



In the matter between:

THE COMPLAINANT

and

INSURANCE COMPANY

RESPONDENT

STATEMENT OF DETERMINATION OF COMPLAINT GIVEN IN TERMS OF SECTIONS 74 AND 75 OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT NO. 2 OF 2010 (THE FSRA ACT)

INTRODUCTION

1. This complaint relates to insurance. This complaint relates to an insurance relationship between The Complainant and the Respondent the Insurance Company. The Respondent is a licensed financial services provider in terms of the FSRA Act, 2010. Accordingly, the Ombudsman has jurisdiction to resolve this matter by virtue of s 74 and s75 of the FSRA Act.

THE COMPLAINT

2. On 26 May 2021, the Complainant submitted a sworn statement of her complaint (the Complaint Form). Complainant alleges that she was sold an insurance policy by one representative of the Insurance Company, who told her that the policy would pay out after ten years as an investment. The policy in question is underwritten by Life Insurance South Africa. By virtue of its licence Insurance Company, is authorised and empowered to deal with such policies. The complaint form was supported by the following documents:

Document	Dated
Copy of Insurance Contract	30 June 2008
Annual Statement	14 April 2017
Insurance Company Complaints Sheet	24 March 2021
Acknowledgement Letter	29 March 2021
Complainant's Bank Statement	13 April 2021

MAIN FACTS

3. The main facts to be gleaned from the complaint form are as follows:
 - 3.1. In 2008, Complainant took an insurance policy with the Insurance Company;
 - 3.2. The policy was sold to her by one Representative of the Insurance Company (who was acting on behalf of Respondent);
 - 3.3. Complainant alleges that she was advised by the Representative that the policy would pay out after ten years as an investment;
 - 3.4. In 2017, Complainant went to the Respondent to enquire about the policy;
 - 3.5. On enquiry Complainant was informed that the policy was a life policy;
 - 3.6. In 2021, Complainant also went to Respondent for further enquiries and was told Respondent denied any knowledge of the policy;

- 3.7. Complainant has been paying the sum of E278.00 premiums for the policy since its inception in 2008;
- 3.8. Complainant states that she is now referred to Mr. XXX, someone she does not know, yet she thought she was signing a policy with :the Insurance Company.
- 3.9. Complainant states that she never at any point wanted a life policy, but she wanted an investment policy:
- 3.10. Complainant further states that she is now unemployed and has no funds to continue paying premiums for the policy:
- 3.11. Complainant requests to receive the value of the policy or be refunded all her premiums that she has paid on the policy, as the investment was ten years, and the ten years has lapsed.

THE RESPONDENT'S RESPONSE

4. On 6 July 2021, the Respondent submitted a response to the complaint and the relevant correspondences between the Respondent and the Complainant were attached. The following documents were attached to the response:

Document	Dated
Internal Arbitrator's email (Annexure 1)	22 June 2021
Annual Statements (5 Letters) (Annexure 2)	11 April 2010
Claims Documents (Annexure 3)	26 September 2014
Cancellation of Life Benefit Letter (Annexure 4)	31 May 2016
Application Form (Annexure 5)	21 May 2008
Beneficiary Change Request (Annexure 6)	17 June 2016
Policy Document (Annexure 7)	30 June 2008

The Respondent raises the following points in its response;

- 4.1. On 24 March 2021, Respondent received a complaint stating that Complainant had requested an investment policy in 2008, for a period of ten years and was informed of the terms and conditions on an investment policy;
- 4.2. Respondent states that Complainant alleges that she discovered in 2017 that the policy was a Greenlight Life cover;
- 4.3. Complainant requested that the Respondent should convert the life policy to an investment policy. Alternatively, Complainant requested that Respondent refunds all the premiums that she had paid under the policy;
- 4.4. On 31 March 2021, the Regional Manager for MP Brokers responded and stated that investigations revealed that Mr. XXX had presented the life product to her;
- 4.5. Respondent states that Mr. XXX in his capacity as Complainant's representative handled the application for insurance/investment at the Insurance Company;
- 4.6. Respondent further states that Mr. XXX is responsible for any advice presented to the customer;
- 4.7. Respondent affirms that Mr. XXX's broker contract with the Insurance Company was terminated and there is no business relationship with him;
- 4.8. Respondent states that the Insurance Company was not party to the advice that was provided and suggests that the Complainant should communicate directly with Mr. XXX;

- 4.9. Respondent further states that if Complainant's dispute is not resolved, she may lodge a complaint with the FAIS Ombudsman;
- 4.10. On 22 June 2021 Respondent confirms that she received an email from Life Insurance South Africa's internal arbitrator, with the above attached documents.

THE REPLIES

5. The Complainant submitted her reply on 27 August 2021. However, the replies did not disclose new facts or issues and accordingly the allegations by the parties are adequately covered in the above captured documents. The reply merely emphasized facts already disclosed and as such are of no pertinent assistance in this determination. The Respondent disclosed that after receipt of Complainant's reply, they believe they have adequately responded to the matter and have nothing further to submit.

DETERMINATION AND REASONS THEREOF

6. It is the role of the Ombudsman to determine whether or not the Complainant's policy was an investment policy or a life policy. The Ombudsman is further tasked to determine whether the Complainant can receive the value of the investment or the premiums she has paid since inception of the policy. The Ombudsman will also determine whether the Respondent can be held liable for the Broker's conduct.

COMMON CAUSE & CONTENTIOUS FACTS

7. From a reading of the submissions, there are common cause facts and there are contentious facts. Facts about the insured having taken a policy underwritten by the Respondent and the payment of premiums since inception, are common cause and not contentious. The only contentious fact(s) are the following:
- 7.1. Whether the Complainant's policy was an investment policy or a life policy;
- 7.2. Whether the Complainant can receive the value of the investment or the premiums she has been paying since the inception of the policy;
- 7.3. Whether the Respondent can be held accountable for the Broker's conduct.

THE APPLICABLE LAW

8. The relationship between the parties is one of insurance. This is a regulated activity in terms of the Insurance Act, 2005. In issuing this decision the Ombudsman will make reference to the Life Policy Insurance contracts' Terms and Conditions, Policy Application Form read together with correspondences exchanged between the parties.

Policy Agreement (Life Policy) & Policy's Terms and Conditions

- 8.1. It is settled law that insurance is a contract-based relationship. This means that the contract of insurance becomes the primary instrument of regulating the affairs of the parties. In the present case the policy holder submitted an application for the policy, and this resulted in the parties entering into the insurance contract. "The terms of a contract of insurance are embodied in a policy." (**Gordon & Gets, *The South African Law of Insurance, 2012, 134***). This is an important document as it provides all the terms and conditions, rights and duties of the parties to the contract.

8.2. The Policy Terms and Conditions is the document through which the parties detailed their duties and responsibilities. Further the Terms and Conditions of the Greenlight Policy, were exchanged between the parties. This is the primary document that governs the relationship between the parties. From the submissions of the parties and the documents filed, there was an insurance contract between the parties, which governs the relationship between the parties and also the transaction.

Policy Structure (Risk or Life Policy)

8.3. According to the Policy, annexed and marked **annexure 7**, the Complainant had a life policy, which was structured into two components, being the life policy or risk cover and a committed savings benefit. In a welcome letter addressed to the Complainant dated 9 June 2008, the Complainant was informed by the Respondent that "her application for insurance and/or savings has been accepted." Respondent further provided the details and breakdown of each component of the policy. Under the risk benefits, Respondent structured the benefit into three categories, being the death benefit (a cover for R100 000.00), physical impairment (R100 000.00) and the final expenses benefit (R50 000.00)

8.4. It remains an undenied fact that the signature that appears in the document belongs to the life assured, hence the principle of *caveat subscriptor (let the signor be aware)*, then applies. The Life Assured signed the contractual document and the law accepts that she read the contents of the insurance application and consented to be bound by the terms of the policy, which is a life policy, not an investment policy, as detailed above. Further, Complainant has not in her submissions denied knowledge of the policy documents.

Committed Savings Benefit

8.5. The life policy also comprised of a savings component, known as a committed savings, benefit and it was held by the Complainant from inception until withdrawals started in 2014 and the benefit cancellation in 2016. It should be noted that all transactions pertaining to this benefit were also recorded as part of Complainants annual statements as shown in **annexure 2**. Complainant continued transacting in this benefit since inception.

8.6. From the submissions of the parties a part withdrawal of E5000.00, occurred in 2012 and a zero-interest loan of E5428.27 in 2014. The above confirms that Complainant's savings account was active, and she was time and again transacting on this account. These transactions are captured in Respondent's **annexure 3**, being Complainant's claim forms and processed documents in proof of the withdrawals. This component of the policy was then cancelled by the Complainant in 2016, refer to **annexure 4**, which is Complainants notice of cancellation dated 31 May 2016. Respondent has attached **annexure 3** to prove that there was indeed a cancellation of this component of the policy. With the evidence provided by the Respondent and Complainant's non-denial of either the withdrawals and the cancellation, the Respondent's version remains probable.

Conduct of the Broker (Alleged Mis-selling or Misinformation)

8.7. It can be ascertained from the submissions of the parties that the Complainant was advised by a broker during inception (the Representative), who unfortunately is deceased, that the policy would pay out after ten years, as an investment, a position that the Respondent has refuted or referred to Mr. XXX. Respondent has maintained her position in that she stated that the policy product offered to the Complainant, was a life cover. Further in terms of her response, Respondent has stated that the life cover was presented to the Complainant by Mr. XXX, who was an independent broker and a certified financial services provider. Respondent in proving her case further stated that Mr. XXX, acted as Complainant's representative and he handled Complainant's application for insurance or investment at the Insurance Company. TLHAPI. AJ, in the matter **of D J Van Rheede Van Oudtshoorn v. VVM Centurion (Edms) Bpk h/a Brokers 2000**, stated as follows:

"...the relationship between broker and the insured, is subject to the law of agency. Depending on the circumstances of the case...an insurance broker is mandated by the insured to carry out certain instructions. In a brokerage agreement, it is required of the broker to exercise reasonable care and skill in executing the mandate of the insured."

8.8. From the above decision it can be noted that the insured gives a broker a mandate and the broker should carry out the instructions of the insured. Respondent has rightly pointed in her papers that the broker, Mr. Kleinsmith was an independent broker and certified financial services provider, who presented the life product to the Complainant.

In affirming the above position, on the obligations of an insurance broker it was stated in the case of '**Superhulls Cover**' [1990] 2 **Lloyds's Rep 431 (QB) at 445.**), that:

"(i) He must ascertain his client's needs by instruction or otherwise.

(ii) He must use reasonable skill and care to procure the cover which his client has asked for, either expressly or by necessary implication.

(iii) If he cannot obtain what is required, he must report in what respects he has failed and seek his client's alternative instructions."

8.9. Regarding any mis-selling or misinformation, such has not been substantiated by the Complainant, as a fact that can be levelled against the Respondent, considering the fact that the alleged misinformation or mis-selling was done by the broker and that Complainant entered into the insurance agreement which provided for a life policy. Further Complainant continued to transact with the Respondent, and she knew that the policy was a life cover policy. Respondent has been in constant contact with the Complainant on the policy and that is seen through correspondences between the parties. The active flow of communication is also seen in the annual benefit statements issued to the Complainant from the period 2010 until April 2021. These statements provide in detail the policies held by the Complainant.

9. The Ombudsman finds that in terms of the insurance contract and all correspondences shared between the parties, it is clear that Complainant had taken a life policy, not an investment policy;
10. The Ombudsman further finds that, subsequent to the correspondence and annual statements that were shared between the parties, Complainant ought to have known earlier that the policy was a life policy not an investment policy, thus the Complainant cannot be paid an investment value, considering the fact that the agreement between the parties was a life cover policy, so there is no value of investment, payable to the Complainant;
11. The Ombudsman finds that the Complainant can exercise her rights of terminating the policy in terms of the insurance agreement, following her allegation that she is now unable to service the premiums;
12. The Ombudsman further finds that there is no sufficient evidence advanced by the Complainant regarding the mis-selling or misinformation of the product;

THE ORDER

13. The complaint is not upheld;
14. There is no order made to the Respondent.

THUS, DONE AT MBABANE ON AND CERTIFIED A TRUE AND CORRECT DETERMINATION OF THE OMBUDSMAN OF FINANCIAL SERVICES IN TERMS OF SECTION 75(5) OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT OF 2010.

THE OMBUDSMAN OF FINANCIAL SERVICES