

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

**PRETORIA**

**Case Number: FOC1653/06-07/GP (2)**

In the matter between:-

**J C P VAN ASWEGEN N.O.**

**Complainant**

and

**FIRST NATIONAL BANK LIMITED**

**Respondent**

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

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**A. PARTIES**

[1] The complainant is Mrs Johanna CP Van Aswegen of 28 Antelope Street, BRONKHORTSPRUIT, MPUMALANGA, 1020, in her capacity as the authorised complainant by the duly appointed Executor (Sanlam Trust Limited) in the estate of her late husband Gerhardus Cornelius Van Aswegen, who died on 31 March 2005.

[2] The respondent is First National Bank Limited, 1<sup>st</sup> Floor, 4, Merchant Place, corner Fredman Drive and Rivonia Road, SANDTON, GAUTENG, 2196.

Respondent is an authorised Financial Services Provider under licence No.3071.

**B. THE BACKGROUND**

[3] Mr Gerhardus Cornelius Van Aswegen ('the deceased') was indebted to the respondent for an overdraft facility for R 500 000, 00. The deceased had ceded several insurance policies as security for the overdraft facility. He had exceeded the overdraft limit by about R 114 000, 00 at the relevant time and the respondent wanted him to bring the overdraft within the arranged limit. He was unable to do so.

[4] Respondent then told the deceased that it would surrender the five policies it held as security for the loan.

They were:

		<b>Ins. Value</b>	<b>Sur. Value.</b>	<b>Pmt. Recd.</b>
<b>Old Mutual</b>	10719086	R250 000	R13 479	R13 347
<b>Momentum</b>	84027688	R 88 573	R22 512	R21 905
<b>Momentum</b>	88534672	R 94 000	R31 758	R31 758
<b>Sanlam</b>	3778906X2	R 36 050	R 7 368	R 7 368
<b>Sanlam</b>	10942668X4	R 49 190	R22 512	R22 512
<b>Total:</b>		<b>R517 813</b>	<b>R97 629</b>	<b>R96 893</b>

[5] A financial advisor employed by the respondent suggested that the deceased simultaneously replace a Sanlam life policy (which was not one of the ceded

policies) with a so-called 'new generation' life policy from Liberty Life - the premiums for which were cheaper than that for the existing Sanlam policy with life cover of R 1 000 000, 00.

- [6] The deceased underwent medical underwriting as required by Liberty Life. On 1 April 2005 Liberty made an offer to insure the deceased with certain loadings due to him having some adverse health conditions. The deceased died before the new policy was finalised. Sanlam paid out R 1 200 000, 00 on the policy which was going to be replaced as it was still in force. In the meantime, respondent had already surrendered the five policies ceded to it, which it utilised to reduce the deceased's overdraft.

#### **The relief sought by complainant**

- [7] The complainant is of the view that the respondent should have first ensured that the new policy was in force before it surrendered the ceded policies and therefore to that extent the deceased was incorrectly advised by respondent's financial adviser and/or relationship manager.
- [8] Therefore, says complainant, the deceased's estate ought to be compensated for the amount of R 420 919, 24 being R 517 813, 08 less the surrender value of R 96 893, 84 of the ceded policies.

## **Investigation by this Office**

[9] It is common cause that the deceased was in financial distress and was unable to meet his commitments as regards the servicing of the overdraft with the respondent. On 24 February 2005, he went to respondent's branch in Bronkhortspruit to discuss the matter. He was told by a relationship manager, a Mr Pieterse that he had to deposit sufficient funds to bring the overdraft within the agreed limit. As he had no means to do so, it was agreed that the ceded policies should be surrendered and the proceeds utilised to reduce the overdraft. Surrender forms were completed on the same day. There is some dispute as to whether it was the respondent's representative who insisted that the ceded policies be surrendered or whether it was the deceased who informed Pieterse to do so. Pieterse says several options were discussed with the deceased, e.g. the sale of some of his vehicles to meet his obligation to respondent; application for a bond over his farm (but this was not feasible as there were no improvements on it) and loans on two of his policies but they would not have been sufficient to cover the required amount. What is clear though is that respondent was entitled to surrender the policies if it chose to do so to settle the overdraft if the deceased was unable to do so.

[10] Respondent's Bronkortspruit branch also had a financial planner by the name of Mr John Van der Merwe. Pieterse says he asked Van der Merwe to assist the deceased with the surrendering of the policies "as a matter of convenience, thus performing an intermediary service" (per respondent's letter dated 30 June 2008 to this Office).

- [11] Van der Merwe's version is that by the time he met the deceased the latter had already given the instructions to surrender the policies ceded to the bank. In other words, he merely provided the necessary assistance to do so. In a letter dated 4 October 2007 Van der Merwe says he was also asked to see if the deceased could not obtain cheaper cover (due to his financial predicament) in place of a Sanlam life policy for R 1 200 000, 00 which was a different one and not part of the five policies ceded to the respondent. A quotation was obtained from Liberty Life and an application for life cover completed – all the very same day the deceased visited the bank on 24 February 2005. The deceased was asked to undergo a medical examination, which he did. As a result of some adverse health results Liberty, in a letter dated 1 April 2005, offered to insure him but the premiums would be loaded by 50 per cent and no disability cover would be provided. The deceased died on 31 March 2005, i.e. before the letter could reach him.
- [12] Van der Merwe says the purpose of the Liberty policy (had it been issued) was to replace the Sanlam policy which had not been ceded as there was also cash available in the policy (*“daar was ook kontant in die polis beskikbaar”*). This last statement is presumably a reference to the cash value the Sanlam (old generation) policy would have built up in the interim.
- [13] Van der Merwe says further that the deceased had wanted to surrender the Sanlam policy as well but he (Van der Merwe) had refused to allow him to do so as the new Liberty policy had not yet come into force. The result, he contends, was that Sanlam paid out the full life cover on the policy which

otherwise would not have happened and therefore complainant has no cause for complaining.

### **The Issues**

- [14] The issues to be decided are whether respondent's surrendering of the ceded policies and the attempted replacement of the Sanlam policy contravened any provisions of the FAIS Act and whether this resulted in any loss to the deceased or his estate.

### **C. DETERMINATION AND REASONS THEREFORE**

- [15] A cause for concern has been the replacement advice record that was completed by Van der Merwe when the Liberty policy was applied for. In it he does not mention that it is the Sanlam policy for R 1 200 000, 00 that is sought to be replaced. (He says so only in his response to the complaint) Inexplicably, he lists four of the five ceded policies as being those to be replaced by the new Liberty life policy.

- [16] There was no logical reason to replace one life policy with another given that the life insured may have deteriorated in health. Respondent's submission that it would have resulted in the insured having to pay reduced premiums is not convincing, to the say least. The saving in premiums was a paltry R 106, 00 per month after the loading because of the deceased's intervening adverse health condition. A new two year suicide exclusion clause would

probably also have come into force. And there is the fact that the “old generation” policy had an investment component in it.

[17] The reasons given by Van der Merwe for wanting to do the replacement are:

*“Cheaper cover, can pay more on his debt;*

*Supplies bank with required cover;*

*New generation policy, cheaper cover over the long term, pay off more debt.”*

Given the extent of the deceased’s financial commitments and the accumulated value of the old generation policy the reasons for wanting to replace the policies do not make sense. The premium savings of R106, 00 per month, which was ostensibly the reason for replacing the Sanlam policy with that from Liberty, was negligible. And the deceased would have lost disability cover as well. Was it perhaps commission driven? Why mention the four ceded policies as being the ones sought to be replaced and not the Sanlam policy which, according to Van der Merwe, was the case?

[18] The distinct impression one gets is that this advice was motivated by the earning of commission. However, even if it was commission driven – has there been any loss suffered by the deceased or his estate?

[19] It was within the discretion of the respondent to surrender the ceded policies and offset the proceeds against the deceased’s overdraft. The Sanlam policy was paid out in full upon the death of the deceased. In the circumstances, the

complaint that the ceded policies should not have been surrendered before the new Liberty policy came into effect is untenable. The result may well have been different if the Sanlam policy had been cancelled before the Liberty policy came into effect, or, if the Liberty policy had come into effect on terms unfavourable to the deceased compared to the Sanlam policy. Respondent could not have had the foresight to know when the deceased was going to die.

[20] Complainant says the deceased should have given the option by respondent to borrow against the policies rather than surrender them. This submission is also untenable as the policies were ceded as security for the debt to the bank.

[21] Complainant also submits that she had R 120 000, 00 available for the deceased to utilise towards the overdraft. This seems to be an afterthought as the fact remains that it was not in fact utilised whilst the deceased was alive.

[22] A further ground for complaint is that certain bi-annual rental was due from a tenant of the farm and this too should have been taken into account by respondent. In my view, respondent was under no obligation to do so.

[23] Finally, complainant refers to potential income that the deceased was to receive from the sale of silicon sand from his farm which could have been utilised towards setting off the loan. This again is pure speculation as to



whether such sales would have taken place and the income that would have been earned.

[24] In all the circumstances, this complaint falls to be dismissed.

## **THE ORDER**

I make the following order:

1. The complaint is dismissed;
2. The respondent is ordered to pay the case fee of R 1000, 00 to this Office.

**Dated at PRETORIA this 21 day of January 2010.**



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**CHARLES PILLAI**  
**OMBUD FOR FINANCIAL SERVICES PROVIDERS**