

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NO: FOC 2587 / 06 - 07 / WC / 03

In the matter between:

LINDITHEMBA LEWIS KAMA

Complainant

and

**CLAIMS BY DESIGN (PTY) LTD, a subsidiary of
GLENRAND M I B**

Respondent

**DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY
AND INTERMEDIARY SERVICES ACT, 2002 (ACT NO. 37 OF 2002) ('FAIS ACT')**

A. INTRODUCTION

The Parties

[1] The complainant is Lindithemba Lewis Kama, an adult male, a cost accountant of 87A Mornay Street, Ravensmead, Parow, Western Cape.

[2] The respondent is Claims by Design (Pty) Ltd, an authorized financial services provider in terms of the FAIS Act, a subsidiary of Glenrand M.I.B Limited, and a duly registered company in terms of the laws of the Republic of South Africa, with its principal place of business at 288 Kent Avenue, Randburg, Gauteng.

The Complaint and the background against which it arises

[3] The complaint relates to the repudiation of a claim on the grounds of non-disclosure of material terms by complainant.

[4] During August 2006, complainant applied for short term insurance cover for *inter alia* his household contents and a motor vehicle. The contract of insurance was negotiated over the telephone with a representative of the respondent. The insurance commenced on 1 October 2006.

[5] On 2 October 2006, complainant lodged a claim with respondent. The claim related to losses allegedly suffered by complainant.

[6] Respondent repudiated the claim and informed complainant of this by e-mail on 17 October 2006. The repudiation was on the grounds of non-disclosure of material facts. In particular, respondent relied on the fact that at the time complainant requested cover; details of his claims history were requested. On the question regarding previous claims, complainant had not disclosed any previous

claims. This, according to respondent denied the insurers the opportunity of evaluating the risk. Respondent accordingly cancelled the policy from inception and advised that it would be refunding any premiums paid.

[7] In addition, respondent advised complainant of the contact details of this Office, presumably should he wish to complain.

Investigation by this Office

[8] In order to establish exactly what was discussed during the telephonic conversation, it became necessary to listen to the tape recording that respondent had provided.

[9] The material aspect of the telephonic conversation between one Clive Pillay ('Pillay'), a representative of respondent and complainant are as follows:

9.1 After introduction and establishing the reason for the call, Pillay informed complainant that the call was being recorded and further went on to make disclosures in terms of the FAIS Act. He advised the complainant that he is a registered FSP representative and that Glenrand accepts responsibility for the advice provided by him.

- 9.2 Pillay then informed complainant that he will be asking him pertinent questions relating to the material terms and conditions of the contract pointing out that the information provided by the complainant will be used to form the contract between the complainant and the insurer.
- 9.3 Pillay gave complainant examples of material information that may lead to the claim being repudiated and the insurer refusing to pay. He provided examples such as where the complainant fails to disclose any previous losses whether he was insured or not, the security protection, ages of the drivers of the vehicles and the purpose for which the vehicle will be insured.
- 9.4 Complainant answered in the affirmative to all the above information provided by Pillay.
- 9.5 Pillay went on further to explain to complainant that he must disclose any information that will be considered material to the insurers acceptance, rating or underwriting of the risk.
- 9.6 Complainant answered in the affirmative to the said information provided by Pillay.

9.7 Pillay then explained to complainant that the insurer may decline to indemnify or compensate complainant for claims under any item or section in the event of any material non-disclosure or misrepresentation.

9.8 Again, complainant's response was in the affirmative.

9.9 All of the above was said as an introduction and prior to the posing of relevant questions. Pillay then proceeded to ask questions, the material ones of which, for the purpose of this determination, are as follows:

9.9.1 *Currently at the moment who are you insured with sir?*
Errrrrr, Nampak, there's a Nampak insurance but then errrrr, very expensive huh, its cost implications and all.

9.9.2 *How long have you been with them for sir?*
Quite a while.

9.9.3 *How long?*
About 3, 4 years, yeah.

9.9.4 *Have you or any of your family household had an insurance application been declined, policy cancelled ,or renewal of any policy refused?*
No.

9.9.5 *Been convicted of criminal offence?*

No.

9.9.6 *Any incidents / accidents losses, damages or write-offs in the last 3 years?*

No.

[10] Having successfully concluded the contract of insurance, complainant received a letter from respondent on 29 August 2006, thanking him for placing his short-term personal portfolio with it and welcoming him as a valued customer. In the said letter respondent advised that the policy was to commence on 1 October 2006 and the debit order was also to run from the same date.

[11] Respondent forwarded the policy documents to complainant under cover of a letter dated 4 September 2006.

[12] In addition to obtaining the recording referred to above, the Office also obtained a copy of an assessor's report and the police report from respondent.

[13] The assessor's report mentions *inter alia* the following:

13.1 The laptop was allegedly lost on 2 October 2006 whilst complainant was on a flight from Port Elizabeth to Cape Town;

13.2 The laptop was apparently in one of complainant's bags which was handed in and traveled in the baggage hold of the aircraft;

13.3 Upon arrival in Cape Town International, complainant 'realised that this laptop was missing from the bag and proceeded to report this to the staff of ComAir Ltd'. He also reported the matter to the police and provided the insurers with a 'police card' confirming this;

13.4 The previous claims history with Outsurance (the previous insurer) was detailed as follows:

15 / 06 / 2005	Cell phone claim
05 / 07 / 2005	Stolen laptop claim
15 / 08 / 2005	Sunglasses
10 / 10 / 2005	Building impact damage
30 / 10 / 2005	Geyser claim
14 / 12 / 2005	Geyser claim
01 / 04 / 2006	Video camera all risks claim
01 / 04 / 2006	Jewellery all risks claim

13.5 In addition to the above, complainant 'also submitted 6 'SOS claims', where plumbers etc were called out to the house'.

- 13.6 The report also makes reference to the claim in respect of the laptop allegedly lost and claimed from Outsurance on 5th July 2005. In this regard, complainant had indicated, in relation to the Outsurance claim that he had purchased the laptop at Tyger Valley Game store 'a few months before'. Complainant was requested to produce the invoice. Outsurance then settled the claim by replacing the laptop at Photo Staa, Cape Town.
- 13.7 In relation to the current claim, complainant was once again asked to produce an invoice for the laptop that was allegedly lost. This time he approached Photo Staa and requested a copy from one Hugh of that store. Complainant's reason, according to the report, for seeking a copy of this invoice was that he wanted to sell the laptop and needed to prove that he was the owner.
- 13.8 Apparently complainant was offered the original invoice that had been made out to Outsurance in respect of the laptop that replaced the one allegedly lost on 5th July 2005. The complainant refused to accept this invoice.
- 13.9 Complainant then proceeded to obtain a letter from a manager at Game, Tyger Valley which he submitted to the current insurers in relation to his claim. This letter was in relation to the same laptop that was replaced by Outsurance in relation to the 5th July 2005 claim.

[14] Complainant was given an opportunity to comment on the report provided by respondent and save to refer us to his previous e-mail dated 10 September 2007 made no further comment. However, in a subsequent e-mail dated 12 September 2007 addressed to the assessor directly and copied to this Office, complainant *inter alia* advised that the assessor must not refer to him as a liar and that he was referring the matter to his attorneys. He did not, however, deal pertinently with the issues referred to in the report.

[15] The office also contacted Outsurance to confirm previous claims and to establish the reason why complainant was no longer its client. During the investigation, it transpired that Outsurance terminated its contract with complainant due to excessive claims and poor premium payment profile.

[16] Complainant's comments with regard to the allegation of non-disclosure of material terms, as set out in his complaint form and in a subsequent e-mail dated 10 September 2007 was *inter alia* that:

16.1 he was never afforded the opportunity to go back and re-think what claims he had in the past;

16.2 it was never explained to him that it was critical to make such disclosure;

16.3 had he be given enough time to give full account and details of his previous claims, he would have disclosed them; and

16.4 that the questions were vague.

[17] Complainant was also asked to specify in relation to a claim in respect of a broken window on his motor vehicle as to when the incident occurred. His response was that this was in January 2006.

[18] Respondent stated the following in its response:

18.1 they noted the nature of the complaint;

18.2 they subsequently listened to a recording of the telephonic conversation of the proposal for insurance;

18.3 they are satisfied that the complainant was clearly instructed as to what was required of him; and that

18.4 the complainant chose to ignore the implications of the declaration and responded in the negative when clearly asked if he had had any previous losses.

B. THE ISSUES

[19] The issues are:

19.1 Whether the complainant failed to make material disclosures when he applied for insurance through the respondent; and

19.2 Whether the insurer was justified in repudiating the claim.

C. DETERMINATION AND THE REASONS THEREFORE

I shall now deal with the above-mentioned issues as follows:

Whether complainant failed to make material disclosures when he applied for insurance through the respondent

[20] Complainant does not dispute that the question whether he had previous claims was posed to him. He also does not dispute that he answered 'NO' to the question whether he had previous claims. Rather, he complains that he was not afforded an opportunity to go back and re-think his previous claims.

[21] Having listened to the recording it is quite clear that the question required a straight forward 'yes' or 'no'. Complainant chose to answer in the negative when asked whether he had previous claims. Had complainant wanted time to think

about the question or whether he had any previous claims it was open to him to ask for that opportunity. This is especially so, bearing in mind that it was he who initiated the contact with respondent for the purposes of securing his short term insurance. According to the recording and documentation before me, there is no evidence that such an opportunity was sought.

[22] Complainant's excuse that the question was vague and that he was not given the opportunity to think is without any basis, especially when one considers that the conversation adequately positioned what was required of him and what the consequences would be of failing to answer honestly. Complainant's excuses are weakened even further when one considers that Pillay had also given examples of non-disclosure and one such example was on all fours with what the complainant failed to disclose.

[23] It becomes clear why complainant, did not want to reveal details of his previous claims history. When one looks at that history it is clear that complainant is someone who may be described as a 'serial claimant'.

[24] It is also important to note that when complainant was asked who his previous insurer was, he did not reveal that it was Outsurance. What he revealed was that it was 'Nampak'. This is peculiar considering that Nampak is not an insurer, but a packaging company where the complainant is employed as a cost accountant.

What is revealing though is that the complainant did not say that he was previously insured through Outsurance.

[25] When one considers that Outsurance had, in fact, cancelled complainant's short term insurance because of an excessive claims history and a poor premium payment profile, one understands why complainant did not want to disclose who his previous insurer really was.

[26] It is evident from an examination of the undisputed facts in this case, that the complainant has been anything but honest in his dealings with respondent.

[27] It is clear that the complainant will go to elaborate lengths to justify a claim; even if it is a false one. This is evident from the various steps he took to attempt to obtain documentation to prove that he had suffered a loss of a laptop for which he attempted to claim from the insurer.

[28] In the circumstances, it would be fair for me to conclude that the complainant intentionally failed to make material disclosures when he applied for the insurance through respondent.

Whether the insurer was justified in repudiating the claim

[29] The very circumstances surrounding the alleged loss are hard to believe. A person who is apparently holding a senior, perhaps fiduciary position, in a large

organisation should carelessly allow his laptop to be put in the baggage hold of an aircraft does not accord with the behaviour of a responsible individual. One just has to see how baggage is handled at airports to realize that one would not simply allow an item as delicate as a laptop to be simply put in the baggage hold. Complainant's version of how the loss of the laptop occurred therefore bristles with improbabilities and should be rejected out of hand.

[30] In so far as the claim for a broken window is concerned, quite clearly this loss on complainant's version occurred in January 2006. Thus there is no basis in law for this claim to be entertained as the alleged loss occurred prior to the inception of the policy. There is therefore no basis for this claim.

CONCLUSION

[31] It is apparent from all the evidence gathered by this office that the respondent was justified in repudiating the claim and further canceling the contract from inception.

[32] It is also apparent that the complainant failed to disclose material facts to respondent and such facts were unearthed in the assessor's investigation of what appeared to be a suspicious claim. It is important that a message is sent out to consumers that they cannot abuse the resources of this Office by lodging

complaints which are tainted with fraud or dishonesty on their own part and expect the FAIS Ombud to come to their assistance.

[33] In this regard it is important to mention the provisions of the Rules on Proceedings of this Office, in particular Rule 7(d), which states:

‘if in the discretion of the Ombud a complaint is being pursued in a frivolous, vexatious or abusive manner, it may be dismissed summarily.’

[34] Further to the above, I believe it is also important that I mention the provisions of section 28(2) (b) (iii) of the FAIS Act which provides:

- ‘b) The Board may by rule determine –
- iii) the granting of costs, including costs against a complainant in favour of the Office or the respondent if in the opinion of the Ombud –
 - (aa) the conduct of the complainant was improper or unreasonable; or
 - (bb) ...’

[35] Section 28(2) (b) (iii) must be read with Rule 9(d) of the Rules on Proceedings of this Office, which provides:

‘When making a final determination in terms of section 28 of the Act, the Ombud may grant costs against the respondent or, in the circumstances contemplated by section 28(2)(b)(iii), against the complainant, in either case in favour of the other party to the complaint or in favour of the Office’

[36] The above vests me with authority to order costs against a complainant in appropriate cases, which costs could include the costs occasioned by the respondent. Whilst I will not do so to the full extent available to me in terms of the FAIS Act and the Rules, I will not hesitate to do so in future where the conduct of any parties is inappropriate or improper. However at the least I believe the complainant should pay the case fees involved.

[37] Based on the foregoing I have no hesitation in dismissing this complaint out of hand and make the following order:

ORDER

[1] The complaint is dismissed; and

[2] The complainant is ordered to pay costs in the sum of R1000.00 to this office.

DATED AT PRETORIA ON THIS THE 5th DAY OF OCTOBER 2007



**CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS**