

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 06980/14-15/NW 1

In the matter between:

THEUNIS VAN SCHALKWYK

Complainant

and

PINNACLE BROKERS

Respondent

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

A. INTRODUCTION

[1] This complaint concerns the investment of complainant's funds into a retirement annuity. Complainant complained that he did not give his financial services provider (FSP) any instruction to place his funds into a retirement annuity where the funds would be locked in and he will have no access until he retires.

B. THE PARTIES

[2] Complainant is Theunis van Schalkwyk, an adult male Human Resources practitioner whose details are on file in this office.

[3] Respondent is Pinnacle Brokers of 154 Kock Street Rustenburg. Respondent is a licensed FSP with license No 13133.

C. FACTUAL BACKGROUND

The following is undisputed:

[4] Complainant was employed by a mining company (Assmang Iron Ore Mine) and in May 2012 he resigned to take up employment abroad. Complainant was offered employment by an international mining company for a post in Mongolia.

[5] Whilst employed at Assmang, complainant was a member of a retirement fund and pension contributions were made to the Assmang Retirement Fund. After his resignation, the pension funds became available.

[6] During July 2012 complainant's funds were placed in a retirement annuity with Old Mutual. The policy is an Old Mutual Max Investment, policy number 016591947. This is a retirement annuity fund and the funds will only be available when complainant turns 55 years old. This was done through the services of the respondent. The FSP in question is Basil Botha (Botha).

[7] Complainant was dissatisfied with this and complained to Old Mutual. The latter referred the complaint to an internal arbitration department who appointed a regional manager to investigate. Old Mutual thereafter responded as follows:

a) This was a matter between complainant and his independent FSP; and

b) They were prevented by legislation from releasing the funds.

[8] Old Mutual was merely a product provider and did not provide advice to complainant. In the result, the funds are still in the Old Mutual policy.

D. THE COMPLAINT

[9] According to complainant, he instructed his broker to invest the funds in such a manner that he could have access to it on reasonable notice of 1 to 3 months. He did not give specific instructions to place the funds into a retirement annuity where it will be locked in.

[10] It is not in dispute that, before complainant left the country, he instructed his mother in law to take care of some of his financial affairs. His mother in law is Mrs Cronje (Cronje) who works as a secretary to Mrs H Coetsee (Coetsee) one of the representatives in respondent's office. This instruction was relayed in an email to his mother in law where complainant requested that his mother in law take care of the pension funds (I will deal with this in more detail below).

[11] It was thus Cronje who requested respondent to invest the available funds. At that time, complainant had already left the country. Complainant is adamant that he gave no instruction for his funds to be placed in a retirement annuity and found out about this about a year later.

[12] The complaint is that respondent, represented by Coetsee and Botha, did not have any instructions to invest the money in Old Mutual as they did. Complainant states that it was never his intention to invest in an annuity as it was his intention to use the funds in business where the returns would outperform an annuity.

[13] Complainant wants the following relief:

- a) That Old Mutual refund his money; alternatively
- b) That respondent pay out an equivalent sum to him and recover the funds from the policy, when it matures.

E. RESPONDENT'S RESPONSE

[14] Botha, on behalf of respondent, responded to the complaint. He admits that he did not hold a personal consultation with complainant when the investment was made. This was because complainant was already on his way to Mongolia to take up new employment. He states that Cronje approached him on 30th July 2012 and requested him to handle a transfer of complainant's pension as he had just resigned. Botha required that complainant sign a service contract with the firm in order for him to proceed. This was duly done by the complainant.

[15] Botha is adamant that at no stage did he receive instructions from complainant to invest in a product where he could access the funds on reasonable notice. Botha supports this with a statement from Cronje who confirms it. Further, he points out

that complainant received his contract from Old Mutual which clearly states it is an annuity. There was no immediate objection.

[16] Respondent relies on documentation used to effect the investment in Old Mutual and points out that they were signed by complainant (I will deal with this in more detail below).

[17] Respondent denies that they acted contrary to the instructions from client. They only became aware that there was a problem after complainant lodged a complaint with Old Mutual.

F. THE ISSUES

[18] The issue here is simple. Did respondent act without an instruction or mandate from complainant before making the Old Mutual investment? If this question is answered in favour of complainant, then what relief can this office order?

G. THE EVIDENCE

[19] It is important for me to set out the evidence made available to this office, pursuant to investigation, and which is relevant to the dispute herein. I set this out below:

19.1 Whilst working for Assmang, complainant was studying towards an MBA at the University of Stellenbosch. When complainant attended classes, he met a fellow student who introduced him to a Canadian mining company. This led to this company offering him employment at their Mongolian

operation. Complainant accepted the offer and had to prepare to move to Mongolia. This had to be done in a short space of time.

19.2 Complainant resigned from Assmang and had to put his private affairs in order before relocating to Mongolia. He moved his wife and two children to Cronje's house where they would live. He paid for this accommodation before departing for Mongolia. He also took Cronje to his bank where he signed a power of attorney in favour of Cronje so that the latter may have access to his bank account in the event of an emergency. This was not a general power of attorney for Cronje to take charge of all of complainant's affairs. It was confined only to access to his bank account.

[20] I must state that none of the parties could produce a general power of attorney from complainant giving Cronje, or Coetsee and/or Botha, unfettered authority and discretion to invest his funds.

[21] It is equally important for me to state that there is no evidence that complainant held a consultation with either Coetsee or Botha before the investment was made. In this regard, Coetsee and Botha rely on the documents signed by complainant. However, it is not disputed the complainant did talk to Cronje, his mother in law, about his pension funds. It appears from the available evidence that Cronje is the only person he spoke to about the fate of his funds before

departing for Mongolia. In this regard I refer to two emails that passed between complainant and Cronje:

- a) The first is an email from complainant to Cronje dated 24th May 2012 at 9h46. He refers to Cronje as “Ma” and he informs her that his pension funds are with Alexander Forbes and gives her the details of the fund, including the fund registration numbers and his employee number;
- b) The second email is a response to the first one and is dated 24th May 2012 and it was sent by Cronje to complainant at 10h44. She addresses him as “Seun” (son) and states as follows:
 - That “Oom Basil” (uncle Basil), referring to Botha, requires the telephone numbers of the person dealing with his pension funds at work so that he can obtain the necessary forms to transfer the funds;
 - She tells him that there are forms to be filled where complainant must give permission to transfer the pension to a “gewaarborgde fonds” (guaranteed fund).

[22] These are the only emails between complainant and Cronje before the investment in Old Mutual was made. There are no emails between complainant and respondent (Coetsee and Botha) before the investment was made.

[23] Equally there is no written communication between complainant and any of the other parties regarding the manner in which complainant preferred his funds to be invested. Cronje, however, states that before complainant left for Mongolia, he gave her authority to deal with his funds as she deemed fit.

[24] It is also important that complainant does not dispute that it was Cronje who took the matter to Botha. In fact she instructed Botha to make the investment in Old Mutual and not the complainant.

[25] Botha submitted to this office that the first consultation with complainant was on the 30th July 2012 wherein complainant requested that his pension funds be transferred to Old Mutual as he was going to work in Mongolia. This is disputed by complainant on two grounds:

- a) He never met with Botha before he left the country; and
- b) On the 30th July 2012 he was already out of the country.
- c) Complainant's passport proves that on the 30th July 2012 he was out of the country. On the probabilities, there was no consultation with Botha, only a consultation with Cronje.

H. THE DOCUMENTS

[26] Of significance are the documents relied on by respondents. They are as follows:

- a) The first document is an appointment letter ("aanstellingsbrief") appointing Basil Botha as complainant's broker. The letter is on respondent's letter head and it is dated 30th July 2012. The letter is ***signed by complainant*** (emphasis added);
- b) The next document is the record of advice, in terms of the Act, which records the following:

- The client is “T Van Schalkwyk” and the financial adviser is “B Botha”;
 - Client objective is recorded as “Klient plaas fondse van pension fonds oor na Ou Mutual” (client transfers pension funds over to Old Mutual);
 - The same is recorded again under the section “Financial needs”;
 - In “section G” appears a number of statements and undertakings from complainant. Next to each statement, complainant placed his initials. There are 8 statements and undertakings, all of which were initialled by complainant. Paragraph 8 states that complainant understands that he has a duty to familiarise himself with the product he purchased;
 - Under the heading “General Remarks” the following is written in manuscript: “Plaas fondse oor na Ou Mutual”. Complainant initialled this just below the writing;
 - At the end of the document, Botha signed as “financial adviser”; and *Complainant signed* as “client”. (Emphasis added)
 - The document is dated, in manuscript, “30 – 7 – 2012”.
- c) Then follows a document which is a “Client – Service Level Agreement” between respondent and complainant. The first page records “the Client” as “Theunis Van Schalkwyk” and it is *signed in full by complainant* at the bottom right corner. This is a lengthy document where *complainant initialled* each page, from the second page to the last page. On the last page it is recorded that the document is signed at “Rustenburg” on the “30

– 7 – 2012”. On this page *complainant also signed in full* as “client”; Botha also signed this page. (Emphasis added);

- d) The last document is one titled “Discretionary Investment” “Risk Assessment”. The following is recorded:
- The question is asked; “when do you expect to start withdrawing the money which you now intend to invest?” Complainant ticked off “Long term say 10 years or more”;
 - Then follow three more questions relating to risk profile; where complainant ticked off the appropriate box;
 - Under the heading “Comments” the following is written in manuscript “80% waarborg 20% risiko” (20% risk and 80% guarantee);
 - The document is dated “30 – 7 – 2012” and it is *signed in full by complainant* and Botha. (Emphasis added)
- e) I now turn to documents obtained from Old Mutual, firstly there is a record that a quote was requested by Botha on the 11th July 2012. This was before the risk assessment was done on the 30th July 2012.
- f) Then there is a document form Old Mutual titled “Finalisor Declaration”. Here *complainant signed in full* as a “Contracting Party” and the document is dated 11th July 2012. (Emphasis added).

These documents are crucial to the issue in this matter. They support the version of the respondent.

[27] Having considered the above documents, this office made them available to complainant and requested an explanation for his signature. Of significance is that complainant did not dispute that his signature and initials appear on all these documents. He challenges the documents on the basis that they are dated “11-7-2012” and “30 – 7 – 2012” when he was not in the country, on that date he was in Mongolia. In his response, complainant states:

*“Therefore, from my passport it is clear that I **have not been able to sign any documents on the either the 11 th of July 2012 or the 30 th July 2012. Simply because I was on neither of these two dates in South Africa.**”*

[28] In a further statement to this office complainant stated as follows:

“Everyone in Pinnacle failed to explain how my signature came attached to documents that were signed on the 30th of July in Rustenburg while I was in Mongolia.” (Emphasis added) He does not say it is not his signature.

[29] Complainant is right to ask how the document can be dated at a time when he was not in the country. He also places the onus on respondent to explain this. However, seeing that it is common cause that the initials and signatures are his, there has to be an explanation from complainant as to why he signed the documents. There is no explanation from him despite the fact that this office gave him repeated opportunities to do so. Surely there is responsibility on complainant to explain his signature. The point being that if he is bound by those documents, the whole basis of his complaint disappears.

Cronje

[30] Cronje provided a statement setting out her version of the facts, dated 7th April 2015. The following emerged:

- a) Complainant approached her and requested assistance with transferring his pension to a “gewaarborgde pensionfonds” (guaranteed pension fund);
- b) Complainant stated he knows nothing about investments and Cronje must do what she thinks is best;
- c) She referred complainant to Botha as Coetsee was unavailable;
- d) Botha gave her the above documents to send to complainant to sign; and
- e) She explained complainant’s financial position to Botha who responded by saying that he will provide “best advice”.

[31] I am also concerned about the role played by Cronje in this whole matter. In his initial complaint to Old Mutual and to this office, complainant said very little about her. Complainant has since changed his attitude substantially; to the point of blaming her for the investment in the retirement annuity. In a comprehensive statement to this office the following, *inter alia*, is stated, by complainant, about Cronje:

- a) Complainant threatens to institute criminal charges for fraud against Cronje. Although he does not say how she committed fraud;
- b) He denies that he discussed a “guaranteed pension fund” with Cronje and states they discussed a “guaranteed fund”;

- c) All his communication about investing his funds was with Cronje; and no one else. He then questions why a secretary was giving financial advice. He failed to explain why he did not consider this at the time;
- d) Complainant denies that he left the investment to her. He states that he had access to “the best investment specialists in the country” while he studied at Stellenbosch. He does not explain why he did not consult them instead of his mother in law;
- e) Significantly, complainant challenges the respondent for accepting an oral instruction, pointing out that a transaction of this nature required documents. Again he failed to explain why he signed these very documents on the 11th and 30th July 2012;
- f) He blames Cronje’s “misunderstanding” that she could do with the money as she pleases as “the root cause of this complaint and everything associated therewith”. To me it does appear as if the root cause was the conduct of both complainant and Cronje;
- g) Complainant denies that he gave Cronje authority to invest his funds in an annuity; and significantly,
- h) Complainant does not dispute that Botha handed the documents to Cronje for signature. He merely points out that no proof was provided that the documents were sent to him. Again, complainant was evasive. He does not admit or deny that he received them, nor does he deny that he signed them. He gives no explanation for his signature.

[32] It has not escaped me that Cronje worked as a short term insurance secretary at respondent. Importantly, she had access to the type of documents described above. Between Cronje and complainant, they are the people who can explain the latter's signature on these documents. Instead they, for reasons known only to themselves, carefully avoid dealing with this. They deliberately failed to cooperate with this office and did not assist to resolve the dispute. I cannot speculate as to why complainant signed the documents.

I. DISPUTE OF FACT

[33] Let me state what is not in dispute, the fact that complainant signed the necessary documents to enable respondent to make the investment in an annuity with Old Mutual. What is disputed is the authenticity of the documents and whether or not they are binding on complainant.

[34] As appears from the above analysis of the evidence, complainant and Cronje are the only people who can shed light on how or why complainant signed the documents. On record before me are conflicting and evasive versions from both parties. The issue cannot be resolved without me first having to resolve this material dispute of fact.

[35] Why complainant signed the documents and under what circumstances is peculiarly within the knowledge of complainant. His failure to explain his signature leaves me in doubt about all his allegations regarding the investment

complained of. I am thus left in a position where it is not possible for me to determine the probabilities regarding the signing of the documents.

[36] Neither Complainant nor Cronje gave this office their full cooperation regarding this important issue. As a result I am unable to resolve the material dispute of fact. This matter requires an adversarial approach were, after full discovery, the parties are led in oral evidence and cross examined. This procedure is available in our courts and it is not appropriate for this office to provide the parties with such a forum.

J. CONCLUSION

[37] It is important for me to state that, in the light of the evidence before me, it will be inappropriate and even possibly unfair for me to make any finding regarding the conduct of the respondent. Accordingly I make no finding in respect of respondent's conduct as FSP.

[38] I refer to section 27 (3) (c) of the Act which reads as follows:

“The Ombud may on reasonable grounds determine that it is more appropriate that the complaint be dealt with by a Court or through any other available dispute resolution process, and decline to entertain the complaint.”

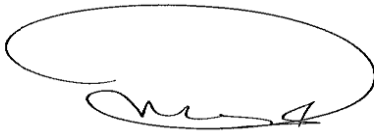
[39] Based on an analysis of the information provided by the parties, I find that there are reasonable grounds for me to determine that it is more appropriate for this complaint to dealt with by a court.

K. ORDER

[40] In the premises, I make the following order:

1. It is appropriate that this complaint be dealt with by a court;
2. The complaint is dismissed.

DATED AT PRETORIA THIS THE 20th DAY OF MAY 2016.

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a cursive name, all enclosed within a large, hand-drawn oval.

NOLUNTU BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS