

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

**CASE NUMBER: FAIS 0091-13/14 G 3**

**In the matter between:-**

**JOHANNES CORNELLIS BOTHMA BESTER**

**Complainant**

**and**

**LOUISE LEE T/A LOUISA LEE FINANSIELE ADVISEURS**

**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. THE PARTIES**

1. Complainant is Johannes Cornelis Bothma Bester, an adult male electrician whose contact details are on file in this office.
2. Respondent is Louise Lee, an adult female and authorised financial services provider who trades under the name and style of Louisa Lee Finansiele Adviseurs, with license number 4425. According to the Registrar's records Respondent's address is 60 Maroelaweg, Brits, Gauteng.
3. Respondent's license was issued on 19 October 2004 and is in force. Respondent is licensed to furnish advice and intermediary services in respect of Short Term Personal and Commercial insurance.

## **B. COMPLAINT**

4. The complaint arises out of the rejection of Complainant's claim by ABSA Insurance Risk Management Services Ltd, T/A AIRMS, hereinafter referred to as (ABSA Insurance).
5. ABSA Insurance, through its underwriting managers, One Commercial Investment Holdings (Pty) Ltd T/A 1Com, hereinafter referred to as (One Commercial) rejected Complainant's claim citing:-
  - (i) Failure to comply with a security requirement; and
  - (ii) Non- disclosure of information relating to the Complainant's credit record. ABSA contended that the credit record was material to their decision to issue the policy
6. In his complaint, Complainant laments Respondent's unprofessional conduct, pointing to the latter's failure to carry out his instructions and advise him. Complainant further questioned how Respondent could properly render financial services to him, when she clearly appeared not to know the very product she had sold.
7. Respondent's failure to give proper advice, resulted in the Complainant's claim being rejected by his insurers, so says Complainant.
8. To add salt to the injury Respondent, instead of taking responsibility for her actions, chose to play the blame game; at one point blaming the insurers, at another, Complainant, depending on who she was interfacing with.

## **C. BACKGROUND INFORMATION**

9. It is necessary to set out a brief background to the present complaint. A substantial part of the complaint is in Afrikaans; what follows is the translated version.

10. As often happens with lay persons, Complainant had initially lodged a complaint with the Ombudsman for Short Term Insurance, ("OSTI"). The complaint was dismissed by OSTI as it could not fault the insurer for rejecting the claim. OSTI instead referred the complaint to this office, for a possible investigation into the conduct of the respondent.
11. The paperwork furnished by Complainant to this office shows that on 31 May 2012, a quote was presented by respondent to Complainant to cover a business. That business is captured on the quote schedule as JCB Trading partnership.
12. Complainant points that the entity recorded by Respondent on the quote schedule is incorrect. He claims to have informed Respondent that the business JCB Trading CC is a close corporation, the sole member of which is Mrs AJ Bester. Complainant says he further furnished Respondent with the correct details of the entity.
13. Authorised by a power of attorney from his wife and sole member of JCB Trading CC, Complainant signed the debit order authorisation and declaration to effect the insurance. The declaration and debit order authorisation appear at the end of the quote with the name JCB Bester Trading partnership.
14. Later in this determination, I deal with the lawfulness of Respondent's conduct in using documents that were clearly meant for one purpose for something entirely different.
15. The declaration contains details of two previous claims.
16. Following signature on the two documents, (debit order authorisation and declaration), Respondent states that she e-mailed Complainant suggesting that the cover for the business be combined with the household contents cover, in a bid to assist Complainant on premiums.
17. The insurance agreement became effective from 31 May 2012.

18. On 21 February 2013 Complainant's house was broken into and goods estimated to the value of R36 234 were stolen. The claim was lodged with ABSA Insurance on 13 March 2013.

19. ABSA Insurance appointed a loss adjuster who prepared a report recommending that the claim be rejected forthwith. Indeed, on 23 April 2013, ABSA Insurance through its underwriting managers, One Commercial, rejected the claim.

20. The basis for the rejection set out in their letter reads:

(i) The policy wording provides that where the household contents exceeds R350 000, the private residence must be protected by a fully operational 24 hour controlled radio alarm linked to a response unit and activated when the residence is unoccupied. The proposal form had noted the household contents as R800 000.

(ii) Adverse credit information in the name of the Complainant, which had not been disclosed to ABSA Insurance at application stage, was uncovered. Further adverse information had been noted against Complainant while the policy was in force, which had not been disclosed. In terms of the agreement, Complainant was required to inform the insurer of any changes in his credit status, as long as the agreement was still in force.

21. On the same day of receiving the letter of rejection Complainant, for the first time, received his insurance schedule. He had in his possession the quote schedule of 31 May 2012, which he believed was the real insurance schedule.

22. As Complainant went through the schedule, he noted material discrepancies between it and the quote schedule. For example, he says he had informed Respondent that although his house has an alarm; it was not linked because they could not afford the service. As for the issue of his credit record, this was the first time complainant heard that it was relevant to the insurance transaction.

Complainant says the issue of his credit record never arose during his interaction with Respondent.

23. Persuaded that there was a mistake as the schedule had noted him as the insured, Complainant wrote to Respondent to enquire about the discrepancies.

24. In Respondent's initial exchanges with Complainant, she appeared to empathise with Complainant and even blamed the insurer. Respondent expressed the view that Complainant's credit record had no relevance to the type of cover he held. Respondent further contended that if the insurers wanted to rely on Complainant's credit history to reject his claim, they ought to have checked that information at application stage, not at claim stage.

25. As for the alarm, Respondent stated she had informed the insurers that the alarm was not linked. She undertook to work on these matters and revert to complainant.

26. After several exchanges with no resolution to his queries, Complainant lodged a complaint with Respondent on 29 April 2013, asking her to explain:-

26.1 Her reasons for deviating from the original instruction of insuring the business, JCB Bester Trading CC without first discussing this with him. In this regard while the quote schedule of 31 May 2012 had JCB Trading partnership as the insured, the policy schedule had complainant as the insured;

26.2 The failure to send him the policy schedule earlier;

26.3 The reason the policy had been re-issued in September 2012;

26.4 Respondent's reasons for misrepresenting to the insurers that Complainant had a linked alarm.

26.5 The relevance of Complainant's credit history to the insurance transaction and the reason this was never brought to his attention; and

26.6 Whether Respondent had taken steps to understand the policy.

27. In the meantime, on 30 April 2013, One Commercial advised Complainant of its intention to cancel his policy on 31 May 2013. The reason furnished was adverse claims experience.

### **Respondent responds to Complainant directly**

28. On 7 May, Respondent responded to Complainant's questions. By this time, it must have been obvious to Respondent that the insurers were not about to relent in their decision. It is at this point that Respondent, with a tincture of condescension, started accusing Complainant of not being frank with her regarding his previous claims. I deal with the essence of Respondent's letter to complainant later in this determination.

29. The parties could not resolve the complaint on their own and so Complainant lodged a complaint with this office.

### **Referral in terms of Rules 6 of the Rules**

30. On 30 May 2013, and in terms of Rule 6 the complaint was referred to the Respondent in order to afford her an opportunity to resolve the complaint with her client.

### **Respondent's responds to this office**

31. The letter to the respondent invites her to demonstrate by way of documents that she had complied with the FAIS Act and the General Code, (the Code) while rendering financial services to Complainant. This is the essence of her response:

31.1 Respondent first averred that on page 8 of 16 of the policy schedule, the 'conditions of the theft cover is comprehensively set out. It is clearly

mentioned that the condition for a theft cover above R350 000, is that a fitted and connected alarm is required.' (copied as is)

- 31.2 The ITC report was not done by her office, but by the office of the assessor. Respondent claim she was not notified of the case and therefore cannot accept responsibility for the action.
- 31.3 The policy of Mr Bester was cancelled due to failure on his part to pay two months' consecutive premiums. He paid the two months' premiums directly into the bank account of the insurer and they graciously reinstated the policy, hence the new schedule in September 2012.
- 31.4 Respondent made no changes to Complainant's debit order, contrary to the allegation by Complainant. She denied lying during the claims process as alleged by the Complainant.
- 31.5 As for to the question regarding the Complainant's credit record, Respondent stated, *'I did not mention the ITC report, because I did not know anything about it. The assessor required evidence and that is why I immediately forward the email to the client.'*
- 31.6 Regarding the instruction to insure the business JCB Bester Trading CC, Respondent, without producing any document, maintained that all negotiations were done by Complainant personally and in writing. Complainant never mentioned prior to the claim that JCB Trading belonged to his wife.
- 31.7 Respondent referred the office to what she termed, complainant's Outsurance previous policy schedule. This was in fact a schedule depicting JCB Bester Trading CC as the insured. Respondent noted that according to the Outsurance schedule Complainant was insured by Momentum but had made no mention of it and the two claims noted therein. He only mentioned Mutual and Federal. According to the Outsurance schedule, there were two claims: a claim for incidental

damage on 27 November 2010 and attempted theft on 11 November 2011.

31.8 Respondent further stated, without providing any document to support her advice:

*'The relevant claims was not explained, which in its own right the claim deserves to be declined. According to his claim (attached), he cannot remember with which company he was previously insured and that he only had a claim during 2006. This implicates him for not telling the truth on his claim form.'*

31.9 Respondent ends her response by stating that if all the allegations made by her client against her are carefully and thoroughly examined, it will be found that she had a reason to reject same. Respondent her letter of response to Complainant dated 7 May 2013.

31.10 But for the two paragraphs, set out here below, the letter to this office in essence contained the same averments as those in the letter mentioned in para 3.9.

31.10.1 When dealing with the issue of the linked alarm, in addition to what appears in paragraph 32.1 Respondent had the following to say, *'You yourself quoted this clause to me per e-mail dated 24 April 2013.'... 'The disclosure to me that the alarm was not linked /activated is not material to the agreement with the insurer as it is a specific condition of cover. So the disclosure of this information serves as an admission of non-compliance.'*

31.11 As to the reason for combining personal insurance with the business, Respondent averred it was to assist complainant with saving on premiums.



## Communication with the One Commercial

32. On 17 February 2014, this office sent an e-mail enquiry to One Commercial, the underwriting managers. The following questions were asked:

- (i) Whether the underwriting managers would have issued the policy had Complainant's credit history been disclosed?
- (ii) Whether the question of forcible entry, on its own, would have helped Complainant?
- (iii) Given that Complainant had clearly answered, 'no' to the question regarding the status of his alarm and his household contents were insured for R800 000, how did the underwriting managers accept the policy?

33. On the same day, One Commercial's Mr Willie Human, (Human) wrote back stating:

- 33.1 When the broker submits their application on their system, a very specific question is asked whether the person, company or any other individual mentioned in the proposal has ever been sequestered or liquidated or have any judgements against them. If the answer to the question had been 'yes', they would not have accepted the application for cover.
- 33.2 With regard to the question concerning the alarm, Human referred to *'the standard policy wording regarding a fully operational 24 hour radio alarm linked to a response unit where the household contents sum insured exceeds R350 000. The sum on the policy was noted as R800 000.'*
- 33.3 Human went on to further state that, where the insured has indicated that there is no alarm, an additional memorandum is noted on the policy which repeats the condition of theft cover already noted in the standard wording. This is to ensure that all parties are aware of

the condition. Theft cover will be excluded however; all other insured perils and extensions will be covered under the policy.

33.4 In closing, Human noted that:-

33.4.1 The proposal is loaded onto their system by the broker and they approve the proposal once all the requested information is completed on the system and no discrepancies are noted:

33.4.2 The policy will be endorsed by a Memorandum when the underwriter wants to extend or restrict cover.

33.4.3 That they do not receive any written proposal and all communication follows directly on the system.

33.4.4 The broker will submit an application; they endorse and approve the application and the broker again accepts the policy.

33.4.5 The accepted policy will then be the final policy schedule.

34. Human further enclosed their comprehensive response to OSTI.

#### **D. INVESTIGATION**

##### **Notice in terms of section 27 (4)**

35. On 18 March, a Notice in terms of section 27 (4) was sent to Respondent inviting her to demonstrate by way of documents how she had complied with section 8 (1) (a) – (c) of the General Code. Respondent was invited to demonstrate by way of information gathered that she had elicited appropriate information that would amongst others, determine the credit worthiness of Complainant.

36. Having established from the insurers that they never get to see the proposal form, but an online application, which must be completed by Respondent, Respondent was invited to deal with the answers she completed on-line. For example, Respondent was invited to explain how she managed to respond to the question dealing with liquidations, sequestration and judgements, given her response, Complainant and this office, that she was not aware of the ITC report.

37. With regard to the minimum security requirements for home contents more than R350 000, Respondent was invited to demonstrate compliance with section section 7 (1) c (vii) of the code.

38. Respondent was further invited to explain her response that Complainant should have been aware of the clause dealing with a linked alarm, as it is clear from the policy document. In this regard, Respondent was reminded of her duty to advise and place her client in a position where he can make informed decisions as required by section 8 (2) of the Code. Respondent's response was due on 1 April 2014.

#### **Respondent responds to the Notice in terms of section 27 (4)**

39. In her response dated 23 March 2014 Respondent failed to address the office on her duties, as set out in the code, when rendering financial services to a client.

40. With regard to the duty to gather appropriate and available information from a client<sup>1</sup>, Respondent simply made the bald assertion that this was done, otherwise drafting the quotation would not have been possible.

41. The credit worthiness of a client is dependent on who receives the premium, states the Respondent. The insurer received the premium directly from the client therefore, *'the onus lies on the insurer as stipulated on all quotations that they reserve the right to do a credit search as per consent clause of the quotation. Creditworthiness is not the onus of the broker in this case.'* (my emphasis)

42. With regard to the online application where Respondent had answered 'no' to the question regarding the creditworthiness of the applicant, Respondent answered that this must have been 'misconstrued'.

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<sup>1</sup> Section 8 (1) (a) of the General Code

43. Respondent further adds that the inherent practical implications in drafting a quotation require the necessary needs analysis. In this regard, Respondent did not hesitate to refer to the quotation supplied on 31 May 2012 and argues that the quotation clearly shows that an alarm is required for content exceeding R350 000 and that this was discussed with the client on the same day. No evidence of this discussion as required by section 3 (2) of the code. She further charged, if Complainant had a problem with the alarm requirement then he was free to either amend the proposal form or refuse the terms. Complainant clearly consented to the terms of the contract by virtue of signing the declaration. This is standard business practice and law. The declarations Respondent is referring to is the one supporting the proposal by JCB Trading partnership.

44. Respondent concluded that, *'If it is proposed that service providers are responsible for the acceptance of contract terms (Non Proxy) the whole judicial system falls flat where no accountability rest on clients no matter the economic sector. As an example, cell-phone clients could therefore hold the service provider accountable when they exceed their limits. The client clearly accepted the terms by signing the proposal and is therefore responsible and accountable by the terms and conditions'*.

## **E. DETERMINATION AND REASONS**

### **Undisputed facts**

45. After an in-depth analysis of the two versions, the following are undisputed and are common cause:

46. Respondent's services were sought so she could advise her client on how to go about securing insurance cover for the business of JCB Bester CC.

47. Respondent made no attempt to gather appropriate and available information regarding her client's financial situation, financial product experience and objectives to enable her to provide the client with appropriate advice<sup>2</sup>.
48. It is also apparent that no effort was made to conduct an analysis for the purpose of advice as required by the code.<sup>3</sup>
49. Respondent made no effort to identify the financial product or products that would be appropriate to the complainant's risk profile and financial needs<sup>4</sup>.
50. It is plain from Respondent's version that she is ignorant of her duties to advise her client.
51. On her own version, Respondent did not know her client, hence the failure to distinguish between a natural person, a partnership and a corporate entity.
52. Quite apart from being irrelevant to the main issue of whether Respondent rendered financial services in line with the Code, her responses were unhelpful and did not detract from her failure to discharge her obligations as a licensed provider.
53. In terms of section 7 (1) (c) (vii) of the code, it was Respondent's duty to provide Complainant with a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction and generally make full and frank disclosures of any information that would reasonably be expected to enable the client to make an informed decision. In particular Respondent had a duty to provide '*concise details of any special terms or conditions, **exclusions of liability, waiting periods, loading, penalties, excesses, restrictions or circumstances in which benefits will not be provided;***' (my emphasis)

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<sup>2</sup> Section 8 (1) (a) of the Code

<sup>3</sup> Section 8 (1) (b) ...

<sup>4</sup> Section 8(1) (c) ...

54. As is apparent from her responses, Respondent with all her twenty four years of experience in the financial services industry, showed no regard for the FAIS Act and the Code.

'It is clear Respondent is relying on the signatures of her client in the proposal form. With respect this will not avail Respondent as the process envisaged in the code is that advice precedes the completion of the proposal forms. It clear that Respondent is struggling to grasp that the enquiry in this forum is concerned with whether the financial service was rendered in line with the Code.

55. As the violations of the FAIS Act and the code are numerous, it would serve no purpose to canvass them all. I set hereunder few examples from Respondent's conduct which must have set Complainant on a collision course with the insurers:

- 55.1 Having provided Complainant with a quotation for JCB Trading partnership, which was not the correct entity in any event, Respondent insured Complainant in his personal capacity, (without communicating this with him).
- 55.2 Without seeking Complainant's consent and without taking the trouble to satisfy herself that Complainant understood what she had done, Respondent used documents that were signed by the Complainant for the purpose of insuring the business for Complainant's personal insurance. These were the debit order authorisation and declaration.
- 55.3 It is worth devoting some time to this issue. The intention evidenced from the first documents; the quote schedule, debit order authorisation and declaration is in line with Complainant's version that he had instructed Respondent to cover the business of JCB Trading CC. Respondent does not dispute this. Instead of carrying out this instruction, Respondent simply insured Complainant in his personal capacity. Whatever the justification s for this deviation, Respondent had a duty in terms of section 8 (2) of the Code to take steps to ensure that Complainant understood what she was doing.

55.4 It is plain from Respondent's version that she does not distinguish between an individual, partnership and a corporate entity. She claims to have combined insurance cover for the business with Complainant's individual cover. In reality however, the business had not been covered at all.

55.5 The same incompetence is demonstrated when Respondent later introduced the Outsurance schedule of JCB Bester Trading CC and accused Complainant of not disclosing his previous claims. Respondent fails to appreciate that is her failure to abide by the code in rendering financial services that saw Complainant's claim rejected by the insurers.

56. I noted from One Commercial's response to this office that due to the fact that this was a housebreaking and theft claim, they confirmed that they would have in any event, conducted the ITC check on all the occupants of the house and that it does not matter who was insured. Respondent tries to make the same point in her response of to the section 27 (4) notice to this office. With respect, Respondent completely fails to grasp the issue that had she known her client and elicited appropriate and available information prior to advising, she would have elicited relevant information to Complainant's credit status. This exercise had to be carried out regardless of whether she was advising the corporate entity or the individual.

57. It was this flagrant disregard for the law coupled with the surreptitious manner in which Respondent used the two documents meant for the business insurance for complainant's personal insurance.

58. In completing the on-line proposal form Respondent answered the material question relating to the alarm incorrectly. Having been instructed that the alarm in Complainant's house was not linked, Respondent answered that it was. See in this regard respondent's letter to One Commercial's Paulus Kruger of 24 April 2013:

*'The client did mention at the initial interview that the alarm was not fitted and that is why I answered "NO" on the application form.'*

59. Contrast this with Respondent's response to Complainant dated 7 May 2013:

*'You yourself quoted this clause to me per e-mail dated 24 April 2013.'  
'The disclosure to me that the alarm was not linked /activated is not material to the agreement with the insurer as it is a specific condition of cover. So the disclosure of this information serves as an admission of non-compliance.'*

60. This is unethical conduct.

61. Respondent misdirected herself in answering the question relating to sequestration, liquidations and judgements. She answered in the negative without first eliciting information from Complainant.

62. While it is apparent that Respondent failed to advise Complainant, she economical with the truth when responding to Complainant. See in this regard Respondent's e-mail correspondence to the Complainant of 26 April 2013,

*"In my opinion, we should focus on why the claim has been rejected, namely your ITC record. My personal feeling is that it has nothing to do with the risk that you are insured for. According to my view point: if any company accepts the records of an ITC report for grounds to reject a claim, the ITC record should be drawn before they accept the risk of the client. As far as I am concerned, that is the crux of our problem here and that is what we should address.*

*I am busy doing follow up work in this regard.*

*Louise. "*

63. When asked to answer about how she answered on-line question regarding sequestrations and liquidations, Respondent, simply said this must have been misconstrued but failed to explain by whom and what exactly had been misconstrued in her plain answer to the question.



64. Taking both versions into account, Respondent failed to conduct herself in line with the provisions of the FAIS Act and the code. All that remains is determination of quantum.

#### **F. CAUSATION**

65. One Commercial rejected complainant's claim for the reasons set out in paragraph 5. Respondent's responses lead logically to the conclusion that she caused the loss by failing to comply with the Code.

#### **G. QUANTUM**

66. Guided by the loss adjustor's report which adjusted the claim to R 28 786, but for respondent's conduct, the insurer would have paid complainant R28 786. This is the amount this office is prepared to allow as a fair and reasonable award for his loss.

#### **K. ORDER**

67. In the premises, the following order is made:

- (i) The complaint is upheld;
- (ii) Respondent is hereby ordered to pay to complainant the amount of R28 786
- (iii) Interest at the rate of 9 %, per annum, seven (7) days from date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 30 OCTOBER OF 2015



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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**