THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: FAB21/2024

In the matter between:

FUTURUM FINANCIAL GROUP (PTY) LTD	APPLICANT
and	
CHRISTOPHER **MARK** SHADWELL	FIRST RESPONDENT
OMBUD FOR FINANCIAL SERVICES PROVIDERS	SECOND RESPONDENT

Tribunal Members: Judge LTC Harms (Chair) and Judge FD Kgomo (Member)

Date of Decision: 7 November 2024

SUMMARY: Application for reconsideration in terms of section 230 of the Financial Sector Regulation Act, No 9 of 2017 - locus standi of heir as complainant under the FAIS Act – causal connection between the cancellation of a Life Cover Policy and the FSP and FSR.

DECISION

1 The Applicant, Futurum Financial Group (Pty) Ltd, an authorised financial services provider (FSP), applies for the reconsideration of a decision of the Ombud for Financial Services Providers of 4 April 2024 ordering it to pay the first respondent, Mr Shadwell (“the Complainant”), R800 000.00 damages as

defined in sec 1 (s.v. “complaint”) of the Financial Advisory and Intermediary Services Act 37 of 2002, plus interest.

2 This application is under sec 230(1) of the Financial Sector Regulation Act 9 of 2017. The parties waived their right to a formal hearing and this decision is based on the record and the submissions filed. The order of the Ombud was suspended in terms of sec 231.

3 For background we will rely on the Ombud’s exposition: The Office initially received a complaint from the Complainant on 31 May 2022. At that stage, the Office was of the view that the matter should be referred to the Ombudsman for Long-Term Insurance (OLTl) and closed its file. The applicant lodged an application with OLTI but OLTl requested the Office to reconsider the advisor's actions in the matter. The matter remains open with OLTl pending the finalization of the matter.

4 The Complainant was nominated in the will of his late sister, Dr. Tamryn Kate Shadwell, as only heir and executor. (The Ombud erred when he stated in par 2 of the determination that the Complainant had been the executor in the estate at the stage of the determination, a matter to which I shall revert.)

5 The deceased had a life cover policy with Brightrock, which was incepted on 1 December 2018. Her financial advisor at the time was Mr. Francios Roets. She, also through Roets, concluded four other policies. These were in her personal interest (retirement annuity, sickness, medical aid (Profmed) and gap cover) and not mainly for the benefit of her estate.

6 Although the Ombud stated in par 4 that Roets had been a representative of Futurum, that is also wrong. He was at the time not a representative of Futurum, having joined Futurum only later, namely on 1 July 2019. The Complainant knew on 4 December 2020 that Roets held no mandate, and he then appointed Roets on behalf of the deceased in relation to the other policies.[1]

7 Roets is not a party to these proceedings since he was not cited in a personal capacity and, as will appear later, there is no evidence that Roets as representative of Futurum provided or was obliged to provide any financial services to the deceased in respect of the Brightrock policy.

8 The life cover policy required monthly premiums of R492.33. The premiums were paid until October 2020.

9 During 2020, the deceased experienced psychological challenges. She could not work and failed to pay premiums on policies she had. The Complainant paid some premiums on her behalf but being unaware of this policy did not pay any premiums thereto.

10 She fell in arrears because the Brightrock premiums were not paid for the months November and December 2020. Because of a grace period, she could maintain the policy if she had paid by end December. She did not and the policy lapsed retrospectively to 1 November 2020.

[1] As the Complainant said: [Roets] was very quick to send me a broker reappointment form that [4] December, for the policies I mentioned on the call to him, so he could continue to earn commission from Tamryn on those policies, but did nothing to protect Tamryn's best interests by mentioning the one policy which has always been under his ownership.

11 The Ombud noted that -

> It is a common cause that the deceased fell in arrears with her monthly premium concerning the Brightrock policy, and the issue of the arrear premiums was discussed with her in a telephone conversation with the insurer [Blackrock] on 29 December 2020. It is accepted that the telephone conversation with the deceased confirmed to the insurer that the policy may be terminated. (Underlining added.)

12 It may be added that she also acknowledged that she knew that the premiums were outstanding.

13 On 27 November 2021, the deceased tragically took her own life.

14 While attending to her affairs, the Complainant became aware of her life cover policy with Brightrock and in these proceedings he seeks to hold Fururum liable for his loss as heir, limited to R800 000.00, the maximum which the Ombud could, at the time, award. As mentioned, his alternative claim against Brightrock remains pending before another forum.

LOCUS STANDI

15 Dealing with the question of locus standi raised as a defence by Futurum, the facts are not in contention. Futurum pointed out that, contrary to the provisions of the Administration of Estate Act, the Complainant did not submit a copy of the Will to the Master. There is, therefore, no will registered and accepted at the Office of the Master. No executor exists, the Will has [not] been submitted to the Master, and no Estate bank account exists.

16 The Ombud rejected this objection based primarily on Rule 3 of the Rules on Proceedings of The Office of the Ombud for Financial Services Providers, 2002[2] which states -

> "Where appropriate, a Complainant includes the Complainant's lawful successor in title or the nominated beneficiary of the financial product which is the subject of the relevant complaint."

17 The Ombud, with respect, misinterpreted the rule and misapplied it to the facts. The Complainant is not a legatee and is not the lawful successor in title of the deceased. That is the estate. The Complainant may be entitled to inherit but that right arises after payment of debts, master's fees, taxes etc and confirmation of the estate account.

18 The Complainant was also not a nominated beneficiary of the financial policy. He was simply the ultimate heir. Had he been a nominated beneficiary – a technical term under tax and pension laws – the policy benefit would not have accrued to the estate, which is not the case.

19 The Ombud also held that

> "any payment made in this matter would, in any event, be made to the estate and can only be made once the formal steps of registering the estate and the appointment have been concluded. There is no prejudice suffered by allowing the matter to proceed before registration of the estate has been initiated *or* finalised."

[2] He did not consider the definitions of "complainant" and "client" in sec 1 of the Act.

But that is not what the Ombud ordered – the order states that the Complainant had to be paid.

20 The Complainant, during the proceedings before this Tribunal, filed an appointment certificate appointing him as executor of the estate. Futurum objects because of the long delay and lack of proper explanation but since this Tribunal is obliged to conduct its matters with as little formality and technicality as possible the objection is dismissed.

21 The problem though remains the form of order of the Ombud and since this Tribunal cannot correct the order it is obliged to remit the matter on this ground to the Ombud.

LIABILITY

22 That brings us to the question of liability of Futurum for the loss suffered by the estate because of the non-payment and cancellation of the policy by the deceased. Whether the policy lapsed as between the estate and is a matter for the OLTI and its successor.

23 For present purposes it must be accepted that the deceased decided to cancel the policy knowing that the premiums were outstanding. The Complainant alleged that she was *non compos mentis* at the time but that is not something attributable to Futurum.[3] His speculation about what she knew or understood is irrelevant for purposes of this decision. Once again, how Futurum's action or non-action could causally be connected to her decision to cancel is not understood.

[3] The application to introduce new evidence of her mental state is dismissed because it is irrelevant to the proceedings.

24 That means that the effective cause of the lapse of the policy was the decision to cancel. The motive may have been because of lack of funds but motive is usually legally irrelevant. The Ombud rightly held that Futurum is not "directly" responsible for her decision to cancel the policy but seemingly held that it was "indirectly" responsible.

25 Much of the complaint is directed at the failure of Roets to have informed the *Complainant* of the fact that the deceased was in arrears. This has been summarised in the following terms:

> Futurum failed to bring the imminent lapse of the deceased's policy to the attention of the Complainant even though he alerted the insurer through Roets, her financial advisor/broker, that she was admitted to a private hospital and subsequently in Tara Moross Psychiatric Hospital and knowing fully well that he is managing her affairs, that she was improvident and had therefore assumed payment of several of her policies that Roets was aware of. Therefore, it acted in contravention of sections 15; 16.1(a) and (d), and 16.2(a) of the FAIS Act.
>
> Futurum failed to comply with sections 2 and 17 of the General Code of Conduct. This was caused by Roets's failure to advise the Complainant of the process and procedure available to him.

26 The second ground is an *ex post facto* event unrelated to the loss. In addition, and this applies to the first ground too, the Complainant was not, as far as the policy was concerned, a client of Roets or Futurum and they had no duty towards him in terms of the Act. They never undertook to provide him with a

"financial service", whether in the form of furnishing "advice" or an "intermediary service" (defined in sec 1) in respect of the policy.

27 The Ombud came to a similar conclusion, finding that Futurum or Roets was legally prevented from disclosing any information regarding the deceased's affairs to the Complainant. Apart from general principles and POPIA, sec 3(3) of the Code of Conduct states:

> "A provider may not disclose any confidential information acquired or obtained from a client, or subject to Section 4(1) a product supplier, in regard to such client or supplies, unless the written consent of the client or product supply, as the case may be, has been obtained beforehand or disclosure of the information is required in the public interest or under any law".

28 That links up with the allegation that the Complainant "alerted the insurer through Roets" of his sister's medical condition. Profmed may have had a right to the information but not a life insurer and the Complainant did not ask, nor could he have instructed Roets, to inform Brightrock of the deceased's mental condition.

29 That brings us to the findings of the Ombud underpinning the payment order. Some context is necessary. When writing the policy, Roets (as representative of his former employer) entered the deceased's correct email address, but Brightrock captured it incorrectly. Roets was unaware of that.

30 The premiums were to be paid by debit order against the deceased's bank account, which means that neither Roets, his former employer or Futurum were engaged by the deceased to perform any intermediary service as defined. There

is no duty in the FAIS Act or Code that requires of a representative to ensure that the insured pays premiums. That is a matter between insurer and insured.

31 When the November debit order was dishonoured, Brightrock wrote to Roets on 10 November informing him of the fact and asking for his help in contacting the deceased to bring the policy up to date.

32 Brightrock followed this up with an email to "Dear Tamryn" informing her again of the arrears and stating that the arrears together with the next premium will be debited to her account on 1 December. Nothing in the body of the email is addressed to Roets but on close inspection he is the email addressee. The same applies to an email of 7 December dealing with the dishonouring of the December debit order.

33 Although disputed by Roets, it may be accepted for purposes of this decision that he did not attempt to contact the deceased, and it is common cause that he did not send her any email in consequence.

34 Then followed the cancellation of the policy by agreement as explained earlier.

35 Although, as said, the Ombud accepted that the cancellation of the policy was not caused by Futurum/Roets, he held that that the prior inaction of Roets in response to the Brightrock emails "is highly relevant and must be assessed". This inaction, the Ombud said, constituted a transgression of the Code and his responsibilities as a Financial Service Provider (which, by the way, he is not at all).

36 The Ombud explained:

> The sequence of events describes a distinct pattern of Mr. Roets's total disregard for the importance of the information he was receiving. Section 2 of the General Code of Conduct . . . states -
>
> *"General duty of provider - A provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry".*
>
> Mr. Roets's disregard for the telephone call and the numerous emails he received does not meet the required standard of due skill, care, and diligence. . . Any reasonable broker would have reacted to the emails and taken steps to ensure that Ms. Shadwell was aware of the problem. His actions display a measure of negligence bordering on gross negligence.

37 Accepting that Roets's inaction amounted to gross negligence in the common-law sense, negligence in the air is irrelevant. The main problem is, as mentioned before, that neither Futurum or Roets were engaged or called on to render "financial" services to the deceased at the time. To act on request by Brightrock as a conduit is not rendering a financial service to the deceased.

38 The Ombud next relied on sec 7(4) of the Code which, in general terms, requires a regular review of a policy and, it is said, that he did not do one. Since Roets as representative of Futurum was not rendering ongoing financial services in respect of the product and since the insurer is obliged to provide annual

statements,[4] it is not understood what annual review of the life policy was supposed to attain.

39 Although quoting the provision, the Ombud did not explain how this alleged failure had a causal link between Roets's omission and the cancellation of the policy. The reference to sec 3(2) of the Code, which requires a record of an agreement not to do a review takes the matter no further.

40 The actual ratio of the decision is to be found in this paragraph:

> If Mr. Roets had forwarded the emails to [the deceased], there is a high probability that [the Complainant] would have been alerted to the arrears, paid them and continued to do so until she passed away. The estate would have benefited from the policy payment. Mr Roets's failure directly caused the policy to be cancelled and the Estate to suffer a loss. There is a direct causal connection between Mr. Roets's omission to act on the emails and the loss suffered by the estate.

41 The first sentence is based on a wrong assumption. Because the deceased no longer had any income, the cost of her insurance became prohibitive, and she and the Complainant decided to cancel all her existing policies. As indicated,

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[4] Long Term Insurance Policyholder Protection Rules (PPR) as published under Government Notice 1407 in Government Gazette 41321 of 15 December 2017 and amended by Government Notice 997 in Government Gazette 41928 of 28 September 2018 quoted by the Complainant:

15A.1 If a premium under a policy, other than a fund policy, has not been paid on its due date, the insurer must notify the policyholder of the non-payment within 15 days after the payment was due,
11.3.2 Subject to any specific provision in this rule relating to the timing of the provision of information, an insurer must take reasonable steps to ensure that a policyholder is given appropriate information about a policy in good time so that the policyholder can make an informed decision about the policy prior to inception and throughout the duration of the policy.
11.3.3 In determining what is "in good time", an insurer must consider the importance of the information to the policyholder's decision-making process and the point at which the information may be most useful.

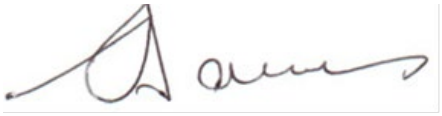
they were of immense benefit to her personally. She knew, although the Complainant did not, of the cancelled Brightrock life policy.

42 Futurum raised the question why the Brightrock policy would have been kept and pointed out that the Complainant had not put forward any argument to substantiate the proposition that the life policy would have been paid until her death. The Ombud failed to consider this and the foundation of the rest of the quoted paragraph falls away.

43 We, accordingly, set the order aside and remit the matter to the Ombud for reconsideration.

ORDER: The determination of the FAIS Ombud is set aside and the matter is remitted for reconsideration.

Signed on behalf of the Tribunal panel on 7 November 2024.



LTC Harms