes place at the offices of Barloworld, a needs analysis is undertaken and **as each insurance policy is discussed and a recommendation made**, this information is captured on the system. At the completion of the discussion, **a full analysis and proposal is printed together with all the policy documents**. The proposal and confirmation of understanding is signed and the policy documents handed to the customer. (own emphasis)
- 18.3 Where the meeting takes place away from the offices of Barloworld, the adviser will print the full compliment of documents for a variety of transactions and will **make use of the documents which satisfy the needs of the customer**. (own emphasis)
- 18.4 In the case of Mr. Leighton, it was this latter procedure that was adopted.
- 18.5 The meeting took place at Mr. Leighton's restaurant on the 20 October 2004. The respondent proceeded to offer various debt protector policies, including the policy which would provide benefits in the event of death. **All relevant terms and conditions were explained**. (own emphasis)



18.6 Having discussed each policy cover in considerable depth, the customer asked the adviser to arrange certain cover.

18.7 In consideration of this, the adviser requested the customer to read and sign the declaration and proposal and took great care in ensuring that the customer properly read and understood what was in the document, which was prepared in plain language and printed in reasonably large font.

18.8 On completion of the transaction, the policy document was handed to the customer. The signed proposal and declaration was placed in the adviser's file.

[19] According to the respondent, based on the above, the complainant's allegations were "groundless." The respondent however did not attach any supporting documentation.

[20] On 30 May 2008, this Office issued a notice in terms of section 27(4) (c) of the FAIS Act, requesting the respondent's complete file of papers relating to the complaint, including proof that the material terms of the product were disclosed. Respondent was also requested to supply any other relevant documentation in their possession demonstrating compliance with the FAIS Act.

[21] On 9 June 2008, the respondent's compliance officer filed a response attaching the following:

21.1 An affidavit deposed to by Redelinghuys;

21.2 A copy of the Optimum Proposal form signed by Mr. Leighton and dated 20 October 2004;

21.3 A document headed Personal Debt Protection Declaration - this document consists of 6 pages.

[22] In its response, the respondent advises that it does not have a written record of advice and avers that:

*"This complaint refers to an action that took place in October 2004 in the early days of FAIS, and the FSP was operating in a developmental phase. Since that time, the FSP has been working very closely with us to continually improve their level of compliance, with the computerised system that they use being aligned with FAIS requirements on an ongoing basis. Having said this, we also confident that the process adopted to carry out the needs analysis at the time, and the recommendation arising therefrom, was carried out in a professional manner and was appropriate in the circumstances."*

[23] In support of this, the respondent referred to Redelinghuys' affidavit. (I deal with the validity of this affidavit later.) The respondent further states that it was not possible for a needs analysis to be undertaken directly with Mr. Leighton as Mrs. Leighton conducted the entire process on behalf of Mr. Leighton. According to the respondent, Mrs. Leighton "very carefully read each and every contract before asking her husband to sign the documents, and all her questions about the debt protection cover appropriately answered."

[24] Thus, the respondent enigmatically concludes that "all other obligations demanded by the code of conduct were complied with and the interests of the client considered throughout the transaction." Further that it believed that its representatives "properly and professionally conducted the transaction process" and could not accept liability.

[25] In response to a specific request that the respondent provide proof that it had disclosed the material terms of the policy, the respondent in a letter dated 14 November 2008 advised firstly, that the proposal form and the declaration are one document and must be read together and secondly, that Mrs. Leighton had "insisted on sitting and reading not only the full terms and conditions for VWFS but also the policy wording of the policy."

[26] The respondent once again referred to the contents of Redelinghuys' affidavit in support of its case. In the respondent's view, "it [was] clear from [Redelinghuys'] affidavit that she [remembered] the events with enough clarity to recall the important details of the meeting and Mrs. Leighton had every opportunity to make an informed decision." The respondent reiterated its stance that it would not accept liability.

[27] As this matter has not been resolved, the complaint must now be determined.

**E. ISSUES TO BE DETERMINED**

[28] The following issues fall to be determined:

28.1 Was the financial service rendered in compliance with the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and Representatives (the Code);

28.2 In the event it is found that the services were rendered in violation of the FAIS Act and the Code did such violation occasion complainant's loss? And if so;

28.3 The quantum of financial prejudice or damage suffered by complainant

## F. DETERMINATION AND REASONS

### The Law

[29] In terms of Part II, Clause 2 of the Code:

“a provider must at all times render financial services honestly, fairly with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.”

[30] Clause 8 (1) (a) and (b) of the Code state that:

A provider other than a direct marketer must, prior to providing a client with advice-

- (a) take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;
- (b) conduct an analysis, for purposes of the advice, based on the information obtained;

[31] Clause 9 provides that a provider must maintain a record of advice which must reflect the basis on which the advice was given and in particular:

- (a) a brief summary of the information and material on which the advice was based;
- (b) the financial products which were considered; and
- (c) the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the client's identified needs and objectives.

[32] Furthermore, the Code provides that a provider must:

- (a) provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision;
- (b) whenever reasonable and appropriate, provide to the client any material contractual information in the possession of the provider; (c) in particular, at the earliest reasonable opportunity, provide, where applicable, full and appropriate information of the following inter alia: nature and extent of benefits to be provided, including details of the manner in which such benefits are derived or calculated and the manner in which they will accrue or be paid; concise details of any special terms or conditions, **exclusions of liability**, waiting periods, loadings, penalties, excesses, **restrictions or circumstances in which benefits will not be provided.**

[33] In essence the primary objective of properly complying with these provisions of the Code is to ensure that the client is in a position to make an informed decision.

[34] In order to demonstrate compliance with the above, a provider is required in terms of Clause 3(2)(a)(i) to have appropriate procedures and systems in place to record such verbal and written communications relating to a financial service rendered to a client.

### **The duty to provide appropriate advice.**

[35] Save for the proposal form signed by Mr. Leighton, the affidavit and the specimen of the Personal Debt Protection declaration, referred to paragraph 22(iii) drawn from the website by respondent, this Office has not been furnished with any other document in relation to this matter to support the respondent's contention that it complied with the FAIS Act and the Code whilst rendering the financial service. The requirement to act with due skill, care and diligence includes the ability to seek from the client pertinent information which would justify the decision to recommend a particular product.

[36] Clause 8(1)(a) and (b) of the Code is instructive in that it requires the provider to take steps to seek available and appropriate information, regarding inter alia, the client's financial situation, financial product experience and objectives to enable the provider to appropriately advise the client.

[37] The vehicle was purchased on credit, hence the recommendation for debt protection cover. Had Redelinghuys applied her mind, it would have been clear that the income that Mr. Leighton relied on for the application for credit comes from self employment. Redelinghuys, in her affidavit, admits that she delivered Mr. Leighton's vehicle at "his restaurant", during which

visit, the paperwork for the transaction was finalised. It would thus be incorrect to say that Mr. Leighton failed to disclose that he was self-employed as that information would have formed part of the credit application approval process, which Redelinghuys herself handled. What occurred here is that Redelinghuys failed to apply her mind to the situation and therefore failed to advise her client appropriately. Had she done so, she would have immediately realised that the product was inappropriate to Mr. Leighton's circumstances.

[38] The insistence by the respondent that it acted in the interests of the client throughout the transaction and its belief that it complied with the provisions of the FAIS Act and the Code is not borne out by the facts.

**Was there proper disclosure of the material terms and conditions?**

[39] In response to the request for proof that the material terms and conditions were disclosed, the respondent provided this Office with the signed proposal form and the unsigned Personal Debt Protection Declaration, averring that they were one document and were to be read together. An examination of these documents reveals that the signed proposal form is numbered at the top "Page 1 of 1." The Personal debt protection declaration is numbered at the top "Page 1 of 6." Furthermore, this was just a specimen extracted from its website. It therefore does not appear to



be part of the same document. Notwithstanding the submission of these documents, it is fair to conclude that Redelinghuys herself was not aware of the exclusion relating to self-employed people. By the same token it is reasonable to conclude that she would also not have been aware of the exclusions relating to pre-existing conditions.

[40] The complainant is also claiming the full sum assured. As there is no proof that any of the material terms of the contract were disclosed to Mr. Leighton, the probabilities favour the complainant's version that the product was sold to them as a normal life cover and not properly disclosed to Mr. Leighton that this policy provides decreasing life cover, in line with the outstanding indebtedness due to Wesbank in terms of the installment sale agreement. The above all serve to indicate that Mr. Leighton was not put in the position to make an informed decision.

#### **The affidavit as a record.**

[41] Redelinghuys' affidavit provided by the respondent is an *ex post facto* account of the details of the financial service rendered, deposed to almost five years after the event. The General Code is clear that a record of advice must be kept at the time the financial service is rendered. The affidavit is not a valid record of advice and therefore cannot be accepted as such. Besides, if this office were to accept the affidavit *in lieu* of a

record of advice, it would be weakening the protection which the Code aims to provide both to the consumer and the financial services industry. The provisions of the Code are not only there to protect consumers. It also there to support the cause of the respondent. The record of advice is often the sole piece of evidence to shed light on what actually happened at the time.

**Did the respondent's conduct occasion the damages sought?**

[42] It is clear that the financial service was rendered in violation of the FAIS Act and the Code. The rejection of the claim by the insurer means that the estate was impoverished by the outstanding amount of the indebtedness to Wesbank.

[43] The failure by respondent to render the financial service with due compliance with the FAIS Act and the Code meant that Mr. Leighton had been denied the opportunity to seek life cover from alternative sources to cover this debt, alternatively to cede an existing policy to cover the debt. In order to establish whether the deceased would have been covered for this debt, this Office has sought and obtained information from at least one other insurer regarding the exact terms on which it would have offered Mr. Leighton insurance for the sum insured. The response is that without any

loadings or exclusions, the life cover would have been provided at normal rates.

[44] I am satisfied that the respondent's conduct occasioned the damage suffered by the estate.

**G. DAMAGES**

[45] The relief sought by the complainant is based on the respondent's failure to properly execute the contract of rendering financial services. It is on this basis that the complainant is of the view that a mere refund of a portion of the premium is not sufficient. Essentially, the complainant seeks as relief the benefit which would have accrued to the estate had the contract in respect of rendering financial services been properly carried out.<sup>1</sup>

[46] In essence what complainant seeks is the benefit of the bargain. Having entered into the transaction on the terms agreed, respondent cannot now avail itself of a condition that essentially allows it to opt out of the bargain. On the question of the benefit of the bargain, the court in Trotman stated that 'A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind.'

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<sup>1</sup> Trotman v Edwick 1951 1 SA 443 A @ 449 BC

[47] This is indeed one of those cases, where complainant should obtain the benefit of the bargain and I shall order accordingly. The benefit of the bargain is the compensation for the loss suffered. In my view the loss is the outstanding balance on the debt due to Wesbank as at date of Mr. Leighton's death. According to Wesbank, the outstanding balance at date of Mr. Leighton's death was R27 265, 86.

[48] The complaint is therefore upheld.

## **ORDER**

The following order is made:

1. The respondent is hereby ordered to pay to the estate the amount of R27 265, 86 less any amounts already advanced within 14 days of the date of this order.
2. Respondent is to pay interest on the aforesaid amount at the rate of 15.5% seven (7) days from the date of this order to date of final payment.
3. The respondent is ordered to pay the case fee of R1000, 00 to this Office.

**Dated at PRETORIA this 2<sup>ND</sup> day of September 2009.**



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**CHARLES PILLAI  
OMBUD FOR FINANCIAL SERVICES PROVIDERS**