

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

CASE NUMBER: FAIS-04766/14-15/ GP 3

In the matter between:

LIZELLE FRANCA BOTHA

Complainant

and

ANNA MATHILDA ACKERMAN

Respondent

**DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY
AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS Act')**

A. INTRODUCTION

[1] This complaint has its roots in an insurance policy which Complainant took out to cover various risks in her business. Respondent was the broker who advised Complainant in procuring the short-term insurance cover. After certain risks materialised, the claim was rejected by the insurer and a dispute arose between the parties.

[2] Complainant referred the matter to the Ombud for short-term insurance who, after considering the matter referred the matter to this office. The basis for the referral

was that the dispute involved the advice given by the broker to client. It is this office that has jurisdiction to deal with the matter.

B. THE PARTIES

[3] Complainant is a businessperson who carries on a small business which involves, *inter alia*, the installation of fibre optic cables and related services. Her address is 190 Roos Street, Meyerspark, Pretoria. She conducted business through a close corporation being Biz Fibres CC with its address at 176 Althea Street Murrifield.

[4] Respondent is a licenced financial services provider (FSP), with FSP number 16899, who conducts business as Duo Brokers. Respondent is the sole proprietor of Duo Brokers.

C. FACTUAL BACKGROUND

[5] Complainant conducts a business, which at the time of this complaint had been established for 10 years. In the certificate of insurance the business is described as "*Installation of Fibre, Networking, Distribution and Maintenance*". The main undertaking of this business was the installation and maintenance of fibre optic cables for clients. The nature of the business required Complainant to call on clients and install and maintain cabling at their premises. The business involved travelling to clients with equipment and stock to do the work. The equipment consisted of electronic and other devices used by Complainant to do the work. The point to be made is that by the very nature of Complainant's business meant that her equipment was not "office bound" but had to be moved from the office to clients'

premises on a regular basis. This meant that the equipment will be at a risk of damage or theft while in transit.

[6] To insure against all risks relating to her business, Complainant approached Respondent to obtain insurance cover. There was already, and at all material times, a broker-client relationship between the parties.

[7] Respondent recommended insurance cover which Complainant accepted. After obtaining cover, Complainant was robbed on her way to a client and all her equipment and personal belongings were taken by three robbers. The incident was reported to the police and a claim was filed against the insurance policy. The insurer rejected the claim and refused to pay any compensation to Complainant.

D. THE MATERIAL UNDISPUTED FACTS

[8] The nature of and the type of Complainant's business is not in dispute. In particular it is common cause that Complainant has to move equipment from her business premises to clients' premises on a daily basis.

[9] The insurance policy was for commercial cover intended to insure the business against the stated risks. A policy was recommended by Respondent and was in effect from the 29th January 2010 to 31st December 2010 and the policy number was CT76077COM. Complainant paid the premiums through a debit order on her bank account with Standard Bank.

[10] On the 8th December 2010 Complainant was on her way to a client when her vehicle had a puncture. She pulled off the road to attend to it when a taxi stopped next to her vehicle. Three men alighted from the taxi and robbed Complainant of her equipment and personal belongings.

[11] The incident was reported to the police and a claim was made on the insurance policy. On the 22nd February 2011 the insurer rejected the claim on the basis that the *“items insured under the electronic equipment section was regularly removed from the premises stated in the policy schedule. Your claim is accordingly hereby rejected”*. In amplification of the rejection the insurer relied on the following policy conditions or exclusions:

“General conditions

1. Misrepresentation, misdescription and non-disclosure

Misrepresentation, misdescription or non-disclosure in any material particular shall render voidable the particular item, section or sub-section of the policy, as the case may be, affected by such misrepresentation, misdescription or non-disclosure;

Electronic equipment section

Defined events c)

Temporarily removed from the insured’s premises to any other location.”

[12] Respondent made various written representations to the underwriters and insurer requesting that the claim be paid. Her pleas fell on deaf ears as the underwriters

insisted that they were not informed that the equipment was regularly removed from the insured's premises.

[13] It is of note that Respondent does not contest the fact that the equipment in question was insured, in terms of the policy, under the "*electronic equipment section*" and not under "*the all-risk section*".

[14] Equally of importance is the fact that Respondent does not dispute having recommended the policy and having informed Complainant that her business was adequately covered.

E. THE ISSUE

[15] The insurer rejected the claim due to the fact that the equipment in question should have been insured under the "*all risk section*" of the policy. This was due to the fact that the equipment was regularly removed from the business premises. The insurer pointed out that they were not informed that the equipment was moved out of the premises regularly and in the ordinary course of the Complainant's business. Had this information been given to them, they would not have agreed to insure the equipment under the "*electronic equipment section*". The risk in the equipment was much higher once they were regularly removed from secured premises and transported and used on site at client premises. Accordingly the premium charged would have been substantially more than the amount quoted Complainant. Indeed the underwriters even suggested that they may have rejected the application for cover due to the high risk.

[16] Respondent agrees that Complainant, personally, made no material misrepresentation or non-disclosure when procuring insurance cover for her business. Nor does Respondent dispute having the necessary knowledge of the nature of Complainant's business.

[17] Two issues resulted in rejection of the Complainant's claim:

- a) The underwriters were not informed that the equipment was regularly removed from secure premises; and
- b) The equipment was insured under the wrong or inappropriate section of the policy, namely "*the electronics section*" when cover should have been requested under the "*all risks section*".

[18] The issue is whether or not this oversight can be attributed to the rendering of advice by the broker. I note that the underwriters and insurers claim that the problem is with the broker and not themselves, an allegation which Respondent disputes.

F. RESPONDENTS RESPONSE

[19] Respondent was given an opportunity to respond to the complaint in terms of section 27 (4) of the Act. In a letter dated 10th March 2015, this office set out the issues and requested a response from Respondent. The questions directed to Respondent were as follows:

- “1. We confirm that a client-and-broker relationship was established between yourself and the complainant;*
- 2. It is also confirmed that the main type of business which was conducted was to produce and to maintain Optic Fibre Cables;*
- 3. The issue arose after the complainant had suffered loss as a result of the complainant’s claim, reference number CT70677COMM/1 had been repudiated by Frontline Underwriters (Pty) Ltd (“Frontline”). The reason for the repudiation was attributed to the following policy condition and/or exclusion: Misrepresentation, misdescription or non-disclosure (General Conditions)and under the Electronic Equipment they referred to defined events namely temporarily removed from the insured’s premises to any other location.*
- 4. The essence of this matter is that Frontline claims never to have been informed that the insured equipment would be removed on a regular basis from the insured premises. Section 8 (1) (a) – (c) of the General Code of Conduct for Authorised Financial Services Providers and Representatives (“Code”) provides that a Financial Services Provider (“FSP”), such as yourself obtain all relevant and available information to ensure that after an analysis has been completed that a recommendation can be made that is appropriate to the client’s needs.*

The nature of the complainant’s work was known to you, and yet it would appear as though no provision had been made to ensure that the complainant’s electronic equipment was adequately provided for;

5. *Furthermore section 2 of the Code provides that a provider must at all times render financial services honestly, fairly, with due skill care and diligence, and in the interests of the client and integrity of the financial services industry. This entails that you have a duty to know what the requirements are of the various underwriters and providers that you market to the public, and ensure that clients such as the complainant comply with the relevant disclosures that would have ensured a successful claim;*
6. *The taking over of ones book by another administrator, insurer or underwriter, represents a replacement of insurance, and it is the duty of the broker in terms of section 8(1)(d)of the code to fully disclose to the client the actual and potential financial implications, including, where applicable, full details of special terms and conditions, exclusions of liability, restrictions or circumstances in which benefits will not be provided;”*

This letter adequately addresses the issues before this office and called for a response from the respondent.

[20] On the 24th March 2015 Respondent responded in a letter and pertinently responded to each of the above questions. Respondent also supported her submissions with documentation. I also point out that before the 24th March 2015, Respondent had forwarded to this office comprehensive documentation which included the following:

- All correspondence, being emails, between the parties and between the respondent and the underwriters;

- All policy documents, including the schedules to the policy; and
- All file documents in Complainant's file, including the record of advice and analysis.

I have read and considered all these documents.

[21] I now deal with Respondents response to the questions in issue:

a) Ad question 1

Respondent admits that at all material times a client-broker relationship had been established between the parties.

b) Ad question 2

Respondent admits the description of and undertaking in Complainant's business. However Respondent contends that this matter is open to interpretation and points out that Complainant did not at any time inform her that the insured equipment was removed from the office on a regular basis to be used at client premises. In this regard Respondent also refers to correspondence from the underwriters.

c) Ad questions 3 and 4

Respondent claims that at no time did Complainant state that the equipment will be removed from the insured premises on a daily basis. A survey was carried out of the insured premises on the basis that the equipment will be kept and used inside the secured premises.

Respondent points out that she prepared the schedules in respect of the cover and together with the policy wording and posted same to Complainant. The

latter had seven days within which to report any errors. There were no questions over the cover provided in the policy.

Even after receiving the documents, Complainant still failed to inform Respondent that the equipment was going to be removed from the premises for use in the business. Respondent states that as a broker, Complainant failed to inform her as to how the equipment was used and where it was intended for use.

Respondent further submits that Complainant had been in business for 10 years and cannot claim to be unsophisticated and uninformed. According to Respondent, the “essence” of the problem was Complainant’s failure to make a full disclosure of the facts to Respondent.

Respondent concludes this paragraph by denying that she contravened the code and that she failed to act in the interests of her client. She states that in fact the equipment was covered correctly under the electronics section.

d) Ad question 5

Respondent points out that, to the best of her knowledge, she procured the best product for her client. She states that no less than 4 people discussed the matter with client and where there was doubt, guidance was sought from the underwriters. The latter (Lleader/Innovation) confirmed that the cover was appropriate.

Respondent concludes this paragraph by again pointing out that had Complainant made the disclosure of exactly how the equipment was to be used, the claim would have been paid.

e) Ad question 6

Here Respondent points out that her book was not transferred from one underwriter to another. Accordingly this did not fall under change of policy as contemplated in section 8 (1) (d) of the Act.

f) Miscellaneous submissions

Respondent concluded her letter by making the following final submissions:

- She denied acting negligently or unlawfully in advising her client;
- Complainant cannot be favoured only on the basis that cover was provided under the wrong section. This point is supported by the submission that Complainant failed to disclose all the facts.
- Respondent points out that the Ombud for short-term insurance found no fault in her advice to Complainant and in fact found fault in the conduct of the underwriters.
- Respondent submits that she cannot be held liable for the errors made by the underwriters.
- Finally a submission is made that the insurer had “other problems” with the claim; there is a suggestion that the claim was false and Complainant was not honest in requesting cover and in making a claim.

G. FINDINGS

[22] I now deal with Respondent’s submissions and her plea that the complaint be dismissed. The findings below will be dealt with according to the questions and answers as stated above. Where necessary, I will refer to the available documentation.

H. NON-DISCLOSURE

[23] One of the principal points relied on by Respondent is that Complainant failed to disclose the fact that the equipment was removed from the insured premises in the course of the latter's business. Respondent also blames Complainant for not pointing out that the equipment was covered in the wrong section of the policy i.e. under "electronic equipment" when it should be under the "all risks" section. I consider the following to be decisive with regard to this issue:

- a) On Respondent's own version she consulted the underwriters. What in fact happened is that Respondent submitted the schedules to the previous policy to the underwriters for purposes of obtaining a quote. In the previous policy the same equipment was covered under the "electronic equipment" section. The underwriters did not raise any concerns and gave a quote accordingly. Respondent also submitted that even if the equipment was listed under "all risks" it would have made no difference to the policy and to the cover Complainant required.
- b) It is obvious that the underwriters gave a quote based on an existing policy or according to the schedules as presented by the broker. They had no reason to query the section under which the equipment was covered. It is certainly not in dispute that Respondent did not tell the underwriters that the equipment was to be moved from secure premises on a daily basis. Respondent then attempts to avoid the consequence of this omission by stating that even if the correct

section (all risks) was stipulated, it would have made no difference to the cover, or the premiums, Complainant wanted.

This submission must be rejected.

Respondent is contradicted by the underwriters who point out that the appropriate section was "all risks", based on the fact that the equipment was to be moved from secured premises. They also state that the risk, in moving the equipment, is substantially greater and a much higher premium would have been quoted, if they were willing to provide cover in the first place. Underwriters do not communicate directly with members of the public; they obtain information, when assessing risk, from the approved brokers. Complainant had no scope for giving the underwriters information directly in obtaining a quote.

On the facts before me, it is clear that when the underwriters made an assessment of the proposal in respect of this policy, they were not told by Respondent about the movement of the equipment and made a quotation and acceptance of risk in good faith and on the information received from Respondent. In this regard I cannot fault the underwriters.

In fact Respondent presents no evidence that she informed the underwriters of the nature of Complainant's business and in particular that the equipment is moved from the premises on a daily basis.

- c) The question then remains; to what extent can Respondent be held responsible for the non-disclosure regarding the use and movement of the equipment.

The immediate answer from Respondent is to blame Complainant for not making a full disclosure of the facts to Respondent. In this regard I make the following findings:

- On being licenced by the Financial Services Board, Respondent conveyed to members of the public that she was competent to give advice and had the appropriate systems and operational ability in place to provide advice on short-term insurance;
- Section 16 of the Act provides as follows:

“A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions, that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied and that for those purposes authorised financial services providers, and their representatives, are obliged by the provisions of such code to -

- (a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;*
- (b) have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities;*

(c) seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;(emphasis added)

Indeed the above is reflected in the Code.

- Section 7 of the code provides that at the earliest possibility provide full and appropriate information. Section 7 (1)(c)(vii) states:

“(c) in particular, at the earliest reasonable opportunity, provide, where applicable, full and appropriate information of the following:

(vii) 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;” (emphasis added).

- Section 8, dealing with the furnishing of advice provides as follows:

“(1) A provider other than a direct marketer, must, prior to providing a client with advice-

(a) take reasonable steps to seek from the client appropriate and available information regarding the client’s financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;

(b) conduct an analysis, for purposes of the advice, based on the information obtained;

(c) identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangement;"

- Section 8 (2) is important and provides as follows:

"(2)The provider must take reasonable steps to ensure that the client understands the advice and that the client is in a position to make an informed decision."

[24] What the Act and Code require is for an FSP to actively obtain the available facts in order to provide client with appropriate advice. The FSP cannot passively rely only on the client to provide the necessary information. It is not in dispute that Complainant did disclose the nature of her business to Respondent, as it is accurately described in the certificate of insurance. On Respondent's own version a survey of the premises was also undertaken by them. Nor was this a new first time application for cover. Respondent had previously obtained cover for Complainant and was familiar with the business. In correspondence Respondent openly admits that it was obvious that equipment will be in transit on a daily basis, bearing in mind the nature of Complainant's business.

[25] Nevertheless there was a duty on Respondent to obtain all relevant and available information regarding the nature of Complainant's business. It is not in dispute that the nature of Complainants business involves leaving the premises to call on

clients for the purpose of installing and maintaining fibre optic cables and networks. It does not require genius to work out that Complainant works outside the secured offices and will transport stock and equipment to clients and back to the office. Upon a competent assessment of the risks, Respondent should have conveyed this fact to the underwriters. She failed to do so.

- [26] It is Respondent who is familiar with their provider's product. Respondent must know that where equipment is moved away from the secured insured premises, then the cover must be under the "all risk" section. Client must then be informed of this and the consequences in so far as it relates to risk and the premiums charged. One cannot attribute such knowledge to a client. If complainant was aware of this, there was no need to engage an FSP. Complainant reasonably relied on the advice of Respondent; it was for respondent to ensure that cover was obtained under the correct section of the policy and according to Complainant's needs.
- [27] Respondent's version that the equipment was covered in the correct section of the policy is disputed by the underwriters and cannot be sustained on the undisputed facts before me.
- [28] On the probabilities, it made no sense for Complainant to obtain cover only for equipment that remained in the insured premises. Respondent had to be aware of this and was under a duty to give appropriate advice.

[29] The failure of the claim, it is undisputed, was due to the equipment being insured under the incorrect section of the policy. The insurer also relied on the nondisclosure of the movement and use of the equipment. This cannot be attributed to Complainant. I find that Respondent acted negligently and in breach of the above mentioned sections of the code.

I. FAILURE TO OBJECT

[30] Respondent's version is that the schedules as well as the terms of the policy were sent to Complainant for the latter's approval. Complainant did not complain about the policy and accepted the terms thereof. This cannot absolve Respondent. Complainant required the services of an FSP and even if Complainant had some knowledge of short term insurance; one cannot attribute to her the expert knowledge possessed by an FSP. There is a duty on an FSP to actively give appropriate advice and not to merely rely on the passive conduct of the client in not making any objections or complaints. Respondent did not act in the interests of the client and is in breach of the Code.

J. CHANGE OF POLICY

[31] Here I agree with Respondent that this matter does not fall within the provisions of section 8 (1) (d) of the Code.

K. OMBUD FOR SHORT-TERM INSURANCE

[32] Respondent refers to a letter from the Ombud for Short-term Insurance, (OSTI) which states that they did not find that Respondent did anything wrong and

suggested the blame might lie with the underwriters. I read this letter and it appears to be nothing more than an expression of a *prima facie* view as no reasons for this conclusion was given. I am not bound by the contents of this letter and it is of no assistance to Respondent.

L. DISHONEST CLAIM

[33] Respondent suggested that Complainant's claim was suspect. This emanates from an assessors report. In fact Respondent went so far as to state that Complainant "was lucky not to be charged with fraud". I read the assessors report and the suspicion came from the fact that Complainant could not provide proof that her vehicle had a puncture and that it was repaired. Complainant had a credible explanation for this and the assessor did not recommend that the claim be rejected on the basis that the robbery was staged or that the claim was fraudulent. In any event Complainant's vehicle's tracker report was obtained and it corroborated Complainant's movements on the day of the robbery. In fact the assessor recommended that the insurer should consider making a payment to Complainant. There is no conclusive proof that there was any form of dishonesty on the part of Complainant. This was mere speculation and Respondent is just being opportunistic in trying to make something of this. I reject the submission that Complainant possibly committed fraud.

M. CONCLUSION

[34] On the facts before me, I find that Respondent in giving advice was in breach of the Act and Code as set out above. I find further that Respondent's conduct resulted in Complainant's claim being rejected and she thereby suffered loss of the indemnity she expected from her insurer. Respondent is therefore liable to indemnify Complainant.

N. THE QUANTUM

[35] In filing her claim, Complainant gave a description of what was lost in the robbery. She also gave a valuation of the equipment that was lost. She also lost a quantity of cash and her personal belongings.

[36] An assessor was appointed by the insurer, Mr P Van Westing. I received his report which investigated the lost equipment and the replacement value thereof. Under the "electronic equipment section" Complainant's loss was estimated at R202 502 - 54 and a recommendation was made that such amount be paid.

[37] The loss under "specified all risks section", which was for a Nikon camera, was estimated at R 8 549 – 10.

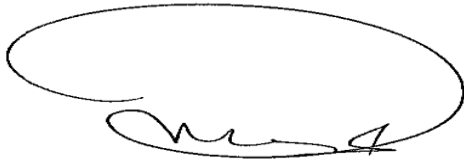
[38] Accordingly the amount to be paid to Complainant is R211 051.64.

O. THE ORDER

[39] Accordingly the following order is made:

1. The complaint is upheld;
2. Respondent is ordered to pay to complainant the amount of R211 051 – 64;
3. Interest on the said amount at 9% per annum from a date 7 (SEVEN) days from date hereof to date of payment.

DATED AT PRETORIA THIS THE 8th DAY OF DECEMBER 2015.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS