

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

CASE NO: FOC2322/05 OFS (4)

In the matter between:

**NICOLAAS BERNARD MENTZ**

**Complainant**

and;

**VERSO INVESTMENT SERVICES  
(PTY)LTD**

**Respondent**

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

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**A. INTRODUCTION**

**The Parties**

- [1] Complainant is Nicolaas Bernard Mentz an adult male, employed as an examiner of vehicles and residing at 3 Jan Fiskaal Street, Bloemfontein.

[2] Respondent is Verso Investment Services (Pty) Ltd, an authorised financial services provider and a duly registered company in terms of the company laws of the Republic of South Africa and having its principal place of business at Belmont Office Park, Twiststraat, Belville, Western Cape.

**B. BACKGROUND**

[3] Respondent rendered certain financial services, namely the sale of a retirement annuity to Complainant.

[4] On or about the 30<sup>th</sup> April 2005 Complainant resigned from the Cape Joint Retirement Fund. The amount payable from the Fund as at the time of resignation was R228, 376.05. Complainant withdrew the tax free portion of this benefit in cash. The balance of R177, 303.62 was transferred into an Investec, Investment Linked Retirement Annuity.

[5] Complainant was at all material times advised by a financial advisor and representative of Respondent, one Walter Borthwick.

[6] In terms of Section 8 (1) (c) of the General Code of Conduct For Authorised Financial Service Providers and Representatives ('the Code') a Risk Analysis was completed by Complainant on 19 May 2005. In response to the question 'Hoe stabiel en verseker is u huidige en toekomstige finansiële omstandigede (byvoorbeeld inkomstestrome en

weksomstandighede?’ Complainant answered ‘Onvoldoende stabiel en verseker’).

[7] Complainant in the Risk Analysis states that his outstanding debt was less than half his yearly income. He also confirmed that his investment term was 10 years or longer. In response to the question, ‘Wanneer beplan u om die eerste ontrekking te maak van die geld wat u nou wil belê?’ he answered ‘Slegs na meer as 10 jaar’.

[8] The Record of Advice, in terms of Section 9 of the General Code of Conduct was completed on the 19 May 2005, and in terms thereof the following comments are relevant:-

- i. In terms of Section A it is stated that ‘Mr Mentz resigned from the (sic) L.A. His taxable portion is to be transferred to a Retirement Annuity. No tax will be payable upon transfer..... His tax free portion will be paid in cash’;
- ii. ‘It is recommended that his taxable Portion is to be transferred to a Retirement Annuity.’
- iii. Under reason for selection, the Record of Advice states, ‘Long term capital growth while reducing risk’. Under details and reason for alternative products selected by the client is further stated, ‘wealth

protector preservation fund was also an option, but Mr Mentz wants a portion in cash upon resignation’;

- iv. Under General Comments and just above Complainant’s signature, various options are set out with the comment, ‘I advised Mr Mentz telephonically as to what his options were.’

[9] This Record of Advice is written by Respondent and signed by Complainant.

[10] A further document setting out the proposal in detail states, ‘Vas tot ouderdom 55. Op ouderdom 55 kan ‘n maksimum van 1/3 in kontant geneem word en R120 000 is belastingvry.’

[11] Section 5 of the Statutory Notice provided to Complainant is ticked. It states, ‘In *most cases* you have the right to cancel a policy in writing within 30 days....’

### **C. THE COMPLAINT**

[12] The crux of the complaint is that Complainant wishes to make use of the cooling off period as referred to in the Statutory Notice, and the Client Pack issued by Investec Asset Management.

- [13] In particular he complains that when he wished to make use of the cooling off period he was unable to exercise this right.
- [14] Complainant in fact goes further and makes the allegation that he was misled by the financial adviser into believing that he had the right to cancel.
- [15] In a facsimile to this Office from the Complainant sent on the 26<sup>th</sup> January 2006, Complainant states, 'I only wanted to exercise my discretion to make use of the cooling off period as defined in the application form from Verso as well (sic) from Investec and confirmed telephonically by Walter Borthwick'.
- [16] Paragraph 5.7 of the Investec Client Pack states, 'In the event of the Investor exercising his discretion to withdraw from an investment within any cooling-off period as defined in *any applicable legislation* from time to time, the investor will be refunded...'
- [17] In Section C of the Complaint Registration Form, Complainant states, 'I was misled by my financial advisor ..... When I wanted to cancel contract. He phoned me and (sic) confirm that I can because I am within the 30 day cooling off period.'

[18] In Section D of the Complaint Registration Form Complainant states, 'I would like my money refunded to invest elsewhere without an adviser misleading me.'

[19] Complainant first directed his complaint to the Pension Funds Adjudicator ('PFA'). The complaint was dismissed by the PFA.

[20] The essence of the dismissal was that the Pension Fund Rules made no provision for termination of membership prior to the selected retirement date, and that as the Rules made no provision for a member's rights to cancel his membership or the investment in a cooling off period or for that matter any other period, it may not allow such other cancellation.

[21] Complainant was advised that by the PFA that should he have a grievance against the broker then he may approach this Office for assistance. The Complainant consequently lodged his complaint with this Office.

### **Relevant Provisions of the FAIS Act**

[24] In terms of the FAIS ACT a complaint means, 'a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative-

- (a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;
- (b) has wilfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage;  
or
- (c) has treated the complainant unfairly;'

[25] Section 7 (1) (c) (xii) of the Code requires a provider to disclose whether cooling off rights are offered and if so, procedures for the exercise of such rights.

[26] In terms of Part II, Section 3 (1) (a) (ii) and (iii) of the Code, the representation must be adequate and appropriate, and provided in plain language.

### **Conclusion**

[27] It is clear from the definition of complaint in the FAIS Act, that in order to succeed, Complainant must demonstrate not only that he has suffered or is likely to suffer financial prejudice or damage, but that this is, in

consequence of either non compliance with the FAIS Act or Code; or the wilful or negligent rendering of a financial service

[28] Failure to meet the above requirements has the effect that there can be no complaint as defined.

[29] In order to ascertain whether any financial prejudice or damage had been incurred, the underlying investment was considered and it was noted that an amount of R177 303, 62 was invested on 3 June 2005 and as at 4<sup>th</sup> of October 2007, the investment had grown to R240 989, 03 after the deduction of fees and costs. This indicates a gain of R63 685, 41, as opposed to any prejudice, and this during the period when the financial markets experienced a sharp sell off.

[30] Having satisfied myself that there is no evidence of financial loss, due consideration was given to whether Complainant had in fact suffered any form of prejudice or is likely to suffer financial prejudice.

[31] It should be mentioned that full consideration was taken of the Risk Profile and Client Advice Record. These documents indicate that ease of accessibility to the funds, other than those withdrawn as a tax free amount was not an issue at the time of contracting.

[32] The choice of a Retirement Annuity as an investment vehicle thus not only conformed to Complainant's needs but met legislative requirements.



[33] In correspondence provided by Complainant and addressed to Mr. Borthwick, Complainant states, “As gevolg van omstandighede buite my beheer will ek graag my opsie uitoefen van die afkoelperiode van 30 dae en die polis kanselleer”. This correspondence is undated and unsigned and bears no discernable date or time reference. It is thus clear that Complainants circumstances, altered post sale.

[34] In transferring out of the Cape Joint Retirement Fund, Complainant wanted to take a portion of his funds in cash. The South African Revenue Service in term of Retirement Fund Practice Note RF 1/98, specifically restricts Complainant to a retirement annuity given the aforementioned fact. This is reflected in the Client Advice Record.

[35] The Cape Joint Retirement Fund was established by legislation, the effect of which is that lump sum withdrawal benefits were previously tax free. In March 1997 the Minister of Finance announced that whilst funds prior to 1 March 1998 would still retain their tax free status, members funds accrued subsequent to 1 March 1998 would be taxed.

[36] The fact that Complainant elected to withdraw only so much of the fund as was tax free in terms of the Minister of Finance’s announcement, quite clearly demonstrates that appropriate and considered advice was given and that Complainant made the correct choice based on the applicable facts at time the financial service was rendered.

- [37] The Client Advice Record clearly shows that Complainant was apprised of *all available options* and elected to follow the advice of Respondent to take the tax free portion in cash and transfer the balance to a Retirement Annuity.
- [38] Whilst Complainant had the option to transfer the funds to a preservation fund and then withdraw at a later stage this would have incurred unnecessary costs in that fees would have incurred on the full transfer amount.
- [39] It is therefore clear that given the surrounding circumstances a retirement annuity was the most appropriate investment vehicle for Complainant.
- [40] The ability to access the funds was not a consideration at time of sale, and played no role in Complainant's decision to enter into the contract.
- [41] Respondent is nevertheless bound by Section 7 (1) (c) (xii) of the code which requires full and appropriate information of whether cooling off rights are offered and, if so, procedures for the exercise of such rights. Whilst Complainant advises that he was informed by the Respondent that he could cancel the contract as he was within the 30 day cooling off period, this is denied by Respondent. In its letter to Complainant dated 7 March 2006 in Paragraphs 4.8 they state, 'it may be possible.....it was a call that rests with the relevant product supplier of the financial product and the rules governing same.'

- [42] Section 5 of the Statutory Notice provided to Complainant by Respondent states 'in *most cases* you have the right to cancel a policy in writing within 30 days after receipt of the policy summary.'
- [43] The Investec Client Pack in point 5.7 states, 'In the event of the investor exercising his discretion to withdraw from an investment within any cooling-off period *as defined in any applicable legislation* from time to time, the investor will be refunded...'
- [44] The terms relating to a 30 day cooling off period as set out in both the Statutory Notice and Client Pack refer to rights in certain circumstances and as set out in the PFA Ruling, does not confer an unqualified right to cancellation. This is dependant on the applicable legislation.
- [45] In this instance the fund is a registered retirement annuity fund governed by the Pension Fund Act 24 of 1956 and fund rules. Neither the act nor the rules make any provision for a cooling off period. The rules in fact clearly restrict any form of entitlement to the member's fifty-fifth birthday. The fund could thus not accommodate Complainant.
- [46] It is clear that Complainant in fact had no unqualified rights to cancellation within 30 days after receipt of the summary contemplated in Section 48, and hence the ticking off of this paragraph as opposed to the crossing out thereof, as has been carried in other paragraphs, may be construed as misleading.

- [47] The restrictions placed on Complainant in terms of RF 1/98 confined him to a retirement annuity in the event of his request for cancellation being granted. The product recommended has a wide choice of underlying funds and, in any event, Complainant has not raised this as an issue.
- [48] The fact that the Complainant would like his money refunded to invest elsewhere in no way satisfies the requirements of the FAIS Act. Complainant has not demonstrated that he has suffered or is likely to suffer financial prejudice or damage, as contemplated in the FAIS Act.
- [49] Thus even if this Office were to find that there had been non-compliance with Section 7 (1) (c) (xii) of the General Code, I find that this would have been neither material, nor resulted in Complainant suffering financial prejudice or being likely to suffer financial prejudice or damage.
- [50] It must be stated that I can find no reason to fault the actual advice rendered. On the contrary the financial adviser must be commended on having rendered advice that was both carefully considered and appropriate to Complainants circumstances, taking into consideration the facts of the matter and the applicable legislation at time of sale.

In the circumstances this complaint is therefore dismissed in terms of Rule 7 (b) (i) of the Rules on Proceedings of this Office and the Respondent is ordered to pay

the case fees of this Office in the sum of R1000, 00 in terms of Section 27 (5) of the FAIS Act, read with Rule 9 (a) of the Rules on Proceedings.

**DATED AT PRETORIA ON THIS THE 5<sup>th</sup> DAY OF OCTOBER 2007**



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**Charles Pillai**  
**Ombud for Financial Services Providers**