

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FOC229/07-08 WC 3

In the matter between:

SIDNEY PRAGASAN MANNIE

Complainant

And;

APBCO INSURANCE BROKERS

Respondent

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

A. PARTIES

[1] The complainant is Sidney Pragasan Mannie an adult male residing in Cape Town in the Western Cape Province. Mr. Mannie trades as Liberty Transport.

[2] The respondent is APBCO Versekeringsmakelaars (Pty) Ltd ('APBCO') an authorised financial services provider (FSP no: 14303) and having its principal place of business in Durbanville, Western Cape Province. While the complaint is directed at APBCO, it

essentially relates to financial service rendered by two of its employees Ms. Renee McKeown, an employee of APBCO and Mr. JJ 'Kowie' De Witt, a director of APBCO.

B. COMPLAINT

[3] On 11 April 2007, this Office received a complaint against APBCO relating to the repudiation of complainant's claim by the underwriting company Heavy Commercial Vehicle Underwriting Managers (Pty) Ltd ('HCV') after an accident involving one of his trucks.

[4] Complainant avers that the claim was repudiated as a result of APBCO not following proper procedures as outlined by HCV.

[5] The following facts are not in dispute.

[5.1] On 24th August 2006, complainant and Ms McKeown of APBCO held a meeting at which, according to Ms McKeown, *'he asked that I put the Trucks and Trailers on cover with immediate effect, as well as 2 other vehicles that were not on cover.'* Ms McKeown confirmed that the vehicles had been covered by HCV.

[5.2] On 31 August 2006, one of the vehicles was involved in an accident. Ms McKeown met with complainant the next day (1 September 2006) at Heavy Duty Alignment Centre and completed the insurance application forms. Ms McKeown once again confirmed to complainant that the vehicle was 'on risk.'

[5.3] However, after submitting the claim for the truck accident, HCV repudiated it on the basis that the truck was not insured at the time of the accident as HCV had not received a fully completed proposal and debit order form.

[5.4] Not satisfied with HCV's decision, complainant forwarded this matter to the Ombudsman for Short term insurance and after his ruling in favour of HCV, lodged a complaint with this Office against his broker, APBCO.

[5.5] Complainant claimed that APBCO had not ensured that his vehicle was insured. He is also claiming further damages relating to the deterioration of his vehicle, occasioned by his inability to afford the repair costs thereof as well as consequential damages as he could not utilise the truck as an income producing asset.

[6] The complaint was forwarded to APBCO on 7 May 2007 in line with Rule 6 (b) of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers (the 'Rules'). Mr. JJ De Witt, a director of APBCO delivered its response on 26 June 2007, with Ms McKeown's version of events attached. This was followed by a further response dated 14th September 2007. What emerges from APBCO's response is that there clearly exists a dispute of fact. For the reasons that follow, this dispute can be resolved on probabilities and there is therefore no need to hold a hearing

C. APBCO'S RESPONSE

[7] Respondent does not deny that complainant was advised that his truck was insured through HCV but denies that APBCO did not follow proper procedures. In essence Mr. De Witt states that HCV confirmed telephonically that complainant was covered. He further alleges that complainant is partially to blame as he deliberately delayed the process by repeatedly not making himself available to sign the necessary applicable forms. I will address this allegation later.

[8] According to the statement of Ms McKeown, on 24 August she had met complainant at the dealership. She contacted her director (Mr. Kowie de Witt) and explained that complainant had no cover in place and asked him to arrange temporary cover on the trucks and trailers. She also arranged cover on two other vehicles.

[9] According to Mr. De Witt, he then telephoned HCV and spoke to a Ms Debra Engelbrecht. He requested HCV to assume risk for the vehicle and hold cover over it with immediate effect, pending receipt of the duly completed application form. Mr. De Witt alleges that Ms Engelbrecht agreed to this proposal and confirmed that they would hold cover accordingly and that the application form should be provided to them as soon as possible.

[10] Having received the insurer's telephonic confirmation of cover, Ms McKeown then advised complainant accordingly. Mr. De Witt insists that had the insurer not agreed to the request for temporary cover, they would not have confirmed to complainant that he was covered but would have approached an alternative insurer.

- [11] It is not disputed that Ms Engelbrecht from HCV sent the proposal form through to Mr. de Witt. However, according to Mr. de Witt there was nothing on the e-mail stipulating that the client would not be indemnified until such time that the forms had been completed and returned to her. Mr de Witt then sent an e-mail through to Ms Engelbrecht with the details of previous insurance, claims experience and the details of the trucks and trailers. This e-mail contained the subject 'Hou dekking vir Liberty Transport' which translated means, 'Hold cover for Liberty Transport.'
- [12] Ms. McKeown in her statement mentions the following: *'Debra faxed the quotation through to our offices and asked for certain documentation, still (sic) no mention of the temporary cover being subject to receiving the signed application forms.'*
- [13] In further support of his version, Mr. de Witt submits that the insurer, at no stage prior to the accident notified them that the undertaking they had given that they were holding the vehicle covered had been withdrawn and in the circumstances they remained on risk with respect to the vehicle.
- [14] Mr. De Witt states that after the accident the insurer once again did not indicate that there was no cover for the vehicle and, in fact, made enquiries from APBCO as to the probable amount of the claim and called for the claims documentation. According to Mr. De Witt, it was after the insurer realised that the claim was going to be somewhat larger than originally anticipated (i.e. in the region of R100 000 as opposed to the initial estimate of R20 000 to R30 000) that they adopted the attitude that they had not agreed to hold cover over the vehicle prior to the receipt of the application form.

- [15] With regard to the averment that the complainant was dilatory in returning the forms, Ms. McKeown in her statement says the following: *'The application form was only e-mailed to me after the client had left. He was in the process of moving office and did not have access to his e-mail or fax facilities.'*
- [16] Mr De Witt states that: *'Mr Mannie was also specifically advised that the application form had to be completed and provided to the insurer as soon as possible. Notwithstanding this (sic) despite his appreciation of the fact that the form was urgently required, Mr Mannie failed to co-operate by making himself available to meet with our representative to finalise the form. Numerous attempts were made on our part to meet with Mr Mannie and he was always unavailable to meet with us to complete the form.'*
- [17] In support of the above respondent provided copies of a printout setting out a list of calls made to complainant.
- [18] Respondent further states that; *'Ms. McKeowan even went so far as to leave a proposal form for Mutual & Federal at Jurie Swart Motors for him to sign as it was according to him easier for him to stop by there when he could as opposed to meeting with Ms. McKeown given that it was a location close to the harbour where he did a lot of work loading containers. Ms McKeowan did the same with the proposal form for HCV. Whilst Mr. Mannie made the time to stop in at Jurie Swart Motors to complete and sign the M & F proposal form he did not bother to do the same for the HCV form and it remained there for at least a week during which he did not arrive as he undertook to do.'*

[19] Respondent provided the contact details of Heidi Richter a lady who had worked at the dealership and with whom the forms had allegedly been left for complainant to sign.

[20] In the circumstances, APBCO denies being liable to complainant with respect to his loss and submits that the insurer was liable in respect of the claim and had unjustifiably repudiated it.

D. COMPLAINANT'S RESPONSE

[21] To ascertain whether complainant had been dilatory and whether this had in any way contributed to the repudiation, He was requested to specifically deal with certain of respondent's allegations. He said:

[21.1] *'The broker did not at any time state that the cover was subject to a completed proposal form nor was any attempt made over the period, 24th until the accident on the 31st August 2006 to fill in the proposal form;'*

[21.2] *'The broker Rene Mkeown (sic) called me many times about details on the Vito (a motor vehicle purchased from Jurie Swartz motors and insured also through respondent) and asked for values on the DVD Player, special speakers and mag wheels;'*

[21.3] *'She faxed the insurance proposal for the Vito to Jurie Swart dealership which I dually (sic) completed. She said that she'll make an appointment to fill in a proposal form for the trucks but she made the appointment but she*

did not turn up. I phoned her and she apologised for not being at the appointment due to a member of her family being ill. A second appointment was set up but she phoned to postpone due to month end obligations. She said that she was very busy with car dealer insurance but she confirmed that the trucks are insured;'

[21.4] *'The broker's written statement clearly reflects that they did not know the correct procedures that have to be followed and basically admitted liability.'*

E. WHAT DUTIES ARE PLACED ON APBCO'S REPRESENTATIVES?

[22] Section 2 of the General Code of Conduct for Authorised Financial Services Providers and Representatives (the Code) places on FSP's the general duty to:

'at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.'

[23] Section 3. (2) (a) (i) states that;

' A provider must have appropriate procedures and systems in place to record such verbal and written communications relating to a financial service rendered to a client as are contemplated in the Act,'

F. **DID HCV AGREE TO HOLD COVER FOR COMPLAINANT AS STATED BY APBCO?**

[24] According to HCV they *'never provide cover, unless a fully completed and signed proposal and debit order form have been received.'* In a statement by Debra Engelbrecht, she says that on 24 August 2006, Mr. de Witt contacted her regarding a client that needed cover. Mr de Witt asked her to *'go on cover'* before receiving the quotation. Ms Engelbrecht alleges that she informed Mr de Witt she could only go on cover on receipt of a fully completed proposal and debit order form. For APBCO to sell HCV's product, they must be familiar with the procedures that HCV has in place.

[25] According to Ms. McKeown, this was the first time that she had business dealings with HCV and was not aware that the client needed to complete the application form prior to the temporary cover being granted. However, it was Mr. de Witt who handled the transaction with HCV while Ms. McKeown gathered the details from Mr. Mannie.

[26] HCV, advised that they have had dealings with APBCO Durbanville since 2002 and have never gone on cover/risk without a fully completed proposal and debit form. While Ms. McKeown maintains that this was her first dealing with HCV, HCV provided this office with proof of at least 3 previous dealings by other APBCO personnel (including Mr. De Witt) with HCV. According to a fax dated 14 March 2007 from Hollard Insurance to the Short term insurance Ombudsman, the underwriters, HCV confirmed to Hollard that they had been dealing with APBCO (and Mr. de Witt in particular) *'for many years and that he is fully aware of their procedures.'* From the documentation provided, it is

clear that HCV required at least a fully completed proposal and debit order form, before clients were placed on cover.

[27] Ms. Engelbrecht in her statement to this Office claims that when Mr. de Witt contacted her on 24 August 2006, he asked her to prepare an urgent quotation but asked that HCV go on cover *'even before receiving the quotation.'* Ms. Engelbrecht alleges that she informed Mr. de Witt that HCV could only go on cover on receipt of fully completed proposal and debit order form. This Mr. de Witt denies ever occurred. It is pertinent that Mr de Witt states that to, *'his knowledge this was the very first time that we had asked HCV to hold cover.'* HCV categorically denied that any assurance was given that cover would be held.

[28] Fortuitously for HCV, Ms. Engelbrecht once again reiterated in an e-mail dated 31 August 2006, some 4 hours before the accident occurred, that the client *'was not on cover'* until they received all the outstanding documentation.

[29] Ms. McKeown insists that on a daily basis she places vehicles on temporary cover through various other insurance companies and cover is arranged telephonically without application forms being completed. Whilst this office did not examine this statement further I must make the comment that I would be very surprised that, if such temporary cover was to be granted verbally it was not followed by written confirmation. In this respect I refer to section (2) of the General Code which requires that a provider have appropriate procedures and systems in place to record such verbal and written communications relating to a financial service rendered to a client. The application form in this instance had only been e-mailed to Ms. McKeown after complainant had left.

[30] Of importance is the fact that there is no written confirmation or recorded conversation indicating that cover was to be held.

[31] I have before me mutually destructive versions as far as the provision of interim cover or the lack thereof is concerned. I must therefore look at the probabilities. Ms. Engelbrecht's version is supported by the various examples of how HCV conducts its business. It appears that it is standard practice for HCV to only go on cover upon receipt of the fully completed proposal form and debit order form. The required documentation was only received by HCV on 4 September 2006, some 11 days after the request for cover was made and 4 days after the accident. The accident itself was only reported on 6 September 2006. There is no evidence before me to suggest that there was a variation of HCV's standard method of dealing with respondent.

[32] As this appears to have been the first instance of respondent requesting interim cover from HCV this ought to have been followed up with a written confirmation by respondent. The FAIS Act requires that the financial services provider render financial services honestly, with due skill, care and diligence. Not ensuring that written confirmation was provided in respect of complainant's cover, particularly in an instance such as this where the respondent had not conducted business in this manner before, is clearly a contravention of the FAIS Act. It is strange, to say the least that this was not obtained in writing. Respondent clearly entered into a transaction without being fully familiar with the product supplier's procedure.

[33] I turn to respondent's contention that it was only after the insurer realised that the claim was going to be somewhat larger than originally anticipated that they adopted the attitude that they had not agreed to hold cover over the vehicle, prior to receipt of the

application form. There is no evidence to support this contention and in fact I note in the facsimile from HCV to respondent dated 6th September 2006, wherein HCV requests the claims documentation they also request a letter of motivation, a fact which indicates a potential problem with the claim at this early stage.

[34] Having considered the evidence before me I have no difficulty in coming to the conclusion that HCV did not agree to provide temporary cover.

**G. WAS COMPLAINANT DILATORY IN ANY MANNER AND DID THIS
CONTRIBUTE TO THE LOSS?**

[35] As stated previously, APBCO maintains that complainant was himself negligent in that he did not make himself available to sign the application forms despite having been advised that the forms had to be completed and provided to the insurer as soon as possible.

[36] Respondent contends that despite numerous attempts to meet with complainant he was always unavailable. In support of its contentions respondent referred to the proposal form that was purportedly left at Jurie Swart Motors.

[37] Respondent provided the name of Heidi Richter a lady that had worked at Jurie Swartz Motors and with whom the form had purportedly been left. The office contacted Heidi Richter. Whilst she clearly remembered the forms for the Vito, insured by Mutual & Federal she denies having seen the forms for HCV. In fact she went further and

averred that as the forms did not relate to a vehicle sold at Jurie Swartz Motors she would not have assisted in this respect.

[38] In effect APBCO argues that had complainant co-operated by meeting with the APBCO representative instead of continually being unavailable then the application forms would have been submitted to the insurer long before the accident occurred and the complainant would have been covered.

[39] Complainant in his version denies that Ms McKeown informed him that the cover was subject to a completed proposal form or that any attempt was made between the 24th August and 31st August (when the accident occurred) to complete any forms.

[40] APBCO provided copies of cellphone records to demonstrate the number of calls made by Ms. McKeown to complainant.

[41] Complainant does not dispute that calls were made but contends that such calls were for the details on the Vito and the values on the DVD player, special speakers and mag wheels.

[42] He further contends that, whilst Ms. McKeown made two appointments with him to fill in a proposal form for the trucks these meetings were both cancelled by her, for the reasons as set out under complainant's response.

[43] At their third appointment they viewed the truck damage together and she confirmed that the claim would be paid and they filled in the claim form together and submitted the claim.

[44] I am unable to conclude that Ms McKeown's cellphone records demonstrate anything other than the fact that she called him several times. This is consistent with complainant's version and not sufficient to support Ms McKeown's version.

[45] This Office put it to respondent that in the light of the alleged difficulties which they were experiencing in getting complainant to sign the forms they should have sent an e-mail or facsimile to the complainant. Respondent's reply was that:

' I do agree that this would have been wise and should have been done had it been possible....Firstly Mr. Mannie was in the process of moving his office at the time and did not have a designated fax number of (sic) e-mail address making it impossible for Ms. McKeown to forward correspondence to him.'

[46] Complainant denied that his facsimile or e-mail were not operational or that he was in the process of moving premises. He says that he did move offices but only within this business premises. This did not affect his contact numbers or e-mail.

[47] What is apparent from the above is that respondent does not have any evidence in support of the contention that complainant was advised that the forms had to be completed as soon as possible or that the complainant was dilatory in attending to sign them.

[48] The actual time between the complainant being advised that he was on cover and the accident was comparatively short. The posting of a letter would not have reached the complainant in time but that did not prevent other forms of communication i.e. a sms, e-mail or facsimile.

[49] The FAIS Act and General Code require proper record keeping and documentation. This particular case is clear evidence of exactly why this legislation was in place.

CONCLUSION

[50] I must consider whether complainant himself acted with sufficient diligence to ensure completion of the documentation, and if not whether this contributed to the loss. Complainant is a businessman and hence familiar with commercial transactions. The Office as a matter of course expects that complainants assume a degree of responsibility for their affairs. The initial meeting between the parties had taken place on 24th August 2006 and the accident on the 31st August 2006. There were only four working days between these dates. The time frame is in my opinion not sufficient to shift a degree of responsibility to complainant, when viewed with the weight of the surrounding evidence.

[51] There is no evidence in support of respondent's version of events. The contrary is in fact the case.

[52] It is clear from the investigations of this office that HCV never agreed to go on risk for the complainant either temporarily or otherwise unless a duly completed proposal form and a debit order form were provided. As previously stated, the FAIS Act and the General Code in particular, places upon a financial services provider the duty to render **at all times** financial services with **due skill, care and diligence**. It was incumbent on APBCO (through its representatives, Ms. McKeown and Mr. de Witt) to ensure that the

proposal and debit authorisation forms were timeously completed and submitted to HCV in order to secure the cover.

[53] In addition there is no evidence that the complainant was in any way responsible for the delay in signing the forms.

[54] Therefore it is clear that APBCO acted negligently in the rendering of the financial service, which negligence resulted in financial prejudice i.e. the repudiation of complainant's claim by HCV.

[55] This office in the case of *Ismail Slamang vs Harnack & Associates (Pty) Ltd.* FOC 351/06-07/WC (3) dealt with the issue of a financial services provider confirming cover prior to the necessary forms being signed. Fortunately for the financial services provider in that instance, it was evident that Slamang was clearly aware that cover was subject to the completion of a proposal form. In the present case respondent was not so fortunate. This case sends out a clear message that in the event that financial services providers seek to go on risk without the requisite forms or records they place themselves on risk.

THE QUANTUM OF COMPLAINANT'S LOSS

[56] I turn now to the actual loss. Complainant has claimed damages to the vehicle in the amount of R143 447.52 including VAT as well as consequential damages. Complainant had a duty to mitigate his damage and therefore I shall not consider his claim for consequential damages. I shall therefore only deal with the damages to the vehicle. Complainant has submitted a quotation to support the R143 447.52.

[57] The vehicle was not repaired and instead remained in an open yard subject to the elements. There was therefore attendant deterioration to the vehicle.

[58] In order to verify the quantum I instructed an independent loss adjustment service to assess the vehicle. The report stated the damage to the vehicle amounted to R118 184.63 including Vat, but as this exceeded 70% of the suggested market value of R166 650.00 it was recommended that the vehicle be considered a total loss and the claim settled as such.

[59] Whilst HCV never assumed the risk, for the purposes of quantum it must be assumed that the contract came into being and that the normal terms and conditions applied.

[60] The application forms specified an insured amount of R250 000 for the vehicle and according to HCV they:

'insure on agreed value- the insured amount at times exceeds the retail value to cater for the HP charges to protect the client in the event of a stolen or hi-jacked vehicle (shortfall).'

[61] HCV further advised that in the event of a client being grossly over insured the reasonable market value applies.

[62] More specifically Paragraph 1 of the Own Damage section of the policy wording states:

'The limit of indemnity for each insured vehicle is as stated in the Schedule which shall be the maximum amount payable in respect of such loss or damage, but it shall not exceed

the reasonable market value of the vehicle and its accessories and spare parts at the time of such loss or damage'

[63] Therefore had the contract of insurance come into being HCV's strict contractual liability would have been that of the reasonable market value of the vehicle already established at R166 650.00.

[64] The excess applicable would be 10% subject to a minimum of R2 500 and the vehicle having been written off an additional 10% salvage applies.

[65] The amount of R166 650.00 is thus reduced by 20% to R133 200.00.

Accordingly the following order is made:

1. This complaint is upheld in terms of Section 28 (1) (b) of the Rules on Proceedings of this Office and respondent is ordered to pay complainant the sum of R133 200.00 within 14 days of the date of this order.
2. Interest on the said sum at the prescribed rate of 15.5% p.a. effective within seven days after date of this order to date of payment of the capital sum.
3. Respondent is ordered to pay case fees of this Office in an amount of R1 000.

DATED AT PRETORIA ON THIS THE 10th DAY OF NOVEMBER 2008



Charles Pillai
Ombud for Financial Services Providers