

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FOC 124/06-07/WC/ (3)

In the matter between:-

SORAYA KAYWITS N.O.

Complainant

and

MICHAEL GEORGE MEIRING T/A ECO SURE

Respondent

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

A. THE PARTIES

[1] The Complainant is Mrs. Soraya Kaywits, an adult female residing at 24 Mountain View Road, Lavalia, GEORGE, Cape Province. Complainant acts in her capacity as the duly appointed executrix of the estate of the late Warwick Vernon Kaywits by virtue of Letters of Executorship No.13352/2007 issued by the Master of the High Court, Cape Town.

[2] The Respondent is Mr Michael George Meiring ('Meiring') formerly trading as Eco Sure, a Financial Services Provider ('FSP') with his place of business at Shop 3c, 79 Market Street, GEORGE, Cape Province.

[3] At the outset the following facts must be mentioned:

3.1 Prior to 30 September 2004 (the date determined by the Minister of Finance in terms of section 7 (1) of the FAIS Act to be the date by which all financial services providers had to be authorised or obtain an exemption as provided for under the FAIS Act) the respondent traded as Eco Sure.

3.2 On 29 September 2004 Meiring applied for an FSP licence under the name 'Ecosure CC' – in other words in the name of a close corporation or a juristic entity.

3.3 On 16 September 2009 this Office obtained confirmation from the Companies and Intellectual Property Registration Office ('Cipro') that no close corporation appears to ever have been registered under the name 'Ecosure CC'.

3.4 An FSP licence (number 17581) was granted under the name 'Ecosure CC' - for which Meiring was the applicant – in terms of the FAIS Act.

- 3.5 It is therefore clear that although an FSP licence was purportedly granted to a non-existent close corporation, in effect it was Meiring who was the applicant and authorised as such and is accordingly cited herein as respondent in his personal capacity.
- 3.6 Although not essential for the purposes of this determination, I mention a few additional aspects for the sake of completeness. Perhaps because he became aware of the anomaly, in May 2006 Meiring applied for Ecosure CC to be changed to Brainwave Projects 927 CC t/a Ecosure as the authorised FSP. (Brainwave Projects 927 CC is in fact a registered close corporation.) This was granted by the Registrar of financial services providers on 26 June 2006. The trading name of Brainwave Projects 927 CC was changed to 'Avantus' in 2007.
- 3.7 The effect is that what was not in fact a registered close corporation was issued a licence as if it was a juristic entity. That non-juristic entity was purportedly granted a change in its licence name to that of a close corporation. Whether this was legally permissible is something the Registrar will have to investigate. What is inexplicable, however is how it came about that an FSP licence was issued to what turns out to have been a non-existent entity. A copy of this determination is being sent to the Registrar for him to take such action as may be deemed necessary.

[4] I turn then to the facts of the matter before me.

B. THE BACKGROUND

[5] The late Mr. Kaywits (“the deceased”) lodged the complaint with this Office. He subsequently died and his wife pursues the complaint on behalf of his estate as the executrix of his estate. For the sake of convenience the executrix will be referred to as the complainant.

[6] The deceased was insured through the respondent with Auto and General Motor and Household Insurance Company (“Auto & General”) since 27 November 2002, which was prior to the establishment of this Office. On the 28 October 2004 (i.e. after this Office was established) the deceased approached the respondent to draw quotes for his short term insurance from Santam. On the 1 November 2004 the deceased instructed the respondent to move his insurance cover from Auto & General to Santam.

[7] The complainant had a burglary on the 22 November 2006 and lodged a claim with Santam through the respondent. The deceased’s claim was repudiated because he allegedly did not comply with certain security requirements set out in the Santam insurance policy.

The relief sought by Complainant

[8] The complainant wants the respondent to replace the goods that were stolen during the burglary, alternatively to reimburse the deceased’s estate in cash for the value of the goods stolen.

Investigation by this Office

- [9] The deceased had previously been insured with Auto & General. The deceased's insurance requirements and other aspects were discussed telephonically by a representative of Auto and General with the deceased. After the inception of that policy the deceased had various claims which were settled by Auto & General.
- [10] During November 2002 the respondent became the deceased's broker and Auto & General was notified to effect the change in its records accordingly.
- [11] In October 2004 the deceased asked the respondent to obtain a short-term insurance quotation from Santam for cover similar to that provided by Auto & General as he wanted to move over to Santam. Respondent used the information in the Auto & General policy to obtain the Santam quotation. The deceased accepted the quotation and a new policy was issued by Santam with effect from 1 November 2004.
- [12] A burglary at deceased's house took place on 22 November 2006. The burglar/s had gained access to the premises through an external door that did not have a security gate. The deceased's claim was rejected on the basis that when the quotation was applied for he had said he had security gates on the external doors of his house when in fact he did not.

[13] The one significant difference, for the purposes of this determination, between the questions asked by Auto and General and those asked by Santam relating to security measures in place at the deceased's house is that the former asked only whether all opening windows, including louvers and fanlights, were fitted with burglar bars. In an e-mail dated 15 March 2006 to respondent, Mr Johan van Manen, the Broker Consultant of Auto & General, says that he listened to the voice log of the conversation between the deceased and their consultant when the policy was sold. The question asked by the consultant and the deceased's answer are recorded in the policy schedule as well. Van Manen says the deceased was not asked if he had security gates installed as that was not a requirement of Auto & General. Santam, however, asked not only whether all opening windows and louvers were fitted with burglar bars but in addition, whether security gates were fitted to all external doors. As a result, the Santam quotation, which was issued thereafter states under '*House contents*':

"Safety measures: Burglar bars

Safety measures: Burglar bars & security gates"

[14] The questions relating to burglar bars and security gates and the answers in the affirmative are recorded in Santam's policy schedule as well.

[15] Meiring informed this Office in a letter dated 26 November 2008 about the respondent's version of events relating to the complaint. (The letter was unsigned and not on a letterhead. He was asked to confirm under his

signature that it was written by him. He did so in a letter dated 28 August 2009 headed "Avantus".)

[16] Meiring says when respondent took over as the deceased's broker they together went through his Auto & General policy schedule and the deceased had confirmed *"that all the cover and security was in place."* When they obtained the Santam quotation they *"worked from his latest policy document from Auto & General."* He says on 29 October 2004 *"the quotation was discussed with the client, as well as all the terms, conditions, excesses applicable and so forth."* However, a perusal of the record respondent kept of consultations with the deceased shows that the following took place on the 29 October 2004:

*"Kanseleer A&G polis, beveel klient aan om stop order by die bank in te sit.
Hy vat polis by Santam. Moet enjin & vin nommer deur gee."*

Nothing is mentioned about the alleged discussion of the quotation with the deceased - more specifically, the terms and conditions.

[17] Santam had the additional question about security gates. Nowhere does Meiring mention that he pertinently drew the deceased's attention to that important fact and that he asked him for a response before he obtained the quotation. Instead, he says he obtained the quotation based on information in the Auto & General policy schedule. Since the latter policy did not have that question the only reasonable conclusion I can draw is that either Meiring or

the responsible staff member of the respondent answered the question without confirming the true facts with the deceased. This was at best negligent and at worst reckless. Havenga says:

“[W]here a broker inserts incorrect information in the application form, and it can be shown that the broker’s conduct was negligent, he or she will be liable to the insured. . . . It is the duty of the broker to see that all answers written down by him or her accurately represent the information provided by the insured” ¹(Footnote omitted.)

[18] Among the varied duties of a broker is the duty to ensure proper disclosure to the insurer. In other words the broker should ensure that all relevant facts have been disclosed to the insurer.²

[19] Havenga submits that there is;

“sufficient authority to argue that a broker’s duty is not merely limited to disclosing material information received from the insured but to actively assisting the insured to disclose material facts.”³

[20] Once the policy is issued, it is once again also the broker’s duty to advise the insured promptly of the terms of the cover that has been arranged.⁴ (Footnote omitted.)

¹ Peter Havenga: *The Law of Insurance Intermediaries* (2001) 36-37

² Lloyd’s *Brokers and the Law of Agency* (First published as an Elborne Mitchell booklet.): http://www.elbornes.com/articles/commercial/com_0005.htm – site visited 2006/01/03

³ *Op cit.* 39

[21] Meiring also relies on the fact that Santam had posted the policy document directly to the deceased and that therefore the deceased ought to have been aware of the security gates requirement. (According to the documentation provided by the respondent a copy was also posted to himself.) He says the covering letter (a copy of which was also posted to respondent) from Santam to the deceased mentions that the contract had been prepared on the basis of the answers to questions given by the insured, or on his behalf by the intermediary. But, it goes on to say, the deceased should check it for accuracy by going through the schedule. If he has neglected to disclose any material facts or circumstances which could affect Santam's evaluation of the risk or the quoted premium, it may affect the validity of the insurance. Finally, in the letter it is stated that if nothing is heard from the deceased within four weeks, it will be assumed that all the information is correct.

[22] Meiring goes on to say that after inception of the policy to the date of the claim, they had seen the deceased fourteen times and as changes took place on the policy he was forwarded the amended policy documents fourteen times as well. Not once, says Meiring, did the deceased say that he did not have the required security gates. He is of the view that the client should take some responsibility to read his policy schedule and insurance documentation.

[23] Meiring's contentions miss an important point. A client relies on the broker to carry out his mandate with reasonable care and skill. From the information

⁴ Op cit 42

provided by the respondent it is evident that a copy of the policy and schedule as well as the covering letter to the insured was in each instance sent to the respondent. As the broker he had the duty to ensure that the policy was correctly issued. He should have noticed both at quotation stage - and when the policy was issued by Santam and a copy sent to respondent - that they differed from the Auto & General policy in a material respect and immediately discuss it with his client. Another reason why the respondent should have known of this material difference between the requirements of the two insurers is that he places business with both of them. The respondent neglected to actually enquire from the deceased whether he had these security measures in place. In other words, the important issue here is that proper disclosure should have taken place at the time the financial service was rendered.

[24] A further contention by Meiring is that after the claim was lodged the deceased informed him that he does not have burglar bars at all the windows. This is an apparent reference to an affidavit the deceased made at the Conville Police Station in which he says that he had burglar proofing at all windows except the lounge window and the front door. Meiring is of the view that should the deceased have claimed through Auto and General it would have repudiated his claim as not all windows had burglar proofing. However, this is mere speculation. As mentioned earlier, the entry to the premises was gained through a door and Auto & General did not require security gates at the external doors as a pre-requisite for cover. In any event, the complaint relates to the Santam policy.

[25] Section 2 of the General Code of Conduct for Financial Services Providers and Representatives (“the Code”) provides that it is the duty of the respondent to render financial services honestly, fairly and with due skill, care and diligence and in the interest of his client and the integrity of the financial services industry.

[26] The respondent also did not adhere to the requirements of Section 8(d) (ii) which clearly stipulates that a provider must:–

“where the financial product (‘the replacement product’) is to replace an existing financial product wholly or partially (‘the terminated product’) held by the client, fully disclose to the client the actual and potential financial implications, costs and consequences of such a replacement, including, where applicable, full details of . . . special terms and conditions, exclusions of liability . . . which may be applicable to the replacement product.” (My emphasis)

[27] The provisions of Section 8 of the Code serve a dual purpose. They are to safeguard both the service providers as well as their clients. Adherence to these provisions would have brought to the attention of the respondent that the security requirements in the Auto & General policy differed from that set out in the quotation obtained from Santam and he ought to have advised his client accordingly.

[28] In general the security requirements as required by insurers in this day and age are of such an important nature that it is incumbent upon financial services providers to accord them special attention. They no doubt constitute a huge difference in premiums as well as the level of risk insurers are willing to assume.

Conclusion

[29] The negligence of the respondent caused the deceased's loss in this instance.

Quantum of complainant's loss

[30] The deceased had alleged that his loss amounted to R23 614, 77 and had provided quotations in support. However, this amount has not been settled by a loss adjuster. I therefore deem it prudent that in this instance the issue of the quantum of complainant's loss be separated from the merits and leave it to the parties to agree on the amount. If they fail to do so, either party may approach this Office to determine the quantum.

ORDER

I make the following order:

1. The issue of merits of the complaint is separated from that of the quantum of the loss suffered by complainant.

2. The complaint on the merits is upheld.
3. The respondent is ordered to pay the complainant such amount as is agreed between the parties as representing the complainant's loss.
4. If the parties fail to agree on the quantum either party may set the matter down before me for determination of the amount of complainant's loss.
5. The respondent is ordered to pay the case fees of R1 000, 00 to this Office.

Dated at PRETORIA this 8 day of October 2009.



CHARLES PILLAI

OMBUD FOR FINANCIAL SERVICES PROVIDERS