

**OUR REFERENCE: FAIS 05474/14-15/ MP 3**

**4 December 2017**

**Attention: Mr Christo Jonker**  
**Forum SA Trading 325 (PTY) Ltd**

**Per e-mail: christo@fsa325.co.za**

Dear Mr Jonker

**Mrs Karen Mandie Van der Merwe obo Brother Roadside Assist v Forum SA Trading 325 (PTY) Ltd & Christo Jonker– RECOMMENDATION IN TERMS OF SECTION 27 (5) (C) OF THE FAIS ACT, (ACT 37 OF 2002)**

**A. THE PARTIES**

1. Complainant is Mrs Karen Mandie Van der Merwe who trades as a sole proprietor under the name and style Brother Roadside Assist. Complainant's full details are on file in this Office.
2. First respondent is Forum SA Trading 325 (PTY) Ltd, a private company duly incorporated in terms of South African law, with registration number (2003/016867/07). First respondent is an authorised financial services provider (FSP) (licence number 17660) with its principal place of business noted in the Regulator's records as No. 20 Dirk Van Der Berg Street, Modimolle, 0510.
3. Second respondent is Christo Jonker, an adult male, an authorised representative and key individual of first respondent. Second respondent's address is the same as that of first respondent.
4. At all times material hereto, complainant dealt with second respondent who rendered financial services to her. In this recommendation, I refer to first and second respondents collectively as respondent. Where necessary, I specify which respondent is being referred to.

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Fairness in Financial Services: Pro Bono Publico

## **B. THE COMPLAINT**

5. During July 2011, complainant requested a quotation from respondent for a newly purchased vehicle, a Nissan UD 401 Rollback (Nissan Rollback), with a retail value of R450 000. On 16 August 2011 complainant sent an e-mail requesting that the vehicle be added to her existing policy with respondent.
6. Complainant had confirmed that the vehicle with registration number BM18NRGP had been fitted with a tracking device and had supplied respondent with the Skytrax installation certificate as confirmation.
7. On 10 May 2014 the Nissan Rollback was stolen, and a claim was duly submitted with the insurer Constantia Insurance Company Limited ('Constantia Insurance'). The claim was handled by Constantia Underwriting Agency (Pty) Ltd t/a Hurriclaim, who informed complainant that they were unable to entertain the claim as the vehicle was not fitted with an early warning tracking unit which was a policy requirement for vehicles with a value in excess of R350 000.
8. Hurriclaim in rejecting the claim, referred to the 'Vehicle Security Requirements' endorsement under the Motor Section of the policy wording which states:

*"The insured warrants that all vehicles insured by this section will be fitted with an early warning tracking unit and which unit shall remain linked to a professional tracking company"*
9. Complainant was upset with the decision as respondent had been in possession of the vehicle security certificate from Tracker confirming the installation of the Skytrax system, yet she had never been advised that the device did not comply with the minimum security requirements.
10. Complainant wants to be compensated in full for the damage suffered as a result of respondent's negligence.

### **C. RESPONDENT'S VERSION**

11. Respondent's reply was received on 18 June 2015 following this Office's Rule 6 (b) letter of 9 June 2015.

The salient features of respondent's response appear in the paragraphs immediately here below:

- 11.1. Complainant had already been in possession of a policy with Auto Trade Underwriters (PTY) Ltd, who administer the policy on behalf of Constantia Insurance, when she met with respondent on 13 May 2011. A 'Brokers Appointment' was then signed which simply placed the existing policy under respondents agency. There is no indication that any revision of the policy was undertaken at this point.
- 11.2. Respondent confirmed that it had been provided with the Skytrax certificates for all the vehicles that had existed on the policy at that time. It must be noted that these certificates complied with the minimum security requirements, as all the vehicles insured at that time were under the value of R350 000, which is the level at which an early warning system is required.
- 11.3. The response confirms that a quotation for the Nissan Rollback was done on 18 July 2011 and that after having received an e-mail confirmation from complainant on 16 August 2011 this vehicle was added to the policy.
- 11.4. Respondent confirms that complainant had installed a Skytrax unit to the vehicle, and that it was provided with the instalment certificate as proof. Despite confirmation to the contrary, provided by Tracker, respondent claims that Skytrax is an early warning system and, as a result, was satisfied that the complainant complied with the minimum security requirements. There is however no documentation that complainant was at any time advised of the requirement of an early warning system for this specific vehicle and the exclusions of cover that would materialise due to non-compliance with this requirement as required by section 7(1)(c) (vii) of the Code.
- 11.5. Respondent then states that after the theft was reported it discovered that the complainant had changed the tracking systems on all the vehicles to a Tom-Tom system, which is more of a fleet management tool, (not too dissimilar, in fact, to the Skytrax system). Respondent claims not to have been advised of this change, and that it was because of this that the claim was unsuccessful and that the claim would have been successful had complainant remained with Skytrax.

12. Documentation provided by Tracker itself has disproved this, and this still does not take away from respondent's duty to have made complainant aware of any and all material terms of the policy along with the consequences of failure to comply with the insurer's requirements.
13. In an attempt to resolve the matter informally, further correspondence dated 24 November 2015, was sent to respondent. This correspondence, which noted this Office's concerns with regards to respondents apparent contravention of sections 2 and 8(1) (c) of the Code, recommended that should respondent be unable to provide either documentation showing compliance with the above mentioned sections of the Code, or a fair and reasonable offer in settlement of the complaint, that the matter would be officially accepted for investigation in accordance with Section 27(4) of the FAIS Act.
14. In response to this correspondence respondent maintained its original position that complainant did not notify it of the change in tracking systems from Skytrax to Tom-Tom, and that complainant had a duty to disclose such material information. Respondent refused to accept responsibility for having failed to appropriately advise the complainant, including its failure to comply with the provisions of section 7 (1)(a) of the Code.

#### **D. INVESTIGATION**

15. On 14 April 2016, this Office sent notice to respondent in terms of section 27 (4) of the FAIS Act, (the Notice) informing respondent that the complaint had not been resolved and that the Office had intention to investigate the matter. The letter reads (omitting for now words not material to the essence):
  - 15.1. *'Your client therefore alleges that you failed in your duty to properly advise her that the insurer requires a particular antitheft device which will meet its standards.'*
  - 15.2. *'In light of the above, we refer you to section 7(1) (a) of the General Code and your duty to make mandatory disclosures to your client that would reasonably be expected to allow your client to make an informed decision'*

15.3. *'The broker made an assumption that because Tracker was facilitating the installation of the unit, the unit was an early warning system.'*

15.4. *'...your advisor acted negligently, and this negligence (and inappropriate advice) has resulted in the loss in question. '*

16. Respondent was invited to revert to this Office with its statement in terms of section 27(4) of the FAIS Act together with all documentation, including any documents in support of its version, and subsequent compliance with the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and Representatives, (the Code).

17. Respondent provided a response to the Section 27(4) Notice on 19 May 2016. The response is summarised below:

17.1. The response conveyed the very same issues previously raised by respondent with the one addition being the claim that an e-mail dated 17 April 2014 was sent to complainant requesting the tracking certificate for the Nissan Rollback. This, respondent claimed, was proof that complainant was well informed of the requirements. This e-mail, a copy of which was provided to this Office, makes no reference to the need for an early warning system, and merely requests the "...afskrifte vir die opspoorstelsel..." (copies of the tracking system).

## **E. ANALYSIS AND RECOMMENDATION**

18. It is important that this Office set out all the issues that are of concern with regard to this complaint. These are:

18.1. It has already been established that respondent, in violation of Section 7 (1) (a), had at no time disclosed to, or made complainant aware of, the requirement that vehicles with a value in excess of R350 000 require a tracking device with an early warning system. Section 7 (1) (a) calls upon providers other than direct marketers to provide *"a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision"*.

- 18.2. Section 7(1)(c)(vii) goes even further in that it requires that FSPs provide '*concise details of any special terms or conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided.*' No documentation has been provided in support of respondent's compliance with this section of the Code.
- 18.3. Respondent further violated the Code in terms of section 8 (1) (a) to (c) and section 2. There is a requirement that an FSP obtain all relevant and available information to ensure that the product ultimately recommended is appropriate to the needs and circumstances of the client. By not making the effort to determine whether the Skytrax system complied with the minimum security requirements of the insurer, respondent missed an opportunity to appropriately advise the complainant that the Skytrax did not meet the requirements of the insurer.
19. Furthermore by not complying with the above mentioned sections of the Code, respondent clearly failed to act with the required due skill care and diligence in the interest of the complainant as provided for in terms of section 2 of the Code.

#### **F. FINDINGS**

20. On the basis of the reasoning set out in this recommendation, respondent's conduct violated the provisions of section 7 (1) (a) of the Code.
21. In addition to this, respondent's conduct violated section 7(1)(c)(vii) of the Code which requires that an FSP must provide "*concise details of any special terms or conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided*".
22. Respondent further violated the Code in terms of section 8 (1) (a) to (c) and section 2.

#### **G. CAUSATION**

23. The question must still be answered whether respondent's failure to comply with the provisions of the Code caused the loss.

24. The actions of respondent amount to a breach of the Code and consequently, a breach of respondent's duty to appropriately advise complainant. See also *J & G Financial Services Assurance Brokers (Pty) Ltd & O v Dr Robert Ludolf Prigge*<sup>1</sup>.

25. There is no doubt that had complainant been made aware that the vehicle required a tracking device with an early warning system that she would have complied. Complainant had demonstrated this by ensuring that all her other vehicles complied with the insurers requirements, and that complainant had attempted to do the same with the Nissan Rollback. Whilst respondent remains oblivious to the question of its conduct which was in violation of the Code, there is no doubt that respondent's actions caused complainant loss.

**H. QUANTUM**

26. This office had received confirmation from the insurer that had the claim been upheld the amount of R355 785 would have been paid. The amount is computed as follows:

• Retail value as at date of loss ( 10.05.14 – M & M code 47050752) –	R205 800
• Extras noted on the policy - Rollback , Load locks and radio -	<u>R168 710</u>
<b>Total:</b>	<b>R374 510</b>
• Less applicable excess as at date of loss – 5% of claim min R2000	R18 725
<b>Total:</b>	<b>R355 785</b>

**I. RECOMMENDATION**

27. The FAIS Ombud recommends that respondent pay complainant's loss in the amount of R355 785.

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<sup>1</sup> J & G Financial Services Assurance Brokers (Pty) Ltd & O v Dr Robert Ludolf Prigge Case No FAB 8/2016 – para 43 to 44

28. Respondent is invited to revert to this Office within TEN (10) working days from date hereof with a response to this recommendation. Failure to respond with cogent reasons will result in a final determination being made in terms of section 28 (1).

29. Interest at the rate of 10.25 % shall be calculated from a date TEN (10) days from date of this recommendation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Alves', is written over a light blue horizontal line.

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**MARC ALVES**  
**TEAM RESOLUTION MANAGER**