

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

HELD IN PRETORIA

CASE NO: FOC233/06

In the matter between:

ZAHID HATIZ

Complainant

and

SPRINGS CAR WHOLESALERS CC t/a

SPRINGS VALID VALUE

Respondent

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

The Parties

[1]. Complainant is Zahid Hatiz an adult male, employed as a financial adviser, and residing at 59 Jacaranda Lane, Panther Street, Boskruin.

[2]. Respondent is Springs Car Wholesalers CC t/a Springs Valid Value a Close Corporation duly registered in terms of the Close Corporations Act

(Act No 69 of 1984) and having its principal place of business at 66 Fourth Avenue Springs.

- [3]. Respondent is not licensed by the Financial Services Board to act as a financial services provider, in terms of Section 7 (1) of the FAIS Act.

Background

- [4]. The following is the background to this complaint.
- [5]. During July 2005 Complainant purchased a Motor Vehicle Mechanical Breakdown Insurance Policy ('the policy') from Respondent.
- [6]. The policy is administered by S A Warranties (Pty) Ltd and underwritten by Regent Insurance Company Ltd. The policy falls within the definition of a financial product as defined in terms of Section 1 of the FAIS Act.
- [7]. Complainant was at all material times advised by an employee of Respondent, one Blanche Jansen Van Vuuren.
- [8]. The policy indemnified Complainants Renault Clio against unexpected mechanical breakdown or failure.

[9]. The policy benefits are contained in a section of the policy called 'Schedule of Benefits'. The exact wording of the two sections material to this determination are set out hereunder:-

[9.1.] 'Plan A: Vehicles less than 5 years (the current year and prior 4 year models)/110 000 kilometres';

[9.2.] 'Plan B: Vehicles less than 8 years (the current year and prior 7 year models)/160 000 kilometres"

[10]. Plan A is circled in the two areas, in which it appears on the policy document under 'Schedule of Benefits'. Plan B is not marked or indicated in any way.

[11]. The various parts of the vehicle covered are set out in a section entitled 'Components Covered' on page 4 of the policy. The material items covered are:-

[11.1.] 'Engine: All internal components.

[11.2.] 'Decarbonisation and failures caused by the build-up of carbon deposits or blown cylinder head gaskets and consequential damage are specifically excluded.'

[11.3.] 'Steering Mechanism: Steering wheel, column shaft, bearings and joints, internal components of the rack and pinion, tie rod ends, servo steering pump and reservoir.'

- [12]. It is material to mention that in terms of Plan A the cover provided for the Steering Mechanism was R5 000 inclusive of VAT. The same cover under Plan B is reduced to R2 500 inclusive of VAT.
- [13]. The motor vehicle suffered a mechanical breakdown and repairs were undertaken at French Auto Workshop in Randburg on 24th November 2005.
- [14]. French Auto Workshop issued two invoices. The first in the amount of R 2 915.05 and addressed to Complainant relates to repairs carried out to the top engine mounting, and high pressure power steering pipe. The second invoice in the amount of R4 517.08 was addressed to SA Warranties and relates to work carried out to repair the power steering pump and replacement of the accessory drive belt.
- [15]. The items set out in the first invoice fall outside the cover afforded by the policy, and no claim was admitted by S A Warranties in respect thereof.
- [16]. In respect of the second invoice submitted to SA Warranties an amount of R2 500 was paid. This amount represents the maximum benefit in terms of Plan B.

[17]. It would appear that the only two items on the second invoice falling within the ambit of the cover afforded under Plan A are the power steering pump and labour. The charge in respect of these items was R3 567 – 01 inclusive of VAT.

Complaint

[18]. In a letter addressed to Respondent dated 15th November 2005, Complainant states the following:

[18.1.] 'I was sold a car at your dealership in July of this year. With the car I was sold a warrantee (sic) from SA Warranties. Blanche, from your offices explained the policy to me.'

[18.2.] 'The Plan that I was sold was clearly defined as a Plan A and clearly marked by her in my presence by circling on the policy document the said plan.'

[19]. Complainant in a further letter which is undated and addressed to both Respondent and S A Warranties states the following:-

[19.1.] 'The consultant that sold me the warrantee explained to me the claims procedure, showed me which plan I was on (Plan A) and the amounts that I could claim under. These amounts were circled on the actual policy document (by the said consultant in

my presence). It was explained that because my car was less than 5 years old, the plan that I would fall under was plan A'

[19.2.] 'Upon investigation on Monday with your claims department I was told that I could only claim for Plan B amounts (which as indicated above, was not indicated by the said consultant at the initial consultation), as the mileage on my car was greater than 110 000km.'

[20]. Complainant first directed his complaint to The Ombudsman for Short-Term Insurance.

[21]. Complainant was then referred to this Office by the Ombudsman for Short Term Insurance on the basis that the complaint appeared to be primarily directed at the selling dealer.

RELIEF SOUGHT

[22]. Complainant seeks relief from this office based on the negligence and or non compliance with the provisions of the FAIS Act by Respondent when selling the policy to him. In particular his case revolves around the negligent statement of Respondent that he was covered under Plan A. The claim was paid out by S A Warranties in accordance with the benefits under Plan B.

[23]. Respondent's representations were material in Complainants decision to enter into the contract. In short he believed that he was getting the cover afforded under Plan A.

[24]. Plaintiffs claim is thus for the difference between the benefits actually paid out in terms of Plan B and the greater benefits which Complainant believes that he contracted for.

THE RESPONSE

[25]. In response to a letter dated 26 April 2006, from this Office to Respondent requesting their version of events, Respondent, attached an undated statement by Blanche Jansen Van Vuuren in which she states:-

[25.1.] 'The benefit that the client was entitled was explained to Mr Hatiz by me, benefit B would be paid out in the event of a claim, in view of the fact that his vehicle had covered 131 500kms.'

[25.2.] 'Mr Hatiz was not only explained the warranty in detail but advised by me to read his policy documents as well.'

[26]. The question as to how Plan A came to be circled was not dealt with.

[27]. In a letter from Respondents legal adviser to this Office dated 4th May 2006; they attached a copy of an incomplete 'Statutory Notice to Short

Term Policy Holders' and advised, 'In the light of the above it is our opinion that in this deal we have acted in accordance with all legal regulations and statuettes (sic).'

[28]. A Statutory Notice is a document which would usually provide a client with the information required in terms of both the Short-Term Insurance Act; the FAIS Act and Code. In this respect I refer further on in this Determination to the specific requirements of Part IV, Section 5(a) to (g) of the Code.

DETERMINATION

[29]. The Complaint is based on Part II Section 3. (1) (a) (i) and (ii) of the General Code of Conduct For Authorised Financial Service Providers and Representatives ('the Code') which requires that representations made and information provided to a client must be factually correct and not be misleading.

[30]. Complainant purchased the policy based on representations made and information provided by Respondent, and accordingly the relief sought is for payment of the policy in accordance with the disclosures.

[31]. Complainant specifically states that he was informed that he was purchasing Plan A and hence requests payment in accordance with said Plan A.

[32]. In addition to rendering the financial services as set out above, Respondent failed to comply with the FAIS Act and the Code in the following respects, in that inter alia:-

[32.1.] The provisions of Part IV, Section 5(a) to (g) of the Code have not been complied with by Respondent in that it has not provided the following:-

- [i] The name and contact details of the provider;
- [ii] The contractual status of the provider, and product supplier;
- [iii] The contact details of the compliance department;
- [iv] Details of the financial services which the provider is authorised to provide in terms of the relevant licence and of any conditions or restrictions applicable thereto;
- [v] Whether the provider holds guarantees or professional indemnity or fidelity insurance;
- [vi] Whether a representative of a provider is rendering services under supervision and
- [vii] The existence of a specific exemption that the registrar may have granted to the provider with regard to any matter covered by the FAIS Act.

[32.2.] Respondent has failed to ensure that full information was provided, with respect to exclusions of liability and restrictions as required in Part VI, Section 7. (1) (c) (vii) of the Code in that that the policy has numerous restrictions and exclusions which appear not to have been drawn to Plaintiffs attention. The benefits under Plan B are so restrictive, as to make me question as to why anyone would take up the policy, if Plan B applied and they were made aware of the applicable restrictions.

[33]. In the eleventh edition of the Concise Oxford English Dictionary, a slash is defined as 'an oblique stroke between separate elements (/) used between alternatives....or between separate elements in a text'

[34]. In circling Plan A, Respondent represented to Complainant that he would enjoy benefits under Plan A. The policy wording in this respect is misleading. The use of a forward slash between '5 years (the current year and prior 4 year models)/110 000 could have two different meanings. The first could be that the underwriter covers vehicles that are less than five years old or alternatively have less than 110 000 km. The second interpretation could be that vehicles less than five years and with less than 110 000 km are covered.

- [35]. It is my view that this misleading statement should be placed squarely at the door of the product provider. Quite clearly this statement may have led this unlicensed representative to carry the confusion through to the consumer who bought the product.
- [36]. It is the duty of Respondent to ensure that the advice given is clear and unambiguous as required in Part II Section 3. (1) (a) and (ii) of the code. It is self evident that a duly authorised representative would need the appropriate training and accreditation in order to ensure that they themselves have the requisite knowledge to ensure that the appropriate advice is rendered.
- [37]. The provision of Section 8. (1) (b) of the FAIS Act requires that an authorised financial services provider must satisfy the registrar as to 'the competence and operational ability of the applicant to fulfil the responsibilities imposed by this Act.' It follows naturally that a provider would need to ensure that its representatives are competent and in this respect this is carried through to Section 13. (2) (a) of the FAIS Act that specifically requires that a provider must be satisfied that its representatives are 'competent to act'.

[38]. This product was sold as an adjunct to another transaction namely the sale of a motor vehicle. Respondent has not taken the trouble to licence the sales representative to sell this particular product. Quite clearly had this been done an assessment of this representative's competence to act as required in terms of Section 13. (2) of the Fais Act would have been carried out.

[39]. In spite of several attempts by this Office to obtain the information as required in terms of Part IV, Section 5(a) to (g) of the Code, from Respondents Legal Adviser this has not been forthcoming.

[40]. Quite clearly by virtue of Respondents lack of authorization there was no attempt to provide any of the required details and to date no response has been received.

[41]. Respondent has acted as a financial services provider, despite not being licensed to do so as required in terms of Section 7.(1) of the FAIS Act and hence I am referring a copy of this Determination to the Financial Services Board.

CONCLUSION

[42]. Whilst Respondent is not an Authorised Financial Services Provider, Rule 4 (d) of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers, allows this Office to entertain a complaint relating to a financial service rendered by a person not authorised as a financial services provider or by a person acting on behalf of such person. I am accordingly doing so.

[43]. Complainants version that Plan A was circled by the representative is a material representation that goes to the heart of the matter.

[44]. This has not been specifically refuted in Respondents reply to Complainants allegations. Respondent clearly states that the benefits under Plan B were explained to Mr Hatiz with the further requirement that he read his policy document. The fact that Respondents legal adviser has seen fit to avoid answering this allegation leads me to believe that Respondents version is so improbable as to be untrue.

[45]. Extrapolating the principal espoused in Absa Bank v W Blumberg and Wilkinson 1997 3 SA 669 at 673 H where the court stated,

'Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted shall be deemed to be admitted.'

[46]. The factual evidence thus supports Complainants version on a balance of probabilities.

[47]. In consequence of Respondents negligent non compliance with the Fais Act, as detailed above, Complainant purchased the policy in the belief that he was covered in terms of Plan A as opposed to Plan B.

[48]. As a result Complainant suffered financial prejudice or damage as defined in the FAIS Act when attempting to claim against the policy. The policy paid out the lower amount as set out in Plan B.

[49]. In the sense that he laboured under the belief that he was covered under Plan A I am interpreting the claim as if it fell under Plan A. I have already noted that that the items that fall within the ambit of Plan A of the policy amount to R3 567 – 01.

[50]. An amount of R2 500 was paid by S A Warranties in terms of Plan B and hence Complainant has suffered damages in the amount of R1 067 – 01.

ORDER:

The following order is made:-

- (a) Respondent is to pay Complainant the sum of R1 067–01;

- (b) Respondent is to pay interest on this amount at the rate of 15.5% after 14 days from date of this order to date of final payment.
- (c) Respondent is to pay the case fee of R1 000 to this office.

DATED AT PRETORIA ON THIS THE 14th DAY OF November 2006



CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS