

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

**PRETORIA**

**CASE NO: FOC3097/06-07/KZN (3)**

In the matter between:

**THULISIWE NTIYA GUMEDE**

Complainant

And

**JDG TRADING (PTY) Limited**  
**Trading as BARNETTS**

Respondent

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**DETERMINATION IN TERMS OF SECTION 28(1) (a) of the FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002 (Act No. 37 of 2002) ('FAIS Act') AND THE FINANCIAL SERVICES OMBUD SCHEMES ACT, 2004 (Act No. 37 of 2004) ('FSOS Act')**

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**A. INTRODUCTORY BACKGROUND**

On 14 October 2006, Complainant went to Respondent's furniture shop, Barnetts at Port Shepstone, Kwa-Zulu Natal. She wanted to buy a small television set and a small stove. She was attended to by Virginia Ramnarain, a salesperson. Complainant purchased a Tedelex 54cm television set and a small Futronic Mini Oven at a combined purchase

price of R2779.88. In addition Complainant also purchased a television licence for R225.00. The Complainant did not offer to pay cash.

According to the Complainant, she was asked to sign many documents. After taking delivery of the goods she attempted to read the documents and found that they did not make any sense at all. In particular, she was unable to understand why she now owed the Respondent an amount of R6 468.89 an amount more than double the value of goods purchased.

Complainant elicited the help of her employer, a Mrs van Zyl. According to both the complainant and Mrs van Zyl the Respondent was unhelpful and did not resolve their complaint. Thus the complaint was lodged with this Office.

In short the complaint relates to additional life policies, warranties, goods policies, administration, club membership and delivery charges commonly sold as an adjunct to the purchase of various consumer items. The facts of the case will emerge in the determination.

## **B. THE PARTIES**

### **The Complainant**

[1] NTIYA THULISIWE GUMEDE, an adult female who is employed as a domestic helper in Southbroom, Kwa-Zulu Natal. Her home is in the rural Transkei. Complainant has a standard 6 education and earns a salary of R300 per week.

## **The Respondent**

[2] JDG TRADING (PTY) Limited, a wholly owned subsidiary of the JD Group Limited, a public company listed on the Johannesburg Securities Exchange. Respondent trades throughout the length and breadth of South Africa, through 928 business units under different brand names known variously as Russels, Bradlows, Joshua Doore, Electric Express, Price 'n Pride, Barnetts and Morkels. The JD Group's claimed annual revenue for the 2007 financial year was R12,9 billion and its annual cash inflow was R12,1 billion from trading activity<sup>1</sup>. The store which features in this determination is the Barnett's store in Port Shepstone, Kwa-Zulu Natal.

### **C. THE COMPLAINT**

[3] Complainant's initial letter of complaint was written on her behalf by her employer, ESTELLE VAN ZYL ('Van Zyl'). It reads as follows:

28/11/2006

Dear Mr Pillai

**CREDIT APPLICATION: LIFE POLICY AND GOODS INSURANCE POLICY MISS  
T.N. GUMEDE**

Thuli bought a small stove and a colour TV on 16<sup>th</sup> October 2006 from, Barnetts Port Shepstone. The two items were marked R799 and R 1999 (Total R 2798.00). She came to me on 23<sup>rd</sup> October and said she is very worried about the "different prices" that is written on the so-called "Schedule to Loan Agreement". We had another problem with

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<sup>1</sup> [http://www.jdgroup.co.za/2007/annualreport\\_2007/index.htm](http://www.jdgroup.co.za/2007/annualreport_2007/index.htm)

Barnetts (they stated they gave her the wrong TV and wanted to change it but after I've spoken to them, they never turned up to change the "wrong TV"). I tried to speak to 3 people on the 23<sup>rd</sup>, but no one was prepared to help us. The problems I queried were the following:

- Thuli was NEVER informed that they sold her a "Goods insurance policy", a "Credit life policy" and an "extended guarantee contract". She started crying when I told her what she had signed. She said the lady never ever mentioned ANY insurance to her and claimed that she is only paying for the goods.
- The loan agreement is very difficult to understand, and a smaller total was pointed out to Thuli when she queried the "Total loan amount agreement of R6243.00" The lady said it is only "sums", she must not worry about it.
- We wanted Barnetts to take the insurance and the extended guarantee off the contract, but a white man, called Rob, laughed at me over the phone and said "sorry, she signed for it, and it can not be stopped!
- Thuli were given copies of different "contracts" that weren't fully filled in.
- I tried to query the rate of **32.50%** but the two ladies I've tried to speak to said it is a fixed rate and that is that. Can the rate be that high?
- They charged her a "contract fee" of R90.00 just to puch (sic) a button on the computer!

Thuli will be so happy if you can speak to Barnetts and tell them that she was not under the impression that she was signing for any policies. **They tricked her into doing so.** Up until today I've tried numerous times to explain to her what she have signed for, but she still does not understand that the repayable amount for the loan is so high because

they tricked her in signing for two policies of R1344.47 and an extended guarantee of ???  
(I've tried to figure the amount out, but can not understand the contract myself!) If she  
can not understand the implications of Barnett's tricky business, how on earth could  
they have ended up telling her to sign for a debt of more than double the worth of the  
goods she had received and think that she understood them!

So sorry for my bad English, sir, but please can you help Thuli. She is working for me  
and get a basic pay of R300 per week and such debt is very hard on her.

Kind regards

Signature

(ESTELLE VAN ZYL)

(A copy of this letter is attached hereto marked Annexure A1)

- [4] In order to ensure that the complaint was properly before me as a complaint as  
defined in terms of the Financial Advisory and Intermediary Services Act, 2002  
(Act No. 37 of 2002 ('FAIS Act.)), Complainant was requested to forward a  
statement signed by herself.

This statement reads as follows:

I, Ms T.N. Gumede, felt that I did not get from Barnetts Port Shepstone the deal that was  
very briefly explained to me. Although I spent a long time in the shop, this time was spent  
WAITING and not used to answer my questions. At the end I was told that the deal was  
approved and I was given lots of papers to sign. I did not understand the papers, but  
queried a few things, such as the big amount of R6243.89 that was reflected on the

documents. I was very briefly told not to worry, as this are only the different calculations the shop makes to get to the end figure.

While in the shop I tried to calculate the three items I wanted to buy:

- a TV licence;
- a stove;
- a TV, and I could not understand that I will have to pay R270 per month (the amount seemed to high) but then the documents were given to me to sign quickly. The documents were not discussed one by one and the lady said it's just the agreement and not necessary. They were doing the documents in the office and only gave it to me quickly to sign. She only wanted my signature for finalisation. It seemed too much to me, but when I confronted the people helping me, they just said it is R270 per month **TO HELP ME TO PAY THE GOODS OFF QUICKER.**

When I got home with the goods, I thought maybe they made a fault. Then they phoned me to tell me they have given me the wrong TV and want to change it. Then I decided to take everything to my employer and asked her to help me. She phoned them and confronted them, but Rob said I've signed the contract and can not change anything. That is when my employer and I decided to ask for your help.

In the meantime I pay the R270 per month to stay out of trouble.

I will appreciate your kind help if you can solve this big problem for me.

Thank you very much.

Signature

T.N Gumede

(This statement is attached hereto marked Annexure A2)

[5] The following further documents accompanied the complaint:

- 5.1 Schedule To Loan Agreement - Annexure A3-4;
- 5.2 Credit Life Policy - Annexure A5-6;
- 5.3 Goods Insurance Policy - Annexure A7-8;
- 5.4 Extended Guarantee Contract - Annexure A9-10;
- 5.5 Statutory Notice to Short-Term and Long-Term Insurance Policyholders  
- Annexure A11;
- 5.6 Disclosure in terms of the Policyholder Protection Rules 2001 (Long-term  
and Short-term Insurance) - Annexure A12.

**[Note that the annexures hereto are arranged and separated as the A and B series according to the source of the particular document]**

[6] From the Complainant's correspondence and her statement, the basis of her complaint is as follows:

- 6.1 The Complainant offered to purchase a small stove and a television set as well as a television licence. She had absolutely no intention to purchase anything else. What alerted her to a problem was the amount of her indebtedness to the Respondent which effectively amounted to more than

double the purchase price of the goods. This was also an indebtedness she could not afford on her seriously limited income;

6.2 She was not informed that she had been sold a 'Credit Life Policy' a 'Goods Insurance Policy' and an 'Extended Guarantee Contract' at the time she purchased the television set and stove. She alleges that 'the lady never mentioned ANY insurance to her and claimed that she is only paying for the goods'. She was, incidentally, also unaware that she was charged attorney's fees and delivery charges;

6.3 The transaction was only very briefly explained to her and the documents given to her merely in order to obtain her signature for finalisation. She was not informed that she was entering into a loan agreement and that interest at the rate of 32.5% p.a. was being applied to the cost of goods and insurance;

6.4 The loan agreement is difficult to understand;

6.5 Upon querying the total loan amount, a smaller amount was pointed out to her and she was advised that it is 'only, "sums" ', she must not worry about it'. In this respect, she maintains that she was misled in that, when she asked about the 'big amount of R6243.80' she was briefly told not to worry as this is 'only the different calculations that the shop makes to get to the end figure';



6.6 The contracts were only partially completed and contained numerous blank spaces;

6.7 She was not afforded an opportunity to read the contracts, nor were they explained to her fully in a language that she could understand.

**D. THE RESPONENT'S RESPONSE**

[7] In a written response to the complaint, dated 23 January 2007 from a Mr. Toy de Klerk, ('de Klerk') Chief Executive, Barnetts, he states the following:

23 January 2007

Dear Mr. Pillai,

CREDIT APPLICATION: LIFE POLICY AND GOODS INSURANCE POLICY – MISS T.N. GUMEDE

After careful consideration of the issue, the following facts emerge:

The correct goods were delivered to Miss T.N. Gumede, as was confirmed with Me.(sic) Van Zyl and as per our delivery waybill (document no. 10677) - Annexure 1.

Although Miss T.N. Gumede claims that she was never informed about any insurance, I wish to attach the following signed documents:

- Free choice document (Annexure 2), which gives her the choice of arranging her own insurance, or accept the insurance the company offers.
- Disclosure in terms of the Policyholder Protection (Annexure 3), summarising the terms and conditions of the policy.

- Thirdly, that she signed acknowledgement of receipt of the Statutory Notice to Short-term and Long term Insurance Policyholders (Annexure 4), which in affect summarises the rights of the policyholder.
- I further attach the two Insurance documents/contracts (Annexure 5 and 6).

Given the above scenario and considering the Incomplete “Schedule of Loan Agreement” as per the complainants letter as well as Miss T.N. Gumede’s claim that she did not understand the content of the documents, Barnetts propose the following:

- Barnetts will reverse the R1344.47 pertaining to the Goods and Life Insurance Contracts as well as R181.88 relating to the Extended Guarantee Contract, which was found to be incomplete, or not understood.
- Barnetts do however require Miss Gumede to supply prove of an existing insurance policy that will exceed the monetary value of Barnetts interest in this contract, as stipulated in the “Free Choice Document”.

The Contract Fees and Finance charge rate, which were questioned in the letter, were charged in accordance with legislation governing Loan Agreement Contracts.

I hope the complainants find the above proposal acceptable and will at their earliest convenience notify the writer in order to process the necessary documents and provide the details of the necessary insurance cover. It must be noted that any reversal of any charges is conditional of (sic) the supply of appropriate insurance, covering this Loan Agreement Contract.

I wish to apologise for any inconvenience.

Kind Regards,

**Toy De Klerk**  
**Chief Executive**

cc. Me. Estelle van Zyl (Cell: 082 304 0380)  
RMB Insurance

P.O. Box 652659  
Benmore  
2010

(A copy of this letter is attached hereto marked Annexure B7)

At this stage, I must point out that the letter claims to annex as 'Annexure 1', the Complainant's 'delivery waybill'. This annexure was missing and despite our efforts to obtain a copy, we were unable to do so. After persistent enquiry from my Office, the Respondent advised that it was unable to find the 'delivery waybill' and ultimately responded by stating that the Schedule to the Loan Agreement 'serves as a waybill' (Annexure B33). We also noted that document number 10677 referred to in Annexure B7 was never found nor can this number be found on the Schedule to the Loan Agreement.

Annexed to this letter were the following documents:

- 7.1 Free Choice document, annexed hereto as Annexure B1;
- 7.2 Disclosure in terms of the Policyholder Protection Rules 2001 (Long-term and Short-term Insurance), Annexure B2;
- 7.3 Statutory Notice to Short-term and Long-term Insurance Policyholders, Annexure B3;
- 7.4 The Credit Life Policy – Annexure B4 -5;

7.5 Goods Insurance Policy – Annexure B6.

[8] In response to a request from this Office to Respondent that it provide the terms of the contract which make insurance a condition of the loan, the 'Terms and Conditions' to the loan agreement was faxed to this Office. A copy is annexed hereto marked Annexure B9-11. At the outset I must point out that this document was not in the possession of the Complainant. She was not given a copy and saw it for the first time after it was faxed to this Office. The Office then issued Respondent with a notice in terms of Section 27 (4) (a) of the FAIS Act which notice specifically requested detailed statements from the individuals who sold the items and financial products. It is pertinent to mention that this notice pointed out to Respondent that unsigned documentation had twice been provided to this Office.

[9] In response to a telephonic request made by this Office to a M/s Renee Griessel, Chief Legal Officer, ostensibly for both the JD Group and RMB Structured Insurance Investments, the following further documents were provided:

9.1 Covering letter from RMB - Annexure B12-13;

9.2 Schedule to Loan Agreement - Annexure B14;

9.3 Loan Agreement - Annexure B15;

9.4 Interview questionnaire - Annexure B16;

- 9.5 The second page of the terms and conditions pertaining to the Goods Insurance Policy - Annexure B17;
- 9.6 Respondent's authorisation as a financial services provider issued in terms of Section 8 of the FAIS Act by the Financial Service Board, - Annexure B18-20;
- 9.7 JD Group directive 12 October 2004 - Annexure B21;
- 9.8 JD Group directive 5<sup>th</sup> October 2004 - Annexure B22-24;
- 9.9 JD Training Module - Annexure B25-31;
- 9.10 Statement by DS Scharnick, Divisional Credit Manager, Barnetts - Annexure B32.

This was a response to a request in terms of Section 27 (4) (a) of the FAIS Act.

[10] In her statement (B32), Ms Scharnick, Divisional Credit Manager of Barnetts Division states the following:

**'AS THE DIVISIONAL CREDIT MANAGER OF BARNETTS DIVISION 4  
I WOULD LIKE TO ENLIGHTEN YOU AS TO THE PROCEDURE BEING FOLLOWED  
WHEN PURCHASING GOODS FROM A BARNETTS BUSINESS UNIT.**

1. On entering the business unit, the customer is greeted by a sales advisor who will then assist the customer in choosing the furniture they require.

2. Once the customer has made her choice, the sales advisor will then complete a **customer pro-forma order**.
3. The customer is then referred to the business unit manager for a further interview.
4. At this interview, the business unit manager generates a quotation which enables the customer to have a clear picture of the following;
  - A) The cost of the goods;
  - B) The charges;
  - C) The contract period;
  - D) The monthly instalment;
  - E) The deposit required.
5. This is then explained to the customer and if she is in agreement with this quotation, she then signs and is referred to the credit department for the deal to be captured on the computer.
6. The credit controller then captures the information provided by the customer.
7. When this process is completed the credit controller then refers the customer to the credit manager who conducts the final interview.
8. The credit manager verifies that all the information that has been captured by the credit controller is correct and as per the customer. She then goes on to explain all the documentation

Pertaining to the contract namely:

- A. TYPE OF CONTRACT CHOOSEN (sic) ( HP OR LOAN)**
  - B. EXTENDED GUARANTEE;**
  - C. FREE CHOICE DOCUMENT REGARDING INSURANCE**
  - D. THE INSURANCE AND WHAT IS COVERED BY IT.**
9. The monthly instalment and the due date of the same is also explained.
  10. Should the customer accept the terms and conditions, the contract is then signed by the customer and all the parties concerned.

**A COPY OF THE SIGNED DOCUMENTATION IS THEN HANDED TO THE CUSTOMER.**

**AS MANAGEMENT I AM NOT AWARE OF ANY DEVIATION FROM THIS PROCEDURE AND NEITHER HAVE I ON MY BRANCH VISITS OBSERVED ANY DIVIATION (sic) FROM THE SAME'.**

DEIRDRE SHARON SCHARNICK  
DIVISIONAL CREDIT MANAGER'  
(Annexed as B32)

Attention is drawn to the following regarding Scharnick's statement:

- a) It is a statement setting out the general or usual procedure and processes followed by the Respondent's staff in any given branch;
- b) The statement makes no mention of what happens at the Port Shepstone branch of Barnetts and in particular what happened with regard to the Complainant's transaction.

I shall return to this statement later in this determination.

[11] The Respondent relies on the documents supplied (Annexure B series) and notwithstanding a request from this Office, Respondent failed to provide any statements from any of the employees who dealt with Complainant in concluding the contract with her. The matter is therefore dealt with on the basis of the evidence available and from the documents supplied, together with this statement of Scharnick.

**E. COMPLAINANT'S RESPONSE TO THE OFFER OF SETTLEMENT**

[12] Respondent's offer to settle the matter was rejected by the Complainant. She, in the meantime and with the assistance of Van Zyl, settled the debt in order to avoid excessive charges. In a letter dated 10<sup>th</sup> September 2007 the Complainant states the following:

'I still feel that he did not keep his promise and, therefore, I hereby wish to request you to please take the matter further. I still do not trust JD Trading, because we (my employer and I) tried almost a year to negotiate with them and now I feel that it is **impossible** for us to get to any agreement with them. JD Trading (particularly Mr De Klerk) did once again not keep his promises!

As I don't think that this settlement amount is correct I would like it if you could please take the matter further'

(Annexed as A13)

[13] In addition, Van Zyl forwarded the following additional documentation to this Office:

13.1 Facsimile to Barnetts dated 8<sup>th</sup> August 2007 requesting a settlement amount - Annexure A14-15;

13.2 Receipt in the amount of R1884.39 - Annexure A16;

13.3 Letter from Barnetts to Complainant and Van Zyl dated 17 August 2007 and attaching account printouts - Annexure A17-22.



**F.**

**THE DETERMINATION**

**Jurisdiction:**

[14] In terms of the FAIS Act complaint means:

‘a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative-

- (a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;
- (b) has willfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or
- (c) has treated the complainant unfairly;

[15] In terms of Part II, Section 3 (1) (a) (ii) and (iii) of the General Code of Conduct for Authorised Financial Services Providers and Representatives, (‘the Code’) representations made in the course of rendering financial services must be adequate and appropriate, and provided in plain language.

[16] Complainant’s allegation is that she was never informed that she was being sold a Goods Insurance policy, Credit life policy and Extended Guarantee Contract. These products fall within the definition of a financial product as defined in the FAIS Act.

[17] This matter has not been settled and the Ombud is obliged in terms of S28 (1) of the FAIS Act to issue a determination.

[18] There is a further ground on which this Office enjoys jurisdiction to entertain this matter and that is in terms of the Financial Services Ombud Schemes Act, 2004 (Act No. 37, 2004) ('FSOS Act') A complaint in terms of the FSOS Act means a:-

'complaint by a client relating to any agreement with, or a financial service or product of, a financial institution, and in which it is alleged that the client has suffered or is likely to suffer financial prejudice or damage as a result of the financial institution-

(a) having treated the client unreasonably or inequitably; or

(b) having maladministered the implementation of an agreement with, or the supply of a financial service or product to, the client.

[19] The Respondent is an authorised financial service provider. As such it falls to be covered under the definition of 'financial institution' in terms of the FSOS Act, read with Section 1 of the Financial Services Board Act 97 of 1990, as amended. As this complaint also relates to the loan agreement itself, it therefore falls to be determined as a complaint falling within the jurisdiction of this Office as Statutory Ombud as defined under the FSOS Act.

## **G. ISSUES FOR DETERMINATION**

[20] The following are the material issues in this case:

20.1 Whether or not Complainant was properly informed by Respondent that they were selling her the following financial products:

(I) Credit Life Policy;

(II) Goods Insurance Policy;

(III) Extended Guarantee Policy on goods purchased;

20.2 Whether or not the Complainant agreed to enter into a loan agreement at all or if she did whether she agreed to do so on the terms and conditions set out in the Loan Agreement, Annexure B9-11 hereto;

20.3 Whether or not the contract documents relied upon by the Respondent is easy to understand, written in plain language and in a readable print and whether or not these documents were properly completed, explained to and were understood by Complainant;

20.4 Whether or not a 'contract fee' was disclosed to Complainant and whether or not she agreed to pay a 'contract fee' of R90;

20.5 Whether or not, in respect of this whole transaction there was compliance with the provisions of the FAIS Act and in particular the Code;

20.6 Whether the loan agreement itself was valid in law.

## **H. ANALYSIS OF THE RELEVANT DOCUMENTS**

In order for me to properly address the various issues for determination, it is important that I carefully examine the various documents provided by both Complainant and Respondent. Whilst it is to be noted that Complainant and Respondent may have provided the same documents, there are differences in certain of these documents which are relevant to this determination.

**It is important that my comments be read in conjunction with the documents in question as annexed hereto.**

### **ANALYSIS OF COMPLAINANT'S DOCUMENTS (Annexure A Series)**

#### **'The Schedule to the Loan Agreement' [Annexure A3-4]**

[21] An examination of The Schedule to Loan Agreement, provided by Complainant reveals the following:

21.1 The sections requiring both the Borrower and the Lender to indicate the date of signature of the document are left blank;

21.2 The allotted space for the signature of the lender as well as the space for a witness to sign in respect of the both the lender and the borrower are conspicuously blank;

21.3 Whilst Annexure A4 states that:-

**'all parties to this agreement must initial this page'**

I note that only the initials of the Complainant appear on this document;

21.4 Annexure A3 shows an amount advanced of R3 128.48;

21.5 In addition Annexure A3 shows 'Borrowers Protection Insurance (incl. VAT) and Life Insurance (excl VAT) monthly premiums of R16.14 paid on behalf of the borrower to RMB Structured Insurance Limited'. These amounts then make up an additional amount of R1344.47 which is apparently advanced by Respondent to and on behalf of Complainant. The breakdown of the premiums allocated to each of the financial products or commissions and charges are unclear and indeed are not stated anywhere in the documentation. It is not possible to determine how the amount of R1344.47 representing 'Borrowers Protection Insurance' and 'Life Insurance' is arrived at;

21.6 Whilst Complainant was provided copies of a Credit Life Policy, Goods Insurance Policy as well as an Extended Guarantee Contract, there is no evidence of how the premiums are split between the various financial products sold to Complainant;

21.7 It must be noted that the premiums are paid as monthly premiums to RMB Structured Insurance. However, such premiums are debited as a once off

lump sum against the borrower. This once off lump sum then attracts interest which accrues at a flat rate of 32.50% per annum calculated and capitalised monthly. The actual effective rate is thus 37.8% per annum.

### **'The Credit Life Policy' [Annexure A5-6]**

[22] In respect of the Credit Life Policy the following is to be noted:

22.1 Whilst the document is complete with Complainants name, date and agreement number and is pre-signed by Gustavo Arroyo and Renee Griessel on behalf of the Respondent, there is no evidence of the acceptance of the policy by the Complainant. The Complainant appears to be compelled to purchase insurance in terms of the Loan Agreement. This is specifically provided for in the 'Terms and Conditions' of the loan agreement. However, as will appear elsewhere in this determination, the 'Terms and Conditions' of the Loan Agreement was not drawn to the attention of the Complainant;

22.2 Whilst the Credit Life Policy states that:-

'4.4.1.....JD Trading advanced monthly Premiums for the full term of the Agreement and paid it to the insurer on behalf of the insured'

the document neither mentions the cost nor commission nor any other charges. Instead the document simply refers to the loan agreement which

as I have already indicated is unclear and that document itself is silent on any of these costs, commissions or premiums;

22.3 It is also to be noted in the Terms and Conditions of the Loan Agreement (Par. 5.7) that the Complainant cedes her right to a refund of the premium to Respondent. This is a monthly premium debited up front as a lump sum and attracting interest at the rate mentioned above. Logic would demand that as soon as there is a claim on this policy, the Respondent's obligation to continue to pay the monthly premiums would in fact cease. Logic would also demand that where there is early settlement, Respondent's obligation to pay premiums would cease. However the full premium would have been paid and it is therefore unclear if any refund would then be made to Complainant in any of these circumstances.

**'The Goods Insurance Policy' (Annexure A7-8)**

[23] The comments in paragraph 22 above, in respect of the Credit Life Policy apply with equal measure to the Goods Insurance Policy. This policy also requires a cession of Complainant's right to a refund of premiums and does not appear to provide for instances in which a successor in title would be afforded protection in terms of the policy.

The premiums for the above insurance amounts to R1344.47. This appears to be out of proportion to the actual value of the goods. Note that the insurer undertook the risk of 'replacement of the Goods with the same or similar items'.

**'The Extended Guarantee Contract' (*Annexure A10*)**

[24] The Extended Guarantee Contract has been signed by both the Complainant and apparently the Respondent. The Respondent has signed in the place reserved for the name of the witness. The terms and conditions of this document are initialled by both Complainant and Respondent as required. However, the remainder of the form contains numerous blank spaces. I mention the following:

24.1 The name of the Complainant as well as the agreement / account number is left blank;

24.2 The business unit stamp and Complainants address is blank;

24.3 The product description as well as the commencement and end date is conspicuously blank.

[25] Once again there is a reference to the Schedule to the Loan Agreement. As I have repeatedly noted, this Schedule to the Loan Agreement is itself unclear as there are no indications thereon of the fees, charges, premiums or commissions charged.



[26] I do note that this agreement does make provision for instances of payment by instalments. In this instance the payment was by way of a loan and hence the terms of the agreement require payment up front. There is no indication of the amount of the premium or how the premium is calculated.

**'The Statutory Notice to Short-Term and Long-Term Insurance Policyholders'**  
**(Annexure A11)**

[27] This document signed by Complainant is the Statutory Notice to Short-Term and Long-Term Insurance and it is pertinent that this makes two very relevant statements.

They are:

- '1.) ..... **you have the right to the following information:**
  - e) Rand amount of fees and commissions payable; and
  
- 4.) **Warning**
  - a) Do not sign any blank or partially completed application forms'.

As I have already indicated, there is no means of working out the Rand amount of any fees and commissions from the Respondent's own documents.

It is also clear that the Complainant was certainly called upon to sign documents which were either blank or partially completed.

**'The Disclosure in Terms of the Policyholder Protection Rules 2001 (Long-term and Short-term Insurance)' (*Annexure A 12*)**

[28] This document is signed by the Complainant and the following is worth noting:

3.) **Intermediary:**

'Appointed by both RMB Structured Life Limited and RMB Structured Insurance Limited in terms of a written agreement: JDG Trading (Proprietary) Limited trading as Bradlows, Russells, Joshua Doore, Giddies Electric Express, Price 'n Pride, Hi-Finance, Barnetts and Morkels....'

Commission payable to intermediary:

by RMB Structured Life Limited: maximum 7.5% (seven comma five percentum) of Premium,

by RMB Structured Insurance Limited; maximum 20% (twenty percentum) of Premium'.

Whilst the maximum commission is set out in this document the actual premium and the calculation of the commission is not easily ascertainable, nor can one ascertain what premium is allocated to which financial product.

**ANALYSIS OF RESPONDENT'S DOCUMENTS (*Annexure B Series*)**

[29] As stated above, a number of documents came from the Respondent. I now examine some of those documents.

**'The Free Choice Document' (Annexure B 1)**

[30] This document sets out the Complainant's rights to make use of an existing policy or take out a new policy. This document is signed by Complainant. This document was not amongst the bundle of documentation provided by Complainant and she does not appear to have been provided with a copy thereof at the time that this transaction was concluded. According to the Complainant she is unfamiliar with the document. Her explanation is that it must have been one of a number of documents that she was called upon to sign.

**'Statement by M/s Scharnick' (Annexure B32)**

[31] In response to this allegation, and notwithstanding our request for statements from the personnel at Barnetts, Port Shepstone, the Respondent relies on the statement of M/s Scharnick. This statement merely sets out what usually happens or is supposed to happen. We are left in the dark as to what happened regarding this particular transaction.

[32] It is relevant that Scharnick states that the customer may choose between '**HP OR LOAN**'. There is no evidence before me that such a choice was presented to the Complainant. She emphatically denies that such a choice was presented. Scharnick does not say that customers are informed that the 'Extended Guarantee' is optional. In this case, Complainant merely signed a blank

document with regard to the 'Extended Guarantee Contract' and she was charged for it.

**'The "Terms and Conditions" of the loan agreement' (*Annexure B9-11*)**

[33] This is a document in three pages, in minuscule print, comprising what are apparently terms and conditions of the loan agreement.

33.1 The following appears in bold print at the bottom of each page of the contract;

**'NOTE: All parties and witnesses to this Agreement must initial this page.'**

The pages are not initialled by **any** of the parties;

33.2 As previously stated, the Complainant did not see this document. There is no evidence, from the Respondent's own copies of this document that the Complainant was familiar with the terms and conditions and acknowledged same in some form. The Complainant's version is supported by the fact that no document of this type exists containing her signature or initials;

33.3 Upon concluding the agreement of loan, the Complainant was provided with the 'SCHEDULE TO LOAN AGREEMENT' and not the first page to the Loan Agreement itself. After the complaint was lodged this document was forwarded to this Office by the Respondent together with the 'TERMS

AND CONDITIONS'. Paragraph 2.1 and 2.2 and 2.3 of this 'TERMS AND CONDITIONS' reads as follows:

'2. THE LOAN

2.1 The Borrower hereby borrows from the Lender the loan amount as reflected in the schedule to this agreement under the heading "Loan amount / principal debt".

2.2 This agreement shall be regarded as being concluded upon the signing thereof by both parties.

2.3 The Borrower acknowledges that the Lender has provided him / her with the proposed loan agreement which served as a quote valid for five (5) days and which set out all the Borrower's obligations, including the loan amount, the total charge of credit and other costs. It is also recorded that this loan agreement is in accordance with the quote given by the Lender.'

It appears that this is an integral part of the loan agreement and it is not signed or initialled by the Complainant, nor is it signed or initialled by anyone on behalf of the Respondent.

[34] Turning now to the additional documentation provided by the Respondent under cover of a letter dated 15 May 2007 by RMB Structured Insurance Investments, the following becomes evident:-

**'Schedule to Loan Agreement' (Annexure B14)**

34.1 The Schedule to the Loan Agreement which corresponds with Complainant's document Annexure A3, being the 'SCHEDULE TO LOAN AGREEMENT' differs in that the previously vacant spaces have now been completed. The date has now been entered and a witness has signed ostensibly in respect of the borrower's signature. No such signature exists on Complainant's documentation. There now also appears to be a signature on behalf of the lender. This was meant to be one and the same document. The inescapable conclusion then is that the Respondent filled in the blanks in the absence of the Complainant and after conclusion of the transaction.

**'Loan Agreement' (Annexure B15)**

34.2 On the 'Loan Agreement' only Complainant's first name; 'Thulisiwe' has been inserted in the space provided for the name of the Borrower. Complainant's address was not filled in and left blank. I note that the Respondent was not bothered to even fill in the full names and address of the Complainant.

**'Interview Questionnaire' (Annexure B16)**

34.3 The 'Interview Questionnaire', one must assume is completed during the course of an actual interview with the customer conducted by the Branch

Manager and the Credit Manager. The document itself appears to be completed and signed by all the parties. The form requires answers, *inter alia*, to the following questions:

‘How much deposit can you pay?’ and

‘How much can you afford to pay as a monthly instalment?’

Whilst the answer to the monthly instalment is given as R270, 00 the answer as to the deposit is indecipherable.

There is also a specific question relating to date and time of delivery. The answer to this question is also indecipherable. It is also to be noted that the Credit Manager is obliged to explain the delivery charges. A block indicating ‘EOM/Delivery Charges’ is also ticked. There is no indication as to what ‘EOM’ means. I must, at this stage, point out that it is not in dispute that the Complainant incurred **no** delivery charge as she collected the goods from the Respondent’s premises personally. She was nevertheless charged an amount of R348.60 for delivery.

## **I. THE APPLICABLE LAW**

Having briefly analysed the various documentation provided I turn now to consider the law applicable to the facts of this case.

[35] It is clear from a reading of the documentation that the loan agreement is at the very heart of this matter. I say so because it is in this document that the various

amounts borrowed as well as the terms and conditions of the loan agreement are set out.

[36] Respondent, a financial institution, has entered into an agreement with the Complainant.

[37] I am obliged in terms of the provisions of the FSOS Act in my capacity as Statutory Ombud to examine whether the Respondent contravened or failed to comply with any provision of the agreement; whether Respondent treated the client unreasonably or inequitably or whether Respondent maladministered the implementation of the agreement.

[38] The first essential of any contract is that the parties must be in agreement as to the terms and conditions of their agreement.

[39] An agreement usually, but not always, consists of an offer followed by an acceptance.

[40] The general rule is that all agreements entered into seriously and deliberately are valid as contracts. It also follows that such agreements or contracts must be lawful. There must be consensus between the parties; i.e there must be a meeting of the minds.



[41] It is not in dispute that the Complainant went into the Respondent's store in order to purchase one television set a TV license and one small stove. It is common cause that the Complainant offered to purchase these goods and the Respondent accepted.

[42] The dispute is:

42.1 Whether the Complainant agreed to accept an offer of goods insurance cover;

42.2 Whether the Complainant agreed to accept an offer of extended warranty insurance for the goods;

42.3 Whether the Complainant agreed to accept Credit Life insurance; and

42.4 Whether Complainant wanted this transaction to be financed in the way it was by Respondent. In particular was she given an option of an Installment Sale or a Loan Agreement. It is not in dispute that the documentation reveals that a loan agreement was entered into. The dispute is whether or not the Complainant was aware that she was entering into such an agreement.

[43] There can be no doubt that it was the Respondent, through its staff, that offered the Complainant the financial products. I accept that when she walked into the store she had no knowledge of these products.

[44] On the Complainant's version she did not agree to purchase financial products and pay a contract fee. The Complainant accepts that she agreed to pay for her goods in installments over a period of twenty four months. She disputes that she agreed to the terms and conditions in the Respondent's agreements.

[45] On the Respondent's version, their staff follows a set procedure and no deviation is expected. The staff is trained in a certain way and is expected to follow instructions. The Respondent refused to furnish me with a statement from the individual members of staff who dealt with the Complainant. Instead the Respondent furnished a statement from the Divisional Credit Manager, Annexure B32, explaining the procedure that all staff are trained to follow.

The statement concludes with the submission that:

**'AS MANAGEMENT I AM NOT AWARE OF ANY DEVIATION FROM THIS PROCEDURE AND NEITHER HAVE I ON MY BRANCH VISITS OBSERVED ANY DIVIATION (SIC) FROM THE SAME'.**

[46] I must therefore accept that on the Respondent's version its staff, at all times, followed the prescribed procedure.

[47] An analysis of the facts however reveals the following:

47.1 On the Complainant's version, she was presented with a number of documents and was merely asked to sign the forms at designated places;

47.2 According to the Complainant the documents were not read to her, she was not given an opportunity to read and understand them and consequently did not know what she was signing. Incidentally the documents themselves, as I will show later in this determination, support this version;

47.3 When she eventually found out what she signed; this with the assistance of her employer, Mrs. Van Zyl, the Complainant broke down and became very distressed as she had never intended incurring such a substantial debt;

47.4 Complainant became even more distressed when she found out that she incurred a debt that she could not afford on her income;

47.5 What came as a shock to her was the difference between the actual cost of the goods, R 3004.88, and the amount of her indebtedness, R 6468.90 an increase of 115.28%.

[48] It is the Complainant's version that had the contracts been explained to her she would not have signed them and would not have purchased the goods from the Respondent, in the manner and form in which she did.

**J. ANALYSIS OF THE DOCUMENTATION IN LIGHT OF THE APPLICABLE LAW**

[49] The documents reveal the following:

49.1 I refer to the 'TERMS AND CONDITIONS' of the loan agreement, Annexure B9-11. This document was faxed to this office on the 15<sup>th</sup> February 2007 from RMB Structured Insurance. It appears that this important document, which forms a crucial part of the loan agreement, was not even available when the transaction was concluded. This is borne out by the fact that this document is not signed or initialed by any of the parties. This notwithstanding that the document specifically provides in bold print at the bottom of each of the pages:-

**'NOTE: All parties and witnesses to this agreement must initial this page'**

Notwithstanding this important directive, on each of the three pages making up the terms and conditions, not one of the pages is initialed. According to the Complainant she did not see these three pages. There are no facts before me to contradict her. In fact the Respondent's own documentation supports her. The question then arises, how can the Respondent claim to have a binding contract when one of the parties, even

possibly both of the parties, does not know that there are terms and conditions?

49.2 I note that paragraph 2.2 of the Terms and Conditions provides as follows:

'2.2 This agreement shall be regarded as being concluded upon the signing thereof by both parties'

This was not done. On this ground too, there was no binding agreement.

49.3 Paragraph 2.3 of the Terms and Conditions provides as follows:

'2.3 The Borrower acknowledges that the Lender has provided him/her with the proposed loan agreement which served as a quote valid for five (5) days and which set out all the Borrower's obligations, including the loan amount, the total charge of credit and other costs. It is also recorded that this loan agreement is in accordance with the quote given by the Lender'

Again there is no evidence before me that the terms and conditions were provided to the borrower and hence it is apparent that this important provision was not complied with. This goes to the root of the agreement and non-compliance could render the agreement of no force and effect.

49.4 Paragraph 4 of Annexure B9 provides:

**'CONTRACT FEE**

It is recorded that the Lender is obliged to pay to its attorneys the amount reflected in the schedule to the agreement as a fee in respect of preparation of this agreement and the deed of pledge, with value added tax thereon. The Borrower hereby consents to pay the amount so indicated to the Lender, with value added tax thereon as set out in the schedule'

The Respondent charges attorneys fees for a document which is a standard document used in all such transactions and is produced merely by printing it off their computer. The Respondent in fact charged the Complainant an amount of R102. 60 for a 'CONTRACT FEE'. This, for a document that was not even on the table for the Complainant to sign. The Respondent cannot possibly sustain a claim for this charge. This charge, as I will show in this determination, is one of many charges that Respondent added to the Complainant's account to merely inflate the amount claimed.

I wonder if the Respondent actually pays these amounts to their attorneys. If it did, it would indeed be extremely lucrative for the attorney.

49.5 Paragraphs 15.8 to 15.12 of Annexure B11 reads as follows:

'15.8. The Borrower hereby confirms that a copy of the Rules set out by the Minister of Trade and Industry for purposes of exemption under Section 15(a) of the Usury Act as published in the Government Gazette was made available to him/her for perusal prior to entering into this agreement.

15.9. The Borrower confirms that a copy of the Lender's registration certificate issued by the relevant Regulatory Institution, the complaints procedure and the manner in which and where complaints may be lodged were prominently displayed at the business premises of the Lender. The Lender is registered with the Regulatory Institution.

15.10. The Borrower confirms that before the conclusion of this agreement the essential terms of the agreement were explained to him/her by the Lender in a language he/she understood.

15.11. The Borrower confirms that he/she was allowed the opportunity to read this agreement or it was read to him/her in the instance where the Borrower is illiterate.

15.12. The Lender shall provide a copy of this agreement to the Borrower before or at the time the money lent, in terms of this agreement is advanced.'

These are important provisions that go to the root of this agreement. The Complainant claims that none of these terms were complied with. This document was not signed by the parties and there are no facts before me to contradict the Complainant.

49.6 Paragraph 1.2 defines 'the lender' as 'JDG TRADING (Pty) Ltd'. This means that the Respondent was in fact the lender. It therefore appears that no money was actually advanced on behalf of the borrower. This was merely a paper transaction.

[50] I refer again to the 'SCHEDULE TO THE LOAN AGREEMENT' which is annexed hereto as A3. This is the copy that was handed to the Complainant when the transaction was concluded. I note that the document provides for the date and signatures of the borrower, lender and witness. Only the borrower's signature appears. The document is not dated. The lender did not sign it, nor is there a signature from the witness. On the face of this document, material terms were not completed. On this ground alone, the document can be found to be of no effect.

50.1 Annexure B14 is the same document as Annexure A3. Annexure B14 is, however, the copy that was sent to me by the Respondent in response to the complaint. This self-same document is now dated and signed by a witness and the lender's representative. It is evident that this document was completed by the Respondent at some later stage and in the absence of the Complainant. This is a highly irregular practice. This too supports the Complainant's version that she was merely told to sign 'lots of papers' (see Annexure A2) with no explanation.

50.2 Interestingly the person who signed as witness to the borrower's signature is the Respondent's credit manager. There is, however no witness to the lender's signature.

50.3 Annexure A3 and B14 contains details of the amounts charged by



the Respondent. At the outset, I was unable to work out how the Respondent arrived at the 'amount advanced' in the sum of R3 128.48. This figure is in excess of the cost of the goods plus the cost of the TV license. This difference of R348.60 can only be explained by the delivery charge of R348.60. According to the Respondent's document, Annexure A20, being a printout of the account from the Respondent's records, Complainant was charged R348.60 for delivery. The Respondent could not provide any proof of such delivery. Respondent eventually explained that there was no actual 'delivery waybill' (document number 10677) but that the 'Schedule to Loan Agreement' serves as a 'waybill'.

(See Annexure B33)

This is a nonsensical explanation. No 'delivery waybill' could possibly have been generated. This does not come as a surprise as according to the Complainant she collected the goods herself. There was thus no basis for the Respondent to debit the Complainant's account with this charge. Again it appears that the Respondent had *carte blanche* to merely inflate the amount claimed.

50.4 The second page of the 'SCHEDULE TO THE LOAN AGREEMENT', Annexure A4 provides that:-

**'ALL PARTIES TO THIS AGREEMENT MUST INITIAL THIS PAGE'.**

Only the Complainant appears to have done this.

[51] I refer to the 'LOAN AGREEMENT', Annexure B15, the one supplied by Respondent. On the first page the name of the 'borrower' is merely scribbled in as 'Thuliswe'. If this was meant to be the Complainant then, at the very least, the Respondent should afford Complainant, the dignity, courtesy and respect of filling in her full name. This is yet another indication of the Respondent's cavalier attitude to dealing with their documents and their clients. Surely they should bear the consequences of this.

It must be noted that apart from merely signing, the Complainant did not fill in any of the details on the documents. This is consistent with her version that she was merely asked to sign 'lots of papers'.

[52] Yet another example of the Respondent's treatment of its own documentation is the 'EXTENDED GUARANTEE CONTRACT', Annexure A10 hereto. This is conclusive proof that the Respondent made the Complainant sign documents in blank, leaving it open to them to complete it to their own benefit, as and when the need arose. The name of the client and agreement number is not filled in. It gets worse; the description of the goods and the effective dates are left blank. This goes to the root of the contract and its omission renders the contract of no force and effect. This did not stop the Respondent from charging the Complainant for the warranty. It must also be noted that the

goods purchased were new and as such do not need a warranty and carry a manufacturer's guarantee anyway. Thus although Complainant is adequately protected by the common law, Respondent saw it fit to sell her an 'EXTENDED WARRANTY CONTRACT' captured on a document which could easily have no meaning whatsoever at claims stage, because of the incomplete information thereon.

In response to the following question from this Office:

'I would also appreciate it if you would advise as to whether the R181,88 relating to the extended guarantee contract was added to the price of the goods and hence reflected as part of the cash price of R2799,88 or whether same was added as part of the insurance price or R1344,47?' (See Annexure B34)

Respondent advised as follows:

'We have received the following explanation and confirmation from the debtor's department in Barnetts. (See Annexure B34)

The mentioned amount of R181, 88 (extended guarantee) was added to the price of the goods and reflects as part of the cost selling price of R2 799, 88.'

This explanation simply means, on the Respondent's own version, the additional cost of the extended warranty was disguised in the purchase price. Patently, the Complainant was not informed that she was paying for an

extended warranty contract. This conduct is both illegal and highly undesirable.

[53] I turn now to the 'INTERVIEW QUESTIONNAIRE', annexed hereto as B16. According to the Complainant she was not taken through this questionnaire but was merely ask to sign where indicated. This document itself supports the Complainant's version. The credit manager's section ticks off delivery charge, as if delivery will take place. Had Complainant been asked about this she would have informed the manager that she was going to collect the goods herself. This is in fact what she did; she collected the goods herself. The inescapable conclusion then is that the manager ticked the blocks after the Complainant signed. On the probabilities the Complainant was not even interviewed.

53.1 Incidentally Respondent charged for a non-existent delivery service in the amount of R348.60. One must also not lose sight of the fact this delivery fee is then added to the principal debt to which finance charges at the rate of 32.50% p.a. are added. This applies equally to the amount of R181.88 in respect of the extended guarantee.

53.2 The Complainant is adamant that she did not request insurance of any kind. According to her she went to the Respondent to buy a television set, a TV license and a small stove. Her version is that she merely signed where the Respondent asked her to sign and

she had no idea that she was purchasing insurance on credit. This is borne out by the documents which appear to have been hurriedly signed. The 'FREE CHOICE DOCUMENT', Annexure B1 hereto, according to the Complainant was not read by her nor did anyone read and explain the document to her.

53.3 The disclosure documents, for long term and short term insurance, were similarly merely signed by the Complainant. Note that this document, Annexure B2 and B3 hereto, are written in extremely small print and is certainly not presented in plain language. It is highly improbable that the Complainant with her limited literacy skills would be able to read and understand this. It is also interesting to note that whilst disclosures are made relating to shareholdings and percentage commission payable to the intermediary, such commission cannot be calculated because one has no idea of the premiums being charged. This is highly irregular and constitutes non-compliance with Section 3 (a) (vii) of the Code.

53.4 Turning now to Annexure B3, the statutory notice, it provides in large print:

**'IMPORTANT – PLEASE READ CAREFULLY THE DISCLOSURE AND OTHER LEGAL REQUIREMENTS'**

This was not taken seriously by the Respondent. If one looks at the signatures at the bottom of the page, one will notice that the Complainant's name was filled in where the signature should appear and where Complainant's full name should appear; her full name is not written. This is evidence that the document was filled in, in haste and once again supports the version that Complainant was merely asked to sign blank documents. On the available evidence, I have to believe the Complainant's version that she was not allowed to read this document. I also have no version from the Respondent's representative.

53.5 A further point to make in relation to Annexure B3 is that the document is silent about any reference to the FAIS Ombud or to provide details of when to complain to this Office.

## **FINDINGS**

[54] I thus have no difficulty in coming to the following conclusions based on the Complainant's version of events as well as copies of the documentation provided and the Respondent's version of events and documentation provided by the latter:

54.1 A number of the documents were incomplete at the time of signature by Complainant;

54.2 Details were filled in after the Complainant had signed documentation and possibly in her absence.

[55] It is however not only the documentation as well as the Complainant's version that supports the above mentioned conclusions.

[56] The Respondents **own** documentation reveals the following undisputed facts:

56.1 In a letter to this Office, dated 23 January 2007 which is annexed hereto marked B7, the Respondent states as follows:

'Given the above scenario and considering the incomplete "Schedule of Loan Agreement" as per the complainant's letter as well as Miss T.N.Gumede's claim that she did not understand the content of the documents, Barnetts propose the following'

56.2 Respondent admits that the agreements were not properly completed and not properly signed;

56.3 Respondent admits that the Complainant was asked to sign documents in blank; and

56.4 Respondent admits the 'terms and conditions' of the loan agreement were not presented to the Complainant for signature, nor was it signed by any person on behalf of Respondent.

[57] Clearly then, all these facts, which are undisputed support the Complainant's version.

[58] This is further proof of the truthfulness of the Complainant's version.

[59] I am thus compelled to conclude, in the light of the overwhelming evidence before me, that Respondent failed to comply with provisions of this agreement and in fact maladministered the agreement on numerous counts.

[60] The 'loan agreement' falls squarely within the ambit of the FSOS Act. The FSOS Act was drafted to deal with situations such as these. It is clear that the Respondent has maladministered the implementation of the agreement on which it relies. I also have no hesitation in concluding that Respondent in this matter has treated Complainant unreasonably or inequitably.

[61] This undoubtedly led to a financial loss for Complainant. I shall deal with the financial loss later in this determination.

**K. FAIS COMPLIANCE**

[62] An important issue in this case is the question as to whether the Respondent, in relation to this transaction, was FAIS compliant. In addressing this issue, Respondent provided the Office with certain documents. They are dealt with hereunder.



[63] The JDG Trading Group Directive dated 05 October 2007 is annexed hereto marked B21-23. This document indicates the seriousness with which the JD Group views the FAIS Act. The directive specifically states that:-

'it is a criminal offence for any unregistered person to give advice regarding such (financial) products that it sells'.

This document purports to set out the difference between Factual Information and Advice. It specifically states the following:

'1.1. 'The act stipulates that only "qualified" and registered financial advisors may give advice. However anyone may point out (underlining in original) factual information to a customer. The terms and conditions, printed on the documents, are factual information.'

[64] The document goes on to provide a few examples, namely:

'1.2.1. A customer asks the salesperson; "Can I provide my own insurance. I have a SANTAM policy". ***The salesperson hands the customer the "Free Choice" document and points out clauses 2, 2.1, and 2.2 to the customer*** (Italics in original). The salesperson has given factual information, not advice.'

'1.2.2. The customer then asks the salesperson; "Which is better for me? Should I use my SANTAM policy or should I take the policy, which you are offering me through RMB Structured Insurance?" ***If the salesperson answers*** (sic) ***this question, it would be giving advice and the***

*salesperson would be breaking the law.* (Italics in original) Therefore the salesperson needs to inform the customer; “In terms of the FAIS act I am not legally allowed to answer that question. Please come with me and let me introduce you to our registered, in-store, financial services adviser.” The salesperson then introduces the customer to the Business Manager or the Credit Manager, both of whom are registered with the Financial Services Board and therefore permitted to give advice.’

[65] A pictorial training document headed:-

‘Module 3: FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT OF 2002 (FAIS ACT)’,

Annexure B25-31 again sets out that only qualified and registered financial advisors may give advice. This document essentially shows how the salesperson must merely **point out** (own emphasis) answers to any questions from sections of the documents that are handed to clients when a transaction is underway.

[66] I find Annexure B30, entitled ‘SALESPERSON’S GUIDE TO SELLING INSURANCE PRODUCTS AND EXTENDED GUARANTEES’ particularly insightful. The following are some of the instructions to staff:

2. You are required to inform prospective customers that insurance is required if the customer wishes to purchase goods on credit.
3. You must inform the customer that he/she has a free choice regarding the insurance and you must request the customer to read and sign the “Free Choice Document”

4. If the customer opts for the insurance products which we offer, via RMB Structured Insurance, or for an Extended Guarantee on the products he/she wishes to purchase, you must hand all the policies and related documents to the customer plus the new note regarding the FAIS Act and request him/her to peruse them. You may not answer any questions which require you to exercise judgment or express an opinion, nor may you give any advice.
  
6. You are, however, entitled to provide the customer with any **factual information**. This is information, which is printed on the various insurance or extended guarantee documents. When you point out this factual information to a customer, you should do so by handing him/her the relevant document and by pointing out the relevant clauses in the document'.

[67] In Annexure B26 the caricature asks the question as to how he can inform the customer as to who is entitled to give advice and the answer is:-

'By making sure that the customer reads Annexure C of GD04.0021'. (Annexed hereto as Annexure B31).

[68] Annexure B31 states the following:

ANNEXURE C

Dear Customer;

**RE: FINANCIAL ADVISORY AND INTERMEDIARY SERVICES**

**ACT OF 2002**

In terms of this Act:-

1. Our employees will assist you in completing the policies for Credit Insurance and will fill in the details provided by you.
2. Our employees cannot and may not give you any advice regarding these policies.
3. If you want advice or if you want to speak to someone who can exercise any judgment in relation to these insurances, please ask our employee to direct you to the in-store registered FAIS representative.
4. Kindly therefore note that the employee will only provide clerical or administrative services to you and if you want any financial services you must speak to the in-store registered FAIS representative.

[69] On the basis of the foregoing, it is the Respondent's submission that they, at all material times, were indeed FAIS compliant.

[70] The Respondent, it must be said, does not dispute that they sold to the Complainant certain financial products. Nor does the Respondent dispute that in relation to these sales they have to be FAIS compliant.

[71] Upon a proper consideration of all the facts and submissions presented to me, whether the Respondent was FAIS compliant or not essentially turns on their interpretation of what is 'advice' as contemplated in the FAIS Act.

[72] The Respondent's case is that they did not give 'advice' as defined in the FAIS Act.

[73] At the outset two things must not slip our minds, viz.:

73.1 the principal purpose of the FAIS Act. is 'to regulate the rendering of certain *financial advisory* (own italics) and intermediary services to clients' and;

73.2 the Legislature had financial advice squarely in their sights, so much so that the word 'advisory' even found its way into the very title of the FAIS Act.

[74] The FAIS Act defines 'advice' as follows:

'advice' means, subject to subsection (3) (a), any recommendation, guidance or proposal of a financial nature furnished, by any means or medium to any client or group of clients-.'

[75] Sub-section 3(a) reads as follows:

- (a) 'advice does not include-
  - (i) factual advice given merely-
    - (aa) on the procedure for entering into a transaction in respect of any financial product;
    - (bb) in relation to the description of a financial product;
    - (cc) in answer to routine administrative queries;

(dd) in the form of objective information about a particular financial product; or

(ee) by the display or distribution of promotional material;

(ii) an analysis or report on a financial product without any express or implied recommendation, guidance or proposal that any particular transaction in respect of the product is appropriate to the particular investment objectives, financial situation or particular needs of a client;

[76] The Respondent's interpretation of 'advice' is based heavily, if not entirely on the aforementioned sub-section (3).

[77] While the definition, in section, 1 of 'advice' is made subject to sub-section (3) (a), it does not mean that this sub-section in any way alters, restricts or expands the definition of advice. In fact all the sub-section does is that it merely qualifies and clarifies the definition by excluding certain very specific conduct from the meaning of 'advice'.

[78] The definition is set out in plain and unambiguous language and certainly does not call for inventive interpretation. One must first consider the plain language of the legislation.

[79] Whilst dealing with the interpretation one should not lose sight of the following:

79.1 The Complainant went to the Respondent's store only for the purpose of purchasing a stove and a television set;

79.2 It cannot be disputed that Complainant had no intention of purchasing any financial products from the Respondent;

79.3 It is highly improbable that Complainant would request any financial products. She nevertheless denies that she did so;

79.4 If the Complainant purchased a financial product, this could only have happened as a result of certain conduct on the part of the Respondent;

79.5 According to the Complainant she was merely told to sign documents and she did not even know that she was purchasing financial products.

[80] On the Respondent's own version, they admit to having sold to the Complainant financial products. However, this they say did not happen as a result of any advice given by members of their staff.

[81] The Respondent's version does not withstand scrutiny. One cannot imagine how one could possibly sell something as technical and intangible as a financial product without making any kind of recommendation, guidance, proposal, or inducement. This to a lay person or semi-literate person?

[82] The Respondent merely hides behind their own expansive and inventive interpretation of sub-section 3(a). According to the Respondent they did not give

any advice but merely 'pointed' to documents containing details of financial products, namely short term insurance, credit life and a warranty.

[83] The definition of 'advice' in section 1 is very clear. It means '*any recommendation, guidance or proposal*' furnished by '*any means or medium*'. The use of the word 'any', clearly includes both express and implied recommendations and guidance. The legislature further states that this can be done 'by *any* means or medium'. This therefore includes any form of communication, including 'pointing' at a document containing a proposal or recommendation to purchase a financial product. Sub-section 3 was added to distinguish 'advice' from mere advertising and promotion, mere procedure and description of a financial product.

[84] If one gives advice orally then this falls within the definition in section 1; but says the Respondent, if the same advice is put in writing and if one then merely points at it, then this falls outside of the definition of 'advice' in section 1. According to Respondent, it then falls within the proviso in sub-section 3(a). This is both absurd and ludicrous and could not possibly have been intended by the legislature.

[85] On the Respondent's own version, they requested the Complainant to sign these documents. The Respondent in fact induced the Complainant to purchase financial products. Yet, the Respondent claims that by merely 'pointing' at the documents, they do not fall within the ambit of the definition of 'advice'. I must



accept that the Complainant did not request any financial products. I accept equally that only the Respondent could have raised this and sold the financial products to the Complainant. How they achieved this by merely 'pointing' the Complainant in the right direction, without giving any advice, is beyond me.

[86] What the Respondent did in concluding these transactions, on their own version, certainly did not amount to:

86.1 mere promotion or advertising;

86.2 mere description of a financial product;

86.3 mere explanation of procedure; and

86.4 objective information about a financial product.

Nor did it amount to answering questions pertaining to routine administrative queries.

[87] To put it plainly, the Respondent sold to the Complainant financial products after making a recommendation that she purchase the same. Indeed I would go so far as to say that it is probable that Respondent misled Complainant into buying financial products by giving her the impression that the various amounts were merely 'sums' which 'she must not worry about'.

[88] In fact it would be fair to say that in all instances in which customers are advanced monies by Respondent, they are in fact compelled to purchase

insurance as required by paragraphs 5.1 and 5.2 of the 'Terms and Conditions' (Annexure B9) to the loan agreement. Note that the customer, in this instance, was not afforded the option of an installment sale agreement.

[89] Whilst in principle, the customer is able to take out insurance with a provider of choice I doubt whether most of the customers are either in position to do so or even properly informed of this right. Complainant certainly, in my view and on the available evidence was not informed of this right.

[90] To uphold the Respondent's interpretation of 'advice' in the manner in which it does, will result in a convenient circumvention of one of the core or principal objectives of the FAIS Act. It will make a mockery of the legislature's intention to regulate financial advisory services.

[91] To strengthen my point one need look no further than the provisions of subsection 3(a) (ii) which I repeat:

(a) advice does not include-

(i) .....

(ii) 'an analysis or report on a financial product without any express or implied recommendation, guidance or proposal that any particular transaction in respect of the product is appropriate to the particular investment objectives, financial situation or particular needs of a client;'

[92] An analysis or report on a financial product is excluded provided it does not contain *'any express or implied recommendation, guidance or proposal'*, all of which you will find in the Respondent's documents. By merely 'pointing' it out does not mean that the Respondent did not give advice as contemplated in the FAIS Act. In any event I cannot fathom how the Respondent can practically conclude these transactions with their clients and customers by merely 'pointing' out information and not giving any advice, as contemplated in the FAIS Act.

[93] The Respondent's conduct falls foul of:

- a) the common law, in that they induced the Complainant to purchase financial products when she had no intention to do so and failed to complete material terms of the contracts on which they rely; and
- b) the legislation, in that they sold to the Complainant certain financial products contrary to the provisions of the FAIS Act and concluded a 'Loan Agreement' contrary to the provisions of the FSOS Act.

**L. CONTRAVENTIONS OF THE FAIS ACT AND THE CODE**

[94] I have already established that Respondent in fact rendered advice as set out above and that such advice was rendered in respect of financial products.

[95] Respondent has not only rendered advice but in doing so breached most of the basic provisions of the FAIS Act as well as the General Code.

[96] To begin with, the Principles of the codes of conduct, set out in Section 16 (1) of the FAIS Act, is premised on the principle;

‘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’.

Clearly from an examination of all the evidence it is clear that Complainant was not given the opportunity to make an informed decision, neither were her needs suitably and appropriately addressed.

[97] Part II Section 2 of the General requires that;

‘A provider must at all times render financial services honestly, fairly with due skill, care and diligence, and in the interests of the clients and the integrity of the financial services industry.’

It is clear that the financial products were simply added on to the principal debt without the exercise of any skill, care and diligence and were certainly not done in the interests of the client. This type of conduct can hardly be said to be upholding the integrity of the financial services industry.

[98] Part VII Section 8 (1) of the Code states that:-

‘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.'

At the risk of being repetitive, it is clear that no appropriate steps were taken to seek from complainant any information save for asking her how much she wanted to pay per month. This was by no stretch of the imagination an exercise in establishing her financial situation, financial product experience and objectives.

[99] These transactions could not have been in the interests of Complainant. The most basic of checks would have established that Complainant could not afford the monthly repayments given her salary of R300.00 per week. Nor does it appear that she intended to incur a debt of R6468. 89.

[100] It is clear that no checks were done to properly ascertain the Complainant's financial situation or financial product experience. The 'Interview Questionnaire' merely asks 'How much can you afford to pay as a monthly instalment'. The answer of R270 conveniently corresponds exactly with the monthly repayment on the schedule to the loan agreement.

This cannot be a mere coincidence and in fact the Complainant's version that she was merely asked to sign the forms is again confirmed.

[101] The final cost to the Complainant within a two year period is a staggering 115.28% over and above the actual costs of the goods. A close look at the structure of the transaction makes it extremely unlikely that had Complainant been given appropriate advice; that she would in fact have accepted this transaction. Given the circumstances of this case, it is clear that the Complainant could have exercised various options had she been appropriately advised.

[102] It is indeed apparent from this transaction that the Respondent's core business may in fact be money lending and the sale of financial products and not that of furniture sales. My view is fortified by Respondent's own description of its business on its web-site as '*a mass consumer financier*'.

[103] Whilst one must take cognisance of the circumstances and client base of Respondent when considering the onerous obligations of the FAIS Act, I am very concerned about Respondent's lip service to the FAIS Act, given that a large portion of their business is derived from the sale of financial products. Note that according to the Respondent, the JD Group generates annual revenue of R12, 9 billion and an annual cash inflow of R12, 1 billion from trading activity.

[104] I have already found, on the Respondent's own version, that incomplete documentation was signed. This is in direct contravention of the Code which requires in Part VI Section 7 (1) that:

'No provider may in the course of the rendering of a financial service request any client to sign any written or printed form or document unless all the details required to be inserted thereon by the client or on behalf of the client have already been inserted'

The documents were not only incomplete but the manner in which they were completed confirms Complainant's version that nothing was explained to her and that she was merely asked to sign documents that were placed before her. This also confirms that documentation was completed in her absence;

[105] Section 3 (1) (a) (iii) of the Code requires that representations must be;

'adequate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client;'

There is nothing on the available evidence to suggest that there was any compliance with this section of the Code;

[106] Section 3 (2) (iv) of the Code requires that:

'representations must be provided timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction.'

I have no doubt that not only were the representations not made timeously but that such representations were misleading;

[107] Section 3 (1) (vii) of the Code requires that:

‘all amounts, sums values, charges, fees, remuneration or monetary obligations mentioned or referred to therein and payable to the product supplier or the provider, be reflected in specific monetary terms: Provided that where any such amount, sum, value, charge, fee, remuneration or monetary obligation is not reasonably pre-determinable, its basis of calculation must be adequately described;’

It is clear from the complaint that neither the Complainant nor her employer understood how the premiums, charges or commissions in respect of the financial products were calculated; and having studied the documentation thoroughly it is clear that the amounts are neither clear and specific, nor easily ascertainable.

[108] The ‘DISCLOSURES IN TERMS OF THE POLICYHOLDER PROTECTION RULES’ document (Annexure B2) sets out the maximum commission payable by RMB Structured Life Limited and RMB Structured Insurance Limited, and in this respect Complainant has signed this document. Given the facts already mentioned it is extremely unlikely that this was ever read or explained to Complainant. In addition it is still unclear from Complainant’s documentation as to exactly how the costing is structured and I am not easily able to determine the costing of the individual products. This does not meet the requirements as set out in the relevant legislation.



[109] Section 8 (2) of the Code requires that:

‘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.’

It is abundantly clear that no such steps, reasonable or otherwise, were taken to ensure that Complainant made an informed decision.

**M. THE INTEREST CHARGED**

[110] In a facsimile to this office from the Complainant’s employer dated 28 February 2007 Mrs. van Zyl states the following with reference to a conversation that she had had with De Klerk from Barnetts:

‘During his first conversation he mentioned that: “...according to the Hire Purchase Act a person MUST have insurance to buy furniture on credit.....but some time between his first conversation and his second conversation to me he changed his story to : “according to paragraph 5 of the Loan Agreement Contract..’

[111] It is evident that Complainant could have been given the option to purchase the goods by way of a credit agreement. Such an agreement would have been governed by the Credit Agreements 1980 (Act 75 of 1980). It is not in dispute that a loan agreement was in fact entered into. There is no evidence before me that Complainant was given a choice in this regard.

[112] At the time of this transaction the ruling prime lending rate of interest was 12% per annum. In terms of the Usury Act the maximum interest rate that can be charged is 20% in terms of a credit transaction where the principal debt does not exceed R10 000 and 17% in respect of credit transactions where the principal debt exceeds R10 000.

[113] The interest rate on the loan agreement was 32.5%, some 12.5% higher than that which Complainant would have paid in the event that she had been offered a credit agreement.

[114] The fact that the insurance is in fact paid across monthly by the Respondent, but charged as a lump sum accruing interest to the Complainant is cause for concern given the obligation on Respondent to render advice in the interests of the client.

[115] Respondent was thus under an obligation to advise Complainant that an alternative method of financing existed and that such method would have been to Complainant's advantage. This did not occur. It must be stated that 'advice' as defined in the FAIS Act, encompasses advice given:-

'(c) on the conclusion of any other transaction, including a **loan** (own emphasis) or cession aimed at the incurring of any liability, or the acquisition of any rights or benefits in respect of any financial product;'

[116] The advice or should I say lack thereof was thus not only not in Complainant's interest, but in fact undoubtedly caused her financial prejudice.

[117] It is noted that Respondent is registered with the Micro Finance Regulatory Council and fell within the Exemption Notice in Terms of Section 15A of The Usury Act, 1968 (Act No.73 of 1968). The exemption notice, namely Notice 1407 of 2005 effectively allowed the Respondent to charge the maximum interest rate of 32.5% on this transaction.

[118] In order to qualify for this exemption the Respondent was in terms of S1 of Notice 1407 required to comply with the provisions of the notice. In particular Section 32 states that:-

‘The lender shall, prior to entering into a money lending transaction with a borrower, consider the ability of the borrower to meet the required repayments in respect of the money lending transaction,’

[119] In doing so the Respondent is required to have regard to the borrower's regular income.

[120] On the available evidence, it is clear that other than two questions on the interview questionnaire,(Annexure B16) namely ‘how much deposit can you pay’ and ‘how much can you afford to pay as a monthly instalment’ there is no indication that the Respondent has properly considered Complainant's ability to

pay. I will go so far as to say that under the present regulatory framework this would amount to reckless lending.

[121] In fact had Respondent complied with the provisions of the exemption it would have been patently obvious that Complainant would have been seriously constrained to meet the monthly instalments, given that it constitutes almost a quarter of her monthly income.

[122] This Office is an integral part of the financial regulatory framework in this country. Justification for regulation can be found, *inter alia* in the need to protect consumers. In particular, the majority of South Africans do not enjoy the benefits of financial literacy and are therefore vulnerable to sharp practices and financial predation. I am therefore forced to make the following comments regarding this transaction:

122.1 The Respondent, through the above mentioned exemption was allowed to charge interest at the rate of 32, 5%. Measured against the prime lending rate at the time, and the maximum allowed in terms of the Usury Act; the rate of interest charged by the Respondent is excessive by any standard;

122.2 It appears that the Respondent charges 32, 5% interest merely because it can. One must not lose sight of the fact that the Respondent, within the retail furniture market, is a significant player. The Respondent uses this to make super profits. The Respondent clearly makes a profit on the retail

price of the goods and in addition is entitled to charge interest where payment is deferred over a period of time. However there can be no justification for the Respondent to fleece the very people who cannot afford the high rates of interest charged. Poor people cannot pay cash for goods and the Respondent does provide a means for such people to acquire furniture and appliances. This does not mean that the Respondent be allowed to charge excessively. This amounts to exploitation of poor and vulnerable people;

122.3 The Respondent justifies its charges on the basis that they conduct business in an environment where there is a high risk of bad debt. However, one cannot mitigate bad debt by fleecing those people who actually pay. There are other means whereby the Respondent can avoid bad debt. One such means is to avoid reckless lending. The present case is in point. The Complainant is an individual who would be unable to service the indebtedness she incurred. The Respondent easily entered into a loan agreement with the Complainant without establishing her ability to meet payments. In fact Respondent did not even take care to obtain the Complainant's proper addresses and her identity details;

122.4 I am thus compelled to refer a copy of this determination to the National Credit Regulator in order that they might properly consider whether any further steps are necessary to ensure that the provisions of the National Credit Act, 2005 (Act No 34 of 2005) ('National Credit Act') are now being

complied with by the furniture retailing industry in general and Respondent in particular.

**N. WHETHER THIS MATTER HAS BEEN SETTLED**

[123] In terms of Section 28 (1) of the FAIS Act the Ombud must in any case where a matter has not been settled or a recommendation referred to in Section 27(5) (c) has not been accepted by all the parties concerned, make a final determination.

[124] It is clear from the copies of correspondence provided to this office that since the lodging of this complaint there has been communication between the Complainant and the Respondent.

[125] It is also fair to say that this correspondence evidences a level of distrust of the Respondent by Complainant. This is evident from the facsimile forwarded to this office by Complainant and attached hereto as Annexure A11. In terms thereof Complainant states:

‘..... we (my employer and I tried for almost a year to negotiate with them..... As I don’t think the settlement amount is correct, I would like it if you can please take the matter further’.

[126] The settlement amount referred to above is the amount as set out in the facsimile from Barnettts to Complainant dated 17 August 2007 and annexed hereto as Annexure A17.

The following is stated therein:

'As discussed with Mr. Toy de Klerk, the balance of R2 154.00 must be paid to settle this account. We will then process a rebate on this account for the difference between the balance and your payment of R2 154.00. Once this is done, the account will have a nil balance.

The rebate that we will pass on this account is made up as follows:

Insurance	R1 344.47
Finance Charges	<u>R 540.42</u>
<b>Total Rebate</b>	<b>R1 884.89'</b>

[127] I have already stated that the contract itself is in fact invalid. It is however necessary to establish whether the settlement as set out in Annexure A17 concludes the matter.

[128] In order to establish this, I firstly considered Annexure A3 which reflected the following figures:

Amount advanced	R3 128.48
Insurance	R1 344.47
Principal Debt	R4 472.94

Finance Charges	R1 668.35
Contract Balance	R6 141.29
Contract Fee	R 90.00
Vat on Contract Fee	R 12.60
Total Loan Repayable	R6 243.89
TV Licence	R 225.00
<b>Total Amount Repayable</b>	<b>R6 468.89</b>

[129] Annexure A3 states at the end that 'The Total Charge of Credit in terms of this Agreement consists of the following elements:

Finance Charges	R 1668.35
Contract Fee	R 90.00
Vat on Contract Fee	R 12.60
<b>Total Amount of Total Charges of Credit</b>	<b>R 1770.95</b>

[130] Complainant indicated that the cost of the items amounted to R2798.00. I was unclear as to how the amount advanced of R3128.48 was arrived at. It was only upon considering Annexure A20 being an account enquiry printout attached to Respondent's fax to Complainant dated 17 August 2007 that I noted a delivery charge of R348.60. It should be noted that this same document reflects a purchase price of R2779.88.

[131] Upon making enquiries with the Complainant she confirmed that she had uplifted the goods herself. I thus requested a copy of the delivery slip from Respondent.



The Respondent was unable to locate such a slip and hence advised that they were refunding the delivery charge.

[132] Complainant subsequently confirmed that the delivery charges of R348.60 had been refunded to her.

[133] It is clear that that the reason that Respondent was not able to find either the original or a copy of the delivery note is that no delivery took place.

[134] This again demonstrates that Respondent either merely ticked the boxes in the interview questionnaire or deliberately charged a delivery fee for a service that was not provided.

[135] In effect had it not been for the intervention of this Office and several pertinent enquiries debating the account, Complainant would have been charged for a delivery that never took place and this after Respondent's offers to settle the matter.

[136] It is clear therefore that Complainant's doubts about whether the matter has indeed been settled is well founded.

[137] It is evident from Annexure A17 that the amount written off was the insurance as well as the finance charges thereon.

[138] The Complainant paid R2 154.00 in order to settle the matter. The Complainant had however, at the time of the settlement offer, already paid nine instalments of R270.00 which in total amounted to R2 430.00 and hence Complainant paid R4 584.00 in total on goods valued at R3004.88.

[139] The cost of the TV licence is of course mandatory and hence when the amount of R225 is added to the cost of the TV and small stove, in terms of Respondent's figures, this raises the raises the Complainant's total indebtedness to R3 004.88. However the amount of R181.88 for the extended guarantee contract must be deducted from this figure. This then reduces Complainant's total indebtedness to R2 823.00 which is R3004.88 – R181.88.

[140] Taking into consideration that the delivery costs of R348.60 have been refunded Complainant has thus paid an amount of R1 412.40 over and above the basic costs of the goods.

## **ABUSE**

[141] It would be extremely naive of me to think that this is an isolated or exceptional case. This Office is in receipt of other such complaints involving the JD group. Nor does it appear that this abuse is confined to the JD group. This is happening throughout the retail furniture industry.

[142] These kinds of practices must be stopped. We cannot allow poor and vulnerable people in the position of Complainant to be exploited. The Respondent is clearly circumventing the FAIS Act with its 'point and sign' policy and practice. Vulnerable people are duped into incurring enormous debt when all they wanted was a simple piece of furniture or appliance. It would be fair to say that Complainant has paid expensive finance and other charges to acquire the furniture that she wanted in the first place. People in the position of Complainant, usually illiterate, semi-literate or financially illiterate and poor, end up paying more than double the purchase price for furniture and appliances. The Respondent is raking in huge profits merely by generating paper transactions.

[143] By being allowed to do this the Respondent gets away with the very mischief that the FAIS Act and other consumer protection legislation seeks to prevent or address. It must be appreciated that consumer protection legislation such as the FAIS Act, the FSOS Act and now the National Credit Act came into existence as a result of market imperfections and an asymmetry of information such as we find in these relationships between industry giants such as Respondent and vulnerable consumers such as Complainant. It is precisely to prevent this kind of market abuse and to ensure consumer protection that market conduct legislation of the kind mentioned came into being. It is imperative that when consumers purchase intangible products, such as those financial products sold to Complainant in this case, there has to be, at the very least, a proper explanation of the nature of the products, so that consumers can make an informed choice.

In my opinion, there is clear justification for regulators to compel the retail furniture industry to explain common law rights to consumers. This will avoid sales of useless and unnecessary 'maintenance contracts' and 'extended warranty contracts'.

[144] In my view it is time for the registrar of the Financial Services Board ('FSB') to intervene. I have no doubt in my mind that the FSB is unaware of these practices. The FSB in good faith expects that the Respondent and the rest of the retail furniture industry is at all material times FAIS compliant. However, given this type of market abuse and on the understanding that it is not an isolated incident, it is time for the registrar to intervene urgently to prevent circumvention of the FAIS Act by the 'point and sign' interpretation and practice carried out by the Respondent.

[145] I recommend that the registrar act in terms of Section 34 of the FAIS Act.

[146] Sec. 34 (1) provides as follows:

'Subject to subsection (2) and (3), the registrar may, after consultation with the Advisory Committee, by notice in the *Gazette* declare a particular business practice to be undesirable for all or a category of authorised financial service providers, or any such provider.

[147] There can be no doubt that this practice falls squarely within the criteria set out in sub-section (2) of Section 34. This sub-section states as follows:

- (2) The following principles must guide the registrar in considering whether or not a declaration contemplated in subsection (1) should be made:
  - (a) That the practice concerned, directly or indirectly, has or is likely to have the effect of-
    - (i) harming the relations between authorised financial service providers or any category of such providers, or any such provider, and clients or the general public;
    - (ii) unreasonably prejudicing any client;
    - (iii) deceiving any client; or
    - (iv) unfairly affecting any client; and
  - (b) That if the practice is allowed to continue, one or more objects of this Act will, or is likely, to be defeated.

[148] I believe that action by the registrar in terms of Section 34 will go a long way toward ending this kind of market abuse and ensuring that there is consumer protection and integrity in this sector of the financial services industry, as contemplated within the regulatory legislative framework.

[149] On the web-site of the JD Group ([www.jdg.co.za](http://www.jdg.co.za)) and in its annual report, the latter describes itself as follows:

- 'JD Group, a **mass consumer financier**, is South Africa's leading differentiated furniture, appliances, electronic goods,

home and office automation retailer, operating nationally through three business divisions and nine brands, and internationally with one business division and one brand in Poland.

- The Respondent, through its various business units covers the mass middle income market;
- JD Group generates annual revenue of R12, 9 billion and an annual cash inflow of R12, 1 billion from trading activity'.

It is apparent from the Respondent's own account of its activities that their principal business is not the retailing of furniture but micro-lending and the sale of financial products.

[150] It is clear to me that the JD Group is a significant player in the markets in which it conducts business, namely the retailing of furniture, appliances, electronic goods, home and office automation. As such it is able (if it so wishes) to exercise a fair degree of market power within these markets. I believe that the evidence presented by this case points to a possible abuse of this market power. The Competition Act 1998 (Act No 89 of 1998), as amended expressly prohibits a dominant player from charging excessive prices to the detriment of consumers.

[151] Although it is not within the jurisdiction of my Office to consider the competition or anti-trust implications of the Respondent's business practices in its market, I

nevertheless believe that the facts of this case (which as previously mentioned is not an isolated case) highlight certain practices which I believe warrants further investigation into the furniture industry.

[152] I am therefore also referring this determination to the Competition Commissioner.

**O. UNFAIR PRACTICES WITHIN THE RETAIL FURNITURE INDUSTRY**

[153] From Complaints received in my Office from consumers and from investigations conducted, a number of unfair practices within the furniture industry have emerged. I am compelled to draw attention to this in order to inform the consumer of what to expect and to prepare to avoid them. It must be noted that these practices are not all evidenced within the JD Group only but appear widely within the retail furniture industry. The following are some of the practices, we have encountered:

153.1 Charging for or selling maintenance contracts, where this is unwarranted e.g. selling a maintenance contract on the back of the sale of a lounge suite. Failure by the retailer to explain to the consumer the latter's common law rights regarding the purchase of new furniture and appliances;

153.2 Charging 'handling fees' up to 14% of the value of the goods without stating what the fee is for and how the amount is arrived at;

- 153.3 Charging a 'Club Fee', without explaining that this is merely optional;
- 153.4 Selling various insurance policies, as part of the whole transaction, without explaining that certain policies are either optional or not necessary at all e.g. selling a policy incorporating benefits on unemployment or retrenchment to a housewife, retiree or the unemployed;
- 153.5 Selling 'Credit Life' policies and 'Goods Insurance' policies where the premiums are out of proportion to the value of the goods (For example in this case, the cash price of the goods was R3004.88–R181,88 and the Insurance Premium R1344.47, before finance charges are added). Upon the sale of such policies, some of which run on a month to month basis, debiting the consumer's account with 100% of the premiums up-front and then adding finance charges to this amount at exorbitant rates;
- 153.6 Charging exorbitant rates of interest in loan agreements without explaining to the consumer that there are other more economically viable options to the latter's benefit;
- 153.7 Charging the maximum rate of interest, up to 32.5%, just because they can;



- 153.8 Deposits being deducted, not from the retail price of the goods but from the entire indebtedness i.e. after insurance and finance charges are levied;
- 153.9 Charging for delivery fees where the consumer collected the goods personally from the retailer;
- 153.10 Charging 'Contract Fees' for standard documents used on a daily basis. These are invariably Attorney and Client fees which are being passed on to the consumer;
- 153.11 Consumers being presented with numerous documents, all at once and being asked to sign without an explanation being tendered of the purpose and content of each document;
- 153.12 The documents are usually in a language the consumer does not understand and no attempt is made to explain the documents in a language the consumer understands;
- 153.13 Consumers being made to sign documents that are either blank or incomplete;
- 153.14 The completion of contractual documentation after the consumer signs and often in the absence of the consumer;

153.15 Consumers being made to sign a forfeiture of insurance premiums, which were debited up front, to the retailer;

153.16 Disguising various additional charges such as extended warranties within the purchase price.

**P. SUMMARY OF MY FINDINGS**

[154] For ease of reference I hereby, for reasons set out in this determination, state a summary of my findings:

154.1 The Complainant had no intention of entering into a loan agreement on the terms and conditions that appear in the Respondent's contract;

154.2 When she signed the Schedule to the Loan Agreement, the Terms and Conditions, comprising an additional three pages was not present. Accordingly she was not given an opportunity to read this agreement and on the Respondent's own version, the agreement was incomplete at point of sale.

154.3 The Loan Agreement relied upon by the Respondent is invalid and of no force and effect.

154.4 The Complainant signed an 'Extended Guarantee Contract' where material terms were left blank. The Extended Guarantee Contract is

equally invalid and of no force and effect, the cost of which was disguised in the purchase price;

154.5 The Respondent sold financial products, without informing the Complainant of such a sale. I find that the Complainant did not know that she was purchasing insurance. I find further that the Complainant had no intention of purchasing insurance from the Respondent;

154.6 The Respondent, in conducting this transaction, failed to comply with the FAIS Act;

154.7 The Respondent, in conducting this transaction, violated the FSOS Act;

154.8 The Respondent, in conducting this transaction, failed to comply with the General Code of Conduct for Financial Services Providers and their Representatives;

154.9 The Respondent's decision to enter into this agreement amounted to reckless lending;

154.10 The Respondent illegally charged the Complainant a fee for delivery.

154.11 The Respondent's conduct caused the Complainant to suffer financial prejudice.

154.12 The Respondent treated the Complainant unfairly as contemplated in the FAIS & FSOS Act.

**Q. SUMMARY OF MY RECOMMENDATIONS**

[155] For convenience I now provide a summary of my main recommendations:

155.1 Our investigations have established that a substantial portion of the retail furniture industry's business has now turned to the rendering of financial services, which appears to be far more lucrative than the mere retailing of furniture and appliances.

If furniture retailers want to be the providers of financial services, then they must be strictly compliant with the provisions, terms and conditions of the relevant legislation and codes of conduct that regulate the financial services industry.

If one considers that the JD Group and other furniture retailers target a market comprised of lower to middle income groups, being the most vulnerable of consumers who are not financially literate and easily exploited, it becomes even more of an imperative that they comply with legislation and regulation. Such legislation was put in place by the government to protect these very consumers from being exploited. It is therefore recommended that the registrar of the

FSB issue the directive in terms of Section 34 of the FAIS Act as set out in paragraphs 145 to 148 above;

155.2 It is equally recommended that the National Credit Regulator in the light of the provisions of the National Credit Act, investigate whether furniture retailers generally and the JD Group in particular comply with the provisions of the said Act;

155.3 This determination is also referred to the Competition Commission for investigation of possible anti-competitive conduct;

155.4 It is recommended that members of the retail furniture industry embark upon a proper programme of education and training of their staff in order to ensure that those rendering financial services do so within the parameters of the applicable legislation and codes of conduct. This must be done in the interests of both consumer and provider;

155.5 Parliament in its wisdom has enacted a raft of legislation to regulate the financial services industry. However, evidence from the complaints handled by this Office indicates that a much greater need exists for more aggressive steps to be taken in the line of consumer education. In this respect little or nothing has been done to inform ordinary people of their common law rights. Thus we find

that vulnerable consumers buy new furniture and believe, upon inducements made by retailers, that they need extended warranty contracts and maintenance contracts.

155.6 This case again highlights the urgent need for there to be effective consumer education targeted at vulnerable consumers. In particular South Africans living in the rural areas, townships and informal settlements require attention. There is an onus on the government, the financial regulators and the industry to embark upon meaningful consumer education. The media, particularly the print media and the national broadcaster need to focus resources on such education. Such education will save the South African consumers millions of rand annually;

155.7 I am aware that there are numerous non-governmental organisations that focus on consumer education. I recommend that they be properly resourced in order to make their programmes more effective;

155.8 The trade unions in this country have memberships who are exposed to these types of exploitation. It is incumbent upon the leadership of such trade unions to ensure that their members are properly advised and given the necessary consumer education;

155.9 The insurance industry and in particular the Life Offices Association ('LOA') needs to take note of the types of insurance products being sold by furniture retailers and take steps to ensure that the product being sold to the consumer is necessary in the circumstances, affordable, written in plain language and most importantly is in the interests of the consumer. I am therefore sending a copy of the determination to the LOA for their attention.

## **THE ORDER**

[156] My finding is that the Respondent's conduct caused the Complainant financial prejudice. I therefore intend to do no more than to address this in my order. In so doing, I am obliged to have due regard to what is equitable in all the circumstances;

[157] In an attempt to avoid further expense the Complainant with the assistance of Van Zyl, settled the indebtedness according to a calculation made by Respondent.

[158] Having found that the 'loan agreement' is of no force and effect, the transaction can therefore only be treated as if it was a purchase for cash as at the transaction date. Accordingly the Complainant is obliged to pay to the Respondent the cash retail price of the goods plus the costs of the television licence. This amounts to R2823.00. The Complainant paid a total of R4584.00. Taking into consideration

the delivery charges of R348.60 which has since been refunded, Complainant paid the Respondent the amount of R1412. 40 which amount the Respondent is not entitled to. The Complainant is therefore entitled to a refund in this amount.

**Accordingly, I make the following order:**

- A. The Respondent is ordered to pay to Complainant the sum of R1412.40;
- B. Interest on the aforesaid amount at the rate of 15% p.a from 14 October 2006 to date of payment;
- C. The Respondent is ordered to pay the case fees of this Office in the sum of R1000, 00.

**DATED AT PRETORIA ON THIS THE 29 DAY OF JANUARY 2008**



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**CHARLES PILLAI**  
**OMBUD FOR FINANCIAL SERVICES PROVIDERS**



I concur in the determination of the Ombud herein.



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**NOLUNTU NELLISA BAM**  
**DEPUTY OMBUD FOR FINANCIAL SERVICES PROVIDERS**

Copies to:

1. Registrar of the Financial Services Board;
2. The National Credit Regulator;
3. The Competition Commission;
4. The Life Officers Association.