

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 04366/18-19/ KZN 3

In the matter between

Vemilla Govender

First Complainant

Candis Govender

Second Complainant

and

AIK INSURANCE BROKERS (PTY) LTD

First Respondent

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

A. THE PARTIES

[1] First complainant is Mrs Vemilla Govender, an adult female whose full particulars are on file with this Office. The second complainant is Ms Candis Govender, an adult female whose full particulars are on file with this Office. The first and second complainants are mother and daughter and the second complainant has *locus standi* as a complainant because she was the premium payer for the policy in question.

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Fairness in Financial Services: Pro Bono Publico

- [2] The respondent is AIK Insurance Brokers CC a close corporation duly incorporated in terms of South African law, with registration number 2007/039643/23. The first respondent is an authorised financial services provider (FSP) (licence number 31119) with its principal place of business noted in the Regulator's records as 171 Alpine Road, Springfield, Durban. The licence has been active since 11 September 2007.
- [3] In December 2017, the first complainant applied for a contract of insurance to insure a 1998 BMW 316. The complainant was assisted by a broker employed by the respondent, Pinky John who responded, on behalf of the first complainant, to the questions asked by the insurer during the underwriting process.
- [4] One of the questions asked by the insurer was who the regular driver of the vehicle was. In response, the broker informed the sales agent that the first's complainant's son, Mr Damelin Ruthman (Mr Ruthman) was the regular driver. The broker was also asked if Mr Ruthman was licensed to drive, what the license code was and when the license was first issued. The broker advised that Mr Ruthman is licensed to drive, holds a Code 10 or C1 driving licence and though she was initially unable to confirm when the first date of issue was, the broker later advised that the license was issued when Mr Ruthman was 20 years old. At the time of the application, Mr Ruthman was 24 years old.
- [5] On the basis of the information received from the broker, the insurer advised that the premium payable on a comprehensive vehicle insurance policy would be R1 689.63. The broker remarked that the quotation was expensive and the sales representative indicated that the factors which had the most impact on the premium were the fact that Mr Ruthman had no history of insurance and had a C1 driver's license. The broker asked how the premium would change if Mr Ruthman had an EB driver's license and the sales representative advised that the premium will be cheaper.

[6] The broker asked that the details of the driver's license be changed from C1 to EB even though she indicated that she did not know if Mr Ruthman in fact has a C1 driver's license. The premium however did not change much and the broker asked if the premium will be cheaper if the policy is issued in the first complainant's name. Although the broker could not say with any certainty how old the first complainant was when she applied for the license, she informed the insurer that the first complainant obtained the license when she was 34 years old. Because of the broker's uncertainty, the sales representative asked if they should keep the response as is and if the broker would later confirm this. The broker responded 'ja, just leave it'. The insurer advised the broker that 'its very important that you update this right' and the broker responded 'okay'. The details were however never updated.

[7] After changing the details of the regular driver from Mr Ruthman to the first complainant, the insurer recalculated the premium and the premium decreased to R672.90. The broker accepted the cover, with the decreased premium, on the complainant's behalf. The policy incepted on 21 December 2017.

[8] On 20 February 2018, the second complainant contacted the insurer to report an accident that occurred involving the insured vehicle and to lodge a claim. The second complainant reported that the accident occurred on 19 February 2018 at approximately 21:00 in Chatsworth, Kwazulu-Natal. The second complainant reported that at the time of the accident, the vehicle was being driven by a family friend, a Mr Denzel Govender (Mr Govender) to refuel the vehicle at a petrol station down the road [from the first complainant's home]. According to the second complainant, a pedestrian who was carrying a child ran across the road and Mr Govender swerved the vehicle to try avoid hitting the pedestrian and the child. The second complainant states that the vehicle

collided with a vehicle that was travelling in the opposite direction and that the vehicle the driver collided with was a marked police vehicle. At the time of the accident, the second complainant's husband was also in the car.

[9] After the accident was reported and the claim lodged, the insurer appointed an investigator to validate the claim. The insurer states that the validation process entails the confirmation of information supplied during the underwriting and claim stage 'as well as to confirm whether the claim submitted would fall within the ambit of cover'. During the investigation, the insurer learnt that the first complainant was not licensed to drive and that she did not know how to drive. The insurer concluded that if the correct information had been provided to it during the underwriting process that the application for cover would not have been accepted and rejected the claim on the basis of material misrepresentation. The insurer also voided the policy from inception and refunded the complainants the premiums it had collected from inception of the policy.

[10] The insurer presented the findings to the first complainant during an interview with the first complainant. The insurer informed the first complainant that it had perused the initial sales conversation to determine the discussion points surrounding her being noted as the regular driver and the driver's license. According to the insurer, the first complainant confirmed during this interview '*that she does not and cannot drive, firstly she is too ill and secondly, she doesn't know how to drive*'.

[11] On receipt of the insurer's decision to the claim, the complainants lodged a complaint with the Ombudsman for Short Term Insurance (OSTI). In its investigation of the complaint, the OSTI was provided with a copy of the recording of the sale and having considered same, upheld the insurer's decision to reject the claim on a preliminary basis. The OSTI found that the first complainant's broker misrepresented that the first complainant 'was in

possession of a valid driver's license, which induced the insurer into contracting with the insured where it would not have done so had the insured's broker disclosed the correct information'.

[12] The OSTI also advised the first complainant that she may have recourse against the respondent and should she wish to pursue the matter further, this Office would be the correct forum for such a complaint. The first complainant was however also advised that if she wished to submit additional facts for the OSTI to consider, that she may do so within 14 days from date of receipt of the OSTI's preliminary decision. The first complainant did not submit any additional facts and on 16 October 2018, the second complainant submitted the completed and signed Complaints Registration Form to this Office.

[13] In the complaint, the complainants confirm that the first complainant was never licensed to drive, did not know how to drive and that the driver at the time of the incident was the regular driver of the vehicle. The complainants claim that the broker was instructed to apply for an open driver policy and was never instructed to add the first complainant as the regular driver of the vehicle. The complainants state that after the accident, the vehicle was towed and kept in storage. The complainants state that the towing company charged R11 000 for the towing and storage. It appears that the vehicle was subsequently sold to SMD who paid only R3 000 leaving the complainants with a R8 000 bill owed to the towing company. The second complainant states in the complaint that she is the sole breadwinner for her family and could not afford to pay the R8 000. She also states that she *'cannot get a lawyer as I cannot afford to that's why I came to you for help'*.

B. RESPONDENT'S VERSION

[14] On receipt of the complaint, this Office forwarded same to the respondent in accordance with the Rules on Proceedings of the Office of the Ombud for Financial Services Providers

(the Rules) under cover of a letter dated 14 November 2018. The respondent was advised that the complaint was being sent to it in accordance with Rule 6(c) of the Rules and was informed that it could either resolve the complaint with the complainants or respond to the allegations levelled against in the complaint. The respondent was advised that in the event it elected not to resolve the complaint with the complainant that it would have to submit the required documentary evidence to support such response.

[15] No response was received from the respondent until a recommendation letter was sent to it by this Office on 18 March 2019. In the recommendation letter, the respondent was advised that despite requests that it furnish this Office with its records in terms of section 9 and 3(2) of the General Code of Conduct for Authorised Financial Services Providers (General Code) that the records had still not been sent to the Office.

[16] The respondent was advised that:

'We have not yet heard from you about these, as a result, we are unable to establish or evaluate what the complainant had been told prior to making the decision to conclude the agreement with the insurer at inception stage. The lack of a record of advice means I have no way of evaluating the advice and the material disclosures that should have been made about the policy. This does not assist you with meeting the requirements of the General Code nor does it demonstrate that you acted in the client's interest when rendering the financial service. Furthermore, one can therefore only conclude that the client was not placed in a position in which he was able to make an informed decision.'

[17] On 12 April 2019 this Office received its first response to the complaint since the first letter, which was sent to the respondent in November 2018. Since the letter of 18 November 2018, this Office had on 26 February 2019 also sent a request for a copy of the sale and

underwriting calls and the above-mentioned recommendation letter was sent on 18 March 2019.

[18] In its response of 12 April 2019, the respondent advised that it had not received earlier emails from the Office because they had been sent to the incorrect email address. The respondent expressed its unhappiness with the recommendation made in the letter of 18 March 2019 because it was under the impression that the Office had taken a final decision on the complaint.

[19] The respondent did not appreciate that the Office was still in the process of assessing the complaint and that because the respondent had not addressed any of the allegations made by the complainant, that the Office had reasonably only assessed the complaint on the strength of the information available to it. Having said this, the extent of the respondent's response is that the first complainant's claim was rejected because the nominated driver was not driving the vehicle at the time of the accident and because the insurer had established that Mr Govender was the regular driver of the vehicle.

[20] The respondent did not deal at all with the fact that its representative had amended the details of who the regular driver would be and the allegation that it did so of its own accord and not consequent to an instruction received from the first complainant. The respondent then asked what steps it would need to take to 'appeal' the decision and enquired about 'any time constraints'.

[21] In response, this Office afforded the respondent another opportunity to submit the documents it had been called to submit in correspondence preceding its 12 April 2019 response. On 17 April 2019, the respondent sent the following documents:

- Client mandate and record of advice;

- Momentum Policy;
- Letter posting policy to client;
- A copy of Mr Ruthman's driver's license and ID document sent to it by the complainants.

[22] The respondent reiterates, in its response of 17 April 2019, that the driver nominated by the first complainant and the driver at the time of the accident are different and that the regular driver was Mr Govender and not Mr Ruthman. After careful consideration of the response, this Office was not satisfied that the response refuted the allegations made by the complainants and accepted the matter for formal investigation. The respondent was advised that the matter was accepted for formal investigation in a notice sent to it in terms of section 27(4) of the FAIS Act dated 3 May 2019.

C. INVESTIGATION

[23] In the section 27(4) notice, the respondent was advised that the matter had been accepted for formal investigation because the six weeks afforded to it to resolve the complaint with the complainants had expired yet the matter had still not been resolved. The respondent was advised that: *'To this end we require you to revert to this Office with your statement in terms of Section 27(4) of the FAIS Act together with all documentation, including any documents that support your version and compliance with the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and Representatives, ('the Code'). Kindly take note that the Office will upon receipt of your response formally commence its investigation procedures. It is therefore imperative that your response is not only comprehensive but includes all the necessary documentation that supports your case'*.

[24] The Office acknowledged that the respondent attached a copy of a record of advice to its last response but the respondent's attention was drawn to the fact that there are a number

of issues with the record including that it is not signed by the parties. The respondent was also advised that:

- *'The record of advice does not make mention of the basis of advice.*
- *The record of advice does not indicate why this particular product was suitable for the complainant's needs and objectives.*
- *The record of advice does not indicate, which other products were discussed with the complainant.*
- *The record of advice does not provide us with reasons and explanations why this product was considered'.*

[25] The respondent was also advised that the record *'does not assist you with meeting the requirements of the General Code nor does it demonstrate that you acted in the client's interest when rendering the financial service. Furthermore, one can therefore only conclude that the client was not placed in a position in which she was able to make an informed decision'.*

[26] In response to the notice, the respondent not only repeats what is contained in earlier responses received from it but now also claims that the broker relied on information she received from the second complainant who, at all times, acted as the first complainant's representative. The respondent claims that the second complainant requested that the first complainant be recorded as the regular driver in order to reduce premiums on the policy. The respondent claims that *'when it became clear that the premiums would be reduced if the First complainant would be the regular driver the complainant chose to nominate V Govender as the regular driver'.*

[27] The respondent avers that the 'fraudulent activity' was committed by the second complainant acting on behalf of the first complainant. The respondent however did not attach any proof to support its averments but instead states that the incorrect information '*could only have come*' from the second complainant. In response to all other allegations regarding the failure to render the service in accordance with the various applicable provisions of the General Code, the submissions made by the respondent amount to bare denials.

D. ANALYSIS

[28] The respondent's approach to and stance on this complaint has been disappointing to say the least.

[29] The respondent refuses to take any responsibility for the financial service rendered to the complainants and maintains its innocence by making unsubstantiated claims about where it received the information it provided to the insurer when it obtained the quotation and when the policy was underwritten.

[30] The respondent claims that the information was obtained from the second complainant in her capacity as the first complainant's representative. This submission is however questionable because the broker repeatedly indicated that she 'did not know' when she was asked pertinent questions regarding, amongst others, the first complainant's occupation. Some of the answers were obviously guesses which were themselves preceded by an 'I don't know' response from the broker.

[31] Even though the broker undertook, at the end of the call during which the quotation was generated (the 'quotation call') to confirm with the first complainant whether the information she could not provide with certainty during the call was correct or not, she seemingly did

not do so. During the second call, where the underwriting was done (the 'underwriting call'), the broker is still as uncertain as she was during the quotation call and appears to me to be overtly dishonest.

[32] At 14:29 into the quotation call, the broker remarks that the premium quoted for the policy is 'expensive' after the sales representative informs her what the premium will be. The sales representative then explains to the broker that the premium is influenced by, amongst others, the fact that Mr Ruthman had no insurance history at all and has a C1 driver's license. In response, the broker asks if the premium will be cheaper if Mr Ruthman has an EB license and the sales representative responds 'yes, it will be way cheaper (14:44 of the quotation call). The broker then instructs the sales representative to effect the change. The sales representative however did not immediately action the request and asked the broker what license Mr Ruthman actually has. The broker indicates that she is not sure but she conspicuously says so after she has already issued the instruction that her response be amended.

[33] The broker was apparently not at all concerned with whether she was representing a true state of affairs or not even after she was informed by the sales representative of the import of providing accurate information. Her response to the caution offered by the sales representative was very flippant 'Just put it as EB' followed by a giggle.

[34] After the license code was changed from C1 to EB, the premium was recalculated and there was only a difference of R95. The initial premium quoted on a C1 license was R1 784 and on the EB license, if Mr Ruthman was the regular driver, the premium was quoted at R1 689. The quote of R1 689 was however revised to R1 621 after the broker confirmed that the broker or admin fee should only be R50 and not R150 as determined by the

insurer. The broker however expressed concern at how expensive the premium was still and asked how this could change if the first complainant was recorded as the regular driver.

[35] The sales representative advised, at 20:18 into the call, that it is 'not about the mother but about the person driving the car'. On hearing this, the broker then informs the sales representative that it is actually the first complainant who drives the vehicle more often and not her son Mr Ruthman. The broker says this even though at the beginning of the call, she stated without any reservations that Mr Ruthman was the regular driver, that he drove the car to work and that she thought the car was parked 'at work' during the day. Even though the broker could not say with any certainty what the first complainant's occupation was, offering first that she thought the first complainant was retired and then stating that she was a housewife, the broker had still indicated that she believed the first complainant to be unemployed. It must be then that if the car was parked 'at work behind locked gates' during the day, and the first complainant is unemployed that the car would be driven more regularly by Mr Ruthman and not the first complainant.

[36] Despite this however, the broker maintains for about 8 minutes of the call from, 20:17 of the recording to 28:02, that the first complainant is the regular driver. Before the broker provides this information to the sales representative, she is not heard asking to confer first with either the first or second complainant to confirm with them who in fact drives the car most often. This is in spite of the sales representative stating that the information must be verified with the first complainant. The sales representative went to great pains to emphasise the importance of the broker providing the correct information but the broker was unperturbed. In a most disturbing act of dishonesty, the broker responds to the sales representative informing her that the information provided must be correct by saying, "ja,

well who is going to know that [the first complainant is not actually the regular driver of the vehicle]?"

[37] The sales representative in turn, informs the broker that it is in fact very easy to '*catch the client out.*' The example given by the sales representative was that if Mr Ruthman is involved in an accident while driving the vehicle, the insurer may investigate how often the vehicle is parked at his workplace. The sales representative advised that should the insurer discover that the car is parked there on most days of the week, that the insurer will know that Mr Ruthman is not in fact the regular driver of the vehicle. Even with this distinct warning to steer clear of providing incorrect information to the insurer because the insurer will diligently investigate whether any information provided to it during the quotation or underwriting stage was correct, the broker remained resolute and insisted that the first complainant be recorded as the regular driver. The broker was however unable to provide the requisite information with conviction. In an unabashed manner she proceeded to provide information she admitted to not knowing but and followed her answers with an unfulfilled promise of verifying the information.

[38] After giving at least two examples of how the insurer will assess who the regular driver is at claim stage and asking the broker repeatedly if she was sure that the first complainant is the regular driver, the sales representative finally provided an updated quotation on the basis of the first complainant being the regular driver and having an EB license. The quotation was followed, approximately five hours later, by underwriting during which the broker confirmed to the same sales representative what had been disclosed during the quotation call. It is clear from the underwriting call that the broker had not verified any of the information she undertook to verify. The broker was still not sure what type of license the first complainant had and when the license had been obtained.

[39] The broker had ample opportunity between the quotation call and the underwriting call to share her concerns with the complainants regarding the premium quoted by the insurer, if Mr Ruthman was recorded as the regular driver. The broker also had ample opportunity to confirm with either complainant whether the information provided to the insurer about the first complainant being a licensed driver was accurate and to obtain quotes from other insurers given her concern at how 'expensive' the premium quoted by Momentum was. Although the broker claimed during the quotation call that the respondent had obtained a quote from Old Mutual and that this quote was lower than that offered by Momentum there is no evidence of this being true. I am not inclined to believe that such a quote was obtained in the absence of the requisite proof given the dubious manner in which the broker, in the presence of her supervisor, secured the quotation on which the cover was ultimately offered to the first complainant and because the broker very readily repeated statements she knew not to be true when the underwriting was done.

[40] The broker showed no concern for the duties imposed on her by the General Code when she rendered the financial service to the complainant.

[41] To begin with, the broker was required, in terms of section 8(1)(a) of the General Code to *'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'*. It is evident that this duty was not discharged, despite it being prescriptive, because more than once during both the quotation and underwriting call, the broker indicated that she 'did not know' what the answer to a particular question was. If the broker had collected any of the information required to duly render the financial service to the complainants, she surely would have known that the first complainant was not licensed to drive.

[42] The broker was however not required to simply collect the information referred to in section 8(1)(a). Section 8(1)(b) and (c) of the General Code mandated the broker to '*conduct an analysis, for purposes of advice, based on the information obtained*' and '*to 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*'. Rather than rely on the information already at her disposal, the broker informed the insurer that Mr Ruthman's code was recorded as C1 or EB so she was unsure which code was correct. The broker however, had a copy of Mr Ruthman's license. It is very clear from the copy that the license code is C1 and not EB. Yet, the broker confirms during the quotation call that the license code is EB and not C1. The broker therefore did not rely even on the information she had in her possession when rendering the financial service and there is no indication that she rendered the service in order to secure an appropriate product for the first complainant.

[43] To further support this, Mr Ruthman's license was first issued to him when he was 22 years old. Yet, the broker informed the insurer that Mr Ruthman was 20 years old when the license was first issued implying that he had been licensed to drive for 4 years when he had only been licensed to drive for 2 years. By the respondent's own version, the broker was already in possession of Mr Ruthman's license when the quote was requested and though she was in a position then to answer the questions put to her truthfully, in my view, the broker deliberately chose not to do so. My view is informed firstly by the fact that the broker conveniently only 'realised' that Mr Ruthman's license was an EB license after the sales representative indicated that the premium would be cheaper if the license was an EB license. Secondly, the broker offered that the first complainant was the regular driver after the sales representative indicated that Mr Ruthman's age and the period for which he had held a license influenced how 'expensive' the premium was. Initially, the broker stated,

with some conviction, that the vehicle would be parked 'at work' during the day implying that it would be driven by Mr Ruthman on most days.

[44] In order to successfully support its averments that it obtained the information on which it relied from the second complainant, the respondent should have submitted the relevant records gathered when the financial service was rendered to the complainants. These include the records the respondent was meant to keep in terms of section 3(2) and 9 of the General Code. In terms of section 3(2)(a) of the General Code, the respondent was required to '*have appropriate procedures and systems in place to-*

- (i) *record such verbal and written communications relating to a financial service rendered to a client as are contemplated in the Act, this Code or any other Code drafted in terms of section 15 of the Act;*
- (ii) *store and retrieve such records and any other material documentation relating to the client or financial service rendered to the client; and*
- (iii) *keep such client records and documentation safe from destruction'.*

[45] The record which the respondent was required to keep in compliance with section 9 of the General Code is a record that must reflect the basis on which the advice was given and in particular must contain:

- (a) *a brief summary of the information and material on which the advice was based*
- (b) *the financial products which were considered; and*
- (c) *the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the client's identified needs and objectives'*

[46] Though the respondent attached the 'client record and advice mandate' to its response of 17 April 2019, this document cannot properly be regarded as a record of advice as

described in section 9 of the General Code because it does not meet the requirements of that provision for the following reasons:

- (i) the first complainant's need is not identified but the space provided to input this information is left blank;
- (ii) there is no summary provided of the information and material on which the advice was based;
- (iii) there is no indication of which financial products were considered; and
- (iv) the respondent only lists the product that was recommended to the first complainant (the cover from Momentum) but even then, the respondent did not provide an explanation of why the product is likely to satisfy the first complainant's need/s.

[47] Some explanation to support the recommendation seems to have been provided on the second page of the document but it seems to have been erroneously recorded. The explanation is just one word 'affordability' and was recorded in a column that made provision for a reason to be provided only if the complainant would not have accepted the respondent's recommendation. As correctly noted on the 'client record and advice mandate', the complainant accepted the advice and the policy incepted on terms informed by incorrect information provided by the broker, the incorrectness of which was unknown to the complainants

[48] Even if the reason for recommending the product to the first complainant was because of affordability, the complainant's need to be covered should have been accorded appropriate priority. In essence, the first complainant was offered a vacant policy because the terms on which it was concluded meant that it would never have responded to the first complainant's need to be indemnified against loss arising from the insured events.

[49] The broker was not honest when rendering the financial service. She wilfully supplied information that was not true and pretended that the information had been received from and /or verified by the first and/or the second complainant. The broker also did not treat the complainants fairly. She did not inform the complainants that she had unilaterally asked that the first complainant be recorded as the regular driver when the 'client mandate and advice record' as well as the information first offered by the broker when she was asked by the insurer during the quotation call who the regular driver of the vehicle would be, point to the fact that Mr Ruthman was to be recorded as the regular driver. The complainants were requested to submit a copy of Mr Ruthman's driver's license, which they did and were seemingly under the impression or reasonably should have been aware that the respondent would rely on this information to source the requisite cover.

[50] Even if the broker did receive the information about the first complainant's alleged status as a licensed and regular driver of the vehicle from the complainants, she knew what the implications of providing the sales representative with the false information would be at claim stage at which point there would be no proof that the first complainant was licensed to drive. The sales representative was careful to explain what the consequences would be during both calls. It does not appear however in the 'client mandate and advice record' that these consequences were relayed to the first complainant despite the broker's obligation to do so as prescribed by section 7(d)(i) and (iii) of the General Code. The broker did not even advise the complainants of the information she provided to the sales representative in spite of her obligation to have fully informed the complainants of the following:

- (i) *'that all material facts must be accurately and properly disclosed, and that the accuracy and completeness of all answers, statements or other information provided by or on behalf of the client, are the client's own responsibility; and*

(ii) *of the possible consequences of the misrepresentation or non-disclosure of a material fact or the inclusion of incorrect information*'.

[51] Given the glaring absence of these disclosures from especially the 'client mandate and advice record', I am unable to find, on a balance of probabilities that the disclosures above were made.

[52] In light of the above, it is to me inescapable that the broker rendered the financial service to the complainants in a manner that flouts the provisions of the General Code and goes against the purport of the FAIS Act. I find that the broker breached the following provisions of the General Code, sections 2, 3(2), 7(1)(a), 7(d)(i) and (ii), 8(1), 8(2) and 9 of the General Code.

E. CAUSATION

[53] The respondent adamantly refutes liability for the complainants' loss and the finding that it has breached the principles of the General Code does not automatically make the respondent liable for the loss. This Office must still determine if the respondent caused the loss. *'The question whether there is a causal nexus in a particular case is a question of fact which is determined by the particular circumstances'*¹ and is undertaken with reference to the well-established two-step enquiry which begins with a more general enquiry of causation and filters to a more limited one. The latter is intended to limit liability to prevent holding a party liable for loss not directly occasioned by any act or omission of theirs².

[54] The question whether the broker is the factual cause of the complainant's loss must be answered by applying the facts to the question whether "but for" the loss would not have

¹ The Law of South Africa Misrepresentation (Volume 29 - Third Edition) at page 321.

² *Ibid.*

ensued 'but for' the broker's actions. In light of the foregoing paragraphs and the findings in paragraph 52 above, I cannot see any reasonable grounds on which to find that the loss would in any event have ensued if the broker did not act as she did. It must, in my view, follow that the respondent is the factual cause of the complainant's loss.

[55] The test for legal causation is however concerned with whether the broker's conduct was the "*main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal*"³.

[56] The respondent alleges that the insurer rejected the claim because the complainants misrepresented who the regular driver of the vehicle was. According to the respondent, the insurer discovered that Mr Govender was the one who drove the vehicle more often and not Mr Ruthman as advised by the complainants. This however is not the reason given by the insurer in the rejection letter or even in its responses to the OSTI when responding to the complaint as it was then lodged by the complainants.

[57] The material misrepresentation to which the insurer has referred in its reasons for rejecting the claim is that the first complainant can drive and has a valid driver's license. Detailed discussions of the recordings, in preceding paragraphs, do not support the respondent's submission that the broker simply relayed information collected from the complainants when the product was sold. The recordings point to a broker who was willing to make false statements because 'who will know'. Even so, in order to adequately deal with the respondent's allegations that the claim would in any event have been rejected because Mr Govender was the *de facto* regular driver, this Office enquired from the insurer *how the claim would have been settled* [if it was approved assuming that Mr Ruthman was recorded as the regular driver of the vehicle].

³ *SA Chemical Workers Union v Afrox Ltd* [1999] ZALAC 8; (1999) 20 ILJ 1718 (LAC) at para 39 quoted in *National Union of Metal Workers of South Africa and others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and another* 2021 (2) BCLR 168 (CC) at para 75.

[58] In response, the insurer advised that:

'If a hypothetical scenario was to be considered based on the incident description furnished by the policyholder to the insurer, accurate and complete information noted and the correct premium paid accordingly, the insured would on a balance of probability have received the benefit of comprehensive cover for the insured value (retail value) thereof .

[59] I read from the insurer's response that if the details of who the regular driver was had not been amended and if the information provided by the complainants had resulted in the obligation to pay the correct premium, that the insurer would more likely than not have accepted the claim even if the vehicle was driven by Mr Govender at the time of the incident. I do not doubt that if Momentum meant to exclude liability for loss even if Mr Ruthman was still recorded as the regular driver, assuming that the details of the claim event had not changed, it would have said so. As such, I am satisfied that on the facts, the respondent is the legal cause of the complainant's loss.

Referral of the determination to the FSCA to investigate the respondent's conduct

[60] The conduct on which the unavoidable finding of liability has been made is such that it raises questions about the character of the representatives implicated in this decision, namely the broker, her supervisor and the key individuals. I am of the view that their conduct warrants an investigation to determine whether they remain fit and proper to act as financial services providers. That is an investigation that falls outside of this Office's purview but within the mandate of the Financial Sector Conduct Authority (FSCA). As such, the facts and information arising from the complaint will be reported to the FSCA in accordance with Rule 10(a) of the Rules.

F. QUANTUM

[61] This Office obtained a settlement amount from the insurer where the insurer advised that settlement amount would have been calculated as follow:

Insured Value:	R 30,600.00
- Less Old Damage:	R 2,500.00
Sub Total:	R 28,100.00
+ Add Accessories	
Rims	R 15,000.00
Sound Equipment:	R 10,000.00
Sub Total:	R 53,100.00
- Less Excess:	R 1,000.00
Total:	R 52,100.00

G. THE ORDER

[62] In the result, I make the following order:

1. The complaint is upheld.
2. The respondent is ordered to pay the complainants the amount of R52 100 plus interest on this amount at a rate of 7% per annum from the date of determination to date of final payment.
3. Any party aggrieved by this decision is entitled to apply for its reconsideration by the Financial Services Tribunal in terms of section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 15th DAY OF NOVEMBER 2021



**ADV NONKU TSHOMBE
OMBUD FOR FINANCIAL SERVICES PROVIDERS**