

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

HELD IN PRETORIA

CASE NO: FOC 1664/05 WC

In the matter between:

MARINA STAIN

Complainant

and

**OLD MUTUAL LIFE ASSURANCE COMPANY
(SOUTH AFRICA) LIMITED**

Respondent

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

Introduction

[1] This complaint concerns the alleged failure by a representative of the Respondent, one Ted Baker ('Baker') to advise Complainant's late husband, Brian Ronald Stain ('deceased') of the need to purchase life cover. The facts and circumstances surrounding the case will emerge in this determination.

The Parties

- [2] Complainant is Marina Stain, a logistics clerk residing at 7 Hawthorne Road, Rustdal, Blackheath, Western Cape Province.
- [3] Respondent is Old Mutual Life Assurance Company (South Africa) Limited, 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 Mutual Park, Jan Smuts Drive, Pinelands, South Africa.

Background

- [4] The following is the background to this complaint, as is evident from the papers before me.
- [5] Complainant was married in community of property to the deceased, who died on 9 March 2005 at the age of 61 years. Two sons were born from this marriage, namely Ronald an electrician and Michael, a financial advisor
- [6] The deceased met Baker, at all material times a financial advisor and representative of Respondent, shortly after the deceased started his own

panel beating business. Baker, so the evidence goes, remained the deceased's financial advisor for a period of over 26 years, until the deceased's death. During this period Baker rendered various financial services to the deceased and their last consultation was held on 11 November 2004.

The Complaint

[7] Complainant alleges that Baker, in the 26 years or so that he had been their financial advisor failed to advise the deceased about the need to purchase adequate life cover. She further alleges that apart from a life policy for approximately R54 000, 00 purchased on 1 August 1982, the only other financial products that Baker recommended to the deceased were retirement annuities and endowment policies. Complainant states that Baker ought to have advised the deceased to purchase adequate life cover.

[8] As a result of Baker's failure, so Complainant alleges she would have to work for a longer period to maintain herself as the retirement annuities do not provide her with sufficient income.

[9] Complainant also states that her husband was in sound health when they met Baker during November 2004. The implication is that the deceased would have qualified for life insurance had it been recommended to him.

[10] Complainant is claiming the sum of R800 000.00, being the maximum amount claimable to bring this matter within the jurisdictional limits of this Office. No further evidence or basis of calculation has been advanced as to how Complainant arrives at this quantum of damages.

The Response

[11] In a letter dated 16 May 2005 addressed to Complainant, Respondent states the following:

[11.1] Baker visited the deceased some 25 years ago on a birthday lead and that life cover was discussed;

[11.2] At this initial meeting the deceased felt that life insurance was not an option;

[11.3] 'Flexicare' was also discussed with the deceased and he felt that his health would militate against it;

[11.4] Complainant was not present at these earlier meetings. Portfolio printouts were given at regular intervals and discussions took place between the deceased and Baker;

[11.5] Retirement funding was a priority for the deceased.

[12] In an e-mail dated 10 June 2005 also addressed to Complainant, Advocate Gerhard de Kock on behalf of Respondent states the following:

[12.1] That Baker in fact advised the deceased on the necessity of life cover in financial planning. The deceased's view was that he would not qualify as a result of his medical condition;

[12.2] The deceased did not offer to elaborate when drawn to do so and Baker did in turn not pursue what the condition was because of the deceased's response.

[12.3] In conclusion it states that 'While it is a financial adviser's duty to give financial advice on appropriate products, the choice of product remains that of the client and a financial adviser cannot force a client to take out a particular policy if the client does not want to do that.'

[13] Respondent maintains throughout that it was due to the deceased's health that no life insurance was taken.

Determination and reasons therefore

[14] This Office is precluded from investigating and determining complaints in respect of a financial service that was rendered on or before 30 September 2004. Thus the only portion of the complaint which would warrant my attention is the meeting held on 11 November 2004 between Baker, the deceased and Complainant. Complainant alleges that it was at this meeting that Baker failed to address the question of life insurance, disability and income protector.

[15] From the papers before me it is common cause that the meeting held on 11 November 2004 pertained to the signing of a premium increase for one of the deceased's retirement annuities. Nothing else was discussed.

[16] It is clear from the outset that Respondent maintains that the deceased's reason for not wishing to pursue any advice relating to life cover was because of the deceased's own concerns about the state of his health. Complainant, on the other hand, maintains that the deceased was in sound health and that there was no reason for an application for life insurance to be declined. The deceased's health is therefore a material

consideration in determining this complaint. The probabilities will determine whether Respondent's or Complainant's version will be upheld. What follows is a brief examination of the investigation conducted by this Office.

16.1 *The deceased's Insurance Portfolio*

In terms of a policy schedule received from Complainant, the deceased had the following policies, which were effected between the periods 1982 to 1995:

- i. Two retirement annuities;
- ii. A life insurance policy to the value of about R55 000,00 incepted on or about 1 August 1982 and subsequently ceded to the Trust Bank (as it then was);
- iii. two endowment policies; and
- iv. Two retirement annuities that were made paid up.

This insurance portfolio has been confirmed by Respondent.

An examination of the deceased's insurance portfolio supports Respondent's contention that the deceased was only interested in providing for his retirement.

16.2 Client Advice Record

The Respondent's version is strengthened when one has sight of a document referred to as a 'Client Advice Record' dated 21 May 2002. The 'needs identified' on this document were 'more funding for retirement'. This document was signed by the deceased and the Baker. Under 'Comments' in the same document, the following appears:

'Client has life/cover

Priority is now retirement funding'

16.3 The Deceased's Medical History

A medical report was requested from the deceased's family doctor, Dr GS Muller Botha. According to the doctor's report, the following was revealed:

- i. The deceased suffered from hypertension and hypercholesterolemia;
- ii. The deceased smoked, he was overweight and had a family history of heart disease; and
- iii. The deceased was on medication since 22 December 1999 for hypertension.

The Office further requested information from Complainant relating to deceased's death and medical treatment. Information disclosed to this Office by Complainant confirms Dr Botha's report that the deceased suffered from high blood pressure and cholesterol. Complainant also confirmed that the deceased suffered from a viral infection during December 2004. The deceased died of cardiac arrest on 9 March 2005.

Further information elicited by this Office reveals that the deceased was treated by 8 different doctors between 20 December 2004 and 8 March 2005.

[17] From the above it is clear that deceased was, in all probability not interested in purchasing life cover as averred by Respondent and its representative. It is clear from all of the above that recommendations may have been made pertaining to life cover which the deceased would have chosen not to follow due to his own concerns about his state of health. It also confirms Baker's contention that the deceased was not interested in life cover as his health would 'mitigate' against it.

[18] Attached to Dr Botha's report, was a letter from Old Mutual's Medical Department dated 19 August 1999. This letter pertained to an application for a life insurance policy bearing application number '9050-6732'. The letter reads as follows:

‘Bogenoemde klient het gevra dat ek aan u die rede gee waarom die bogenoemde aansoek ongunstig behandel is.

Die rede is **Abnormale elektrokardiogram**’

This attachment makes it abundantly clear that the deceased’s state of health did indeed ‘mitigate against life cover’, as advised by Respondent.

[19] This aspect of the matter was never mentioned by Complainant anywhere in her correspondence. It therefore contradicts Complainant’s statement that the deceased was a healthy man and that he would never have signed anything without her knowledge.

[20] Respondent confirmed that apart from the above application for life insurance which was declined, no other applications for life insurance were lodged with it.

[21] This Office interviewed Baker. During the consultation Baker was asked what his areas of speciality was. He stated that risk planning was the most important, followed by retirement planning and then investment planning.

[22] The Office requested Respondent to confirm what Baker stated in writing. A schedule headed ‘Weekly Production’ was presented to this Office. This schedule reflects that Baker wrote 48 cases between 1 January 2004 and

31 December 2004, 28 were 'Flexi/Conventional' life policies. The remaining 20 cases related to investments, retirement annuities and endowments. In an affidavit by Baker he states that 'My whole concern in the life industry always focussed on life cover before anything else...'

[23] It is evident from all the above that whilst deceased may have qualified for life cover at some stage of his life, with the passage of time medical evidence available to him may have caused him to appreciate that life cover for him was not an option. This does not indicate any failing on the part of the Respondent. My view in this respect is confirmed by the evidence indicating that a life policy applied for in 1999 was turned down due to an abnormal electrocardiogram reading. This evidence, coupled with the version presented to this Office by the Respondent and Baker clearly points to the fact that the deceased would not have been interested in life cover, due to his own understanding of his state of health as indicated by Dr Botha.

[24] Of importance is the fact that at the critical stage when this Office would have had to consider the financial service rendered incorporating the advice given, namely the 11 November 2004, the deceased was, in all probability not interested in life cover. On this basis alone, it can be said that there is no basis for the complaint.

[25] In all the circumstances, this complaint is without substance and I therefore dismiss the same.

DATED AT PRETORIA ON THIS THE 25th DAY OF APRIL 2006



CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS