

PRETORIA

Case Number: FOC 4535/07-08/GP (3)

In the matter between:-

NIVASHAN MOODLEY

Complainant

and

THE STANDARD BANK OF SOUTH AFRICA LTD

Respondent

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

A. PARTIES

[1] The Complainant is Nivashan Moodley, a pest control operator residing at 1 Acacia Park, Acacia Road, Northcliff, Gauteng.

[2] The Respondent is Standard Bank Insurance Brokers (Pty) Ltd, an authorised financial services provider and a division of the Standard Bank of South Africa Limited.

COMPLAINT

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- [3] Complainant obtained short term indemnity insurance for the contents of his house (the premises) with Santam Insurance Company. The policy was intermediated through respondent. Respondent was represented by a consultant, a Mr Lee-Juan Meyer (Meyer) during the course of the transaction.
- [4] The transaction was concluded telephonically on the 18th and 19th September 2007 and it was agreed that the policy commence on 1st October 2007.
- [5] In the course of the conversation and in response to the question whether he had security gates in front of all doors complainant answered in the affirmative.
- [6] Complainant's premises were burgled on the 22nd December 2007 and in the words of Miss Tisarnia Moonsamy, complainant's fiancé *'We were wiped out, literally, from our televisions to our refrigerator'*. Whilst complainant is the insured Miss Moonsamy is listed as a co-complainant on the complaint registration form signed by complainant. In addition the contact details on the complaint registration form are those of Miss Moonsamy and after the sale of the policy, Miss Moonsamy appears to have been the primary source of communication both with this Office and respondent.

an assessor duly arrived to confirm the loss. In a 2008 Santam repudiated the claim on the grounds that the policy condition regarding safety and security measures were not met. The kitchen door was not fitted with a security gate, at the time of loss.

[8] Subsequent to the repudiation Miss Moonsamy lodged a complaint with respondent and when it could not be resolved referred the matter to this Office. Whilst Ms Moonsamy has raised issues relating to the provision of policy documents and the supply of information to her without authorization, the essence of the complaint is that respondent failed to comply with the General Code Of Conduct For Authorised Financial Services Providers and Representatives (the Code). In particular the allegation is that Meyer did not communicate with complainant in a manner which avoided uncertainty or confusion and that the advice was inadequate and inappropriate in the circumstances, taking into account the factually established or reasonably assumed level of knowledge of the client.

[9] The door (described as a kitchen door in the assessor's report) used to gain entry is about a metre to the left of the main entrance. According to Miss Moonsamy as they had never been given a key to this door they assumed that it must have been sealed off and hence did not disclose that there was no security gate. Further she reasons that Mr Moodley's clear lack of education regarding insurance should have alerted the intermediary and led

ions so as to ensure adequate disclosure. In this

s:

'However if a specific question to the above effect was not asked, or the consultant did not make it clear enough for a first time consumer to understand what exactly he/she needed to know....I feel that Standard Bank needs to be exposed for their lack of skills, and manipulating clients to take out a cover that might not even protect them'¹ and 'Now I am sure that after hearing that recording yourself, it is clear that Mr Moodley is not educated in terms of insurance.'²

The relief sought by Complainant

[10] Complainant seeks to be indemnified in terms of the Santam policy for the loss suffered in the burglary.

Investigation by this Office

[11] In the complaint registration form Miss Moonsamy specifically makes reference to two e-mails^q that she sent to respondent. The first being to the one to Ms Denise Shaw which as she puts it ~~explains~~ explains the entire situation^q and the second to Mr Dave Watson which ~~explain~~ explain my reasons for bringing this matter to your offices.^qThese are the e-mails referred to in paragraph 9 above.

¹ e-mail dated 4th January 2008 to Ms Denise Shaw at respondent

² e-mail dated 16th January 2008 to Mr Dave Watson at respondent

Moonsamy states:-

“both he (the complainant) and myself are in agreeal that if a specific question was asked in regards to ‘how many doors we have at our property,’ he would have answered 2-only one door can be used as an exit or entry into our premises, and he would of went on to explain that the other door is a door that from inception of our lease agreement was sealed off. Infact we were never given a key for it, and were under the impression that it must have been sealed / ceased and that this door had no security gate.’ ‘If it was simply asked without any elaboration “does all your openings have gates / burglar bars” we would have answered ‘yes’ ..because as far as we are concerned, every point in the house that we were able to open had security features.’

(quoted as is from e-mail)

[13] It must be noted that the first e-mail precedes complainant having received a copy of the recording and hence accounts for the somewhat speculative tone.

[14] The second e-mail is after receipt of the voice recording and hence Ms Moonsamy utilises the actual wording. She refers to complainant having answered ~~y~~yes I have them on all entry pointsqwhen asked by Meyer whether he had bars on all windows and doors she contends that in referring to entry points complainant meant ~~d~~doors that can be entered fromq

es that *“the consultant then asked again in order to all doors-front door; back doors; side door ...and Mr Moodley replied ‘ja’.”* This answer is explained as follows *“he referred to the one door - because if you see our property, there is no back door or side door..in fact the door that was broken into is about a meter left from the main/only entrance point (this caused Mr Moodley some confusion, and in his head he justified the answer with the fact that your consultant mentioned ‘front door’ in a singular form and he presumed that we could only have one front door)”*.

[16] I must point out that in compiling this second e-mail Ms Moonsamy makes reference to having consulted with complainant about his replies.

[17] The complaint was forwarded to respondent as required in terms of the rules governing this Office. In reply respondent reaffirmed its repudiation and attached a copy of the recording, written transcripts of the said recording as well as photographs of the doors through which entry had been gained.

[18] The basis of respondent's repudiation is as follows:-

18.1 *‘We advise that the complainant specifically informed our consultant that all doors had security gates,’*

formed the consultant either intentionally or

18.3 *'robbers had access through the doors that does (sic) not show any security gates.'*

[19] The recordings and transcripts were examined and the relevant portions read as follows:-

19.1 *'Consultant: Alright. And burglar bars on your windows?'*

Customer: Through out, ja.

Consultant: All the opening and fixed windows, or just the opening windows?'

Customer: No all the entry points are actually burglar guarded

Consultant: So all the opening windows?'

Customer: Ja. No, all, all. From my door to my big windows, everything'

19.2 *'Consultant: Right..and now ...so, so you say you have security gates in front of your doors as well*

Customer: Ja

Consultant: Front, back, side, all the doors?'

19.3 *'Consultant: ...It is also very important that you advise us of any changes in your circumstances. What I am saying there, anything that can affect your policy or its premium, let us know.*

Customer: Ok

Consultant: As not informing us can result in your claim being repudiated, ok?

Customer: Ja Ja.

Consultant: So that means, if you take off any security on there, or...

Customer: Obviously I have to inform you guys'

[20] It is relevant to note that after receiving the answer that everything from the door to the big windows were secured the consultant enquired about other security measures before returning once again to confirm that there were security gates in front of all doors.

[21] The consultant requests the complainant to contact the call centre in the event that he does not receive the documentation within 21 days and further goes on to emphasise the need to read the documentation and revert if there is any uncertainty:

...do me a favour, when you get your
...be sure you read through it,' and 'Make sure you
are comfortable with everything that is notified, if not, if there is
something on there that ...um...that's not clear to you, let us rather
know.'

[22] Turning to that portion of the complaint relating to the provision of policy documents I note that Ms Moonsamy phoned respondent on 13 November 2007 and advised that the policy document had not been received. Respondent provided only the policy schedule via e-mail to Ms Moonsamy on the same day and hence the following day she requested ~~the~~ the policy wording as well.q

[23] Ms Moonsamy contends that she received neither a reply nor the requested document.

[24] Respondent was requested to deal fully with this issue and responded as follows:

24.1 *"The Bank has confirmed with the insured that the policy was posted on 19th September 2007. An SMS was sent on 19 September 2007 at 12.26 to cell phone number 076 907 3536 as follows: 'Thank you for placing your insurance with SBIB. Your new policy has been posted*

e contact us if not received within 21 days. A copy
not reflecting the above is attached.

24.2 *The Policy Schedule was emailed to the complainant on the 13th November 2007.*

24.3 *The Bank further advises that the consultant, Geneveve to whom the email dated 13 November 2007³ was addressed to did not reply to this email. Instead a copy of the policy wording was posted to the complainant and in this is evidenced in the Bank's events log.*

24.4 *Due to the size of the policy wording the Bank does not email this document and instead posts this to the client at the chosen address."*

[25] The explanation offered by respondent accords with the details captured in the data management system screenshot, ~~E~~Eventslogq copies of which were provided to the Office.

C. DETERMINATION

[26] The complaint is directed against the financial service provider for the advice rendered and not the product provider Santam. Whilst the FAIS Act imposes

³ The e-mail referred to was sent on the 14 November 2007 and not the 13th November.

providers, consumers themselves have corollary
this instance apply in respect of the duty of the
insured to make proper disclosure. Where disclosure has not been made, the
materiality of such non disclosure becomes applicable. The contract was
entered into with respondent acting as intermediary between complainant and
the product provider. Hence disclosures were as a matter of course made to
respondent.

[27] In examining the duty of disclosure I am guided both by the relevant
provisions of the Short Term Insurance Act, No 53 of 1998, as well as case
law.

[28] In the Appellate Division (Now Supreme Court of Appeal) case of *Mutual and
Federal Insurance Co Ltd vs Oudtshoorn Municipality 1985 (1) 419 at 435 F to
H*, Joubert JA in applying the reasonable man test to determine materiality
said the following:

It is implicit in the Roman-Dutch authorities and also in accordance with the general
principles of our law that the Court applies the *reasonable man test* by deciding upon
a consideration of the relevant facts of the particular case whether or not the
undisclosed information or facts are reasonably relative to the risk or the assessment
of the premiums. If the answer is in the affirmative, the undisclosed information or
facts are material. The court personifies the hypothetical *diligens paterfamilias* ie the
reasonable man or the average prudent person.

has a long history in our law and it is notable that in
quotes Solomon JA who in the case of *Fine vs The
General Accident, Fire & Life Assurance Corporation Ltd 1915 AD 213 at
(220-221) said:*

And in Joel's⁴ case Fletcher Moulton LJ says if a reasonable man would have
recognised that it was material to disclose the knowledge in question, it is no excuse
that you did not recognise it to be so. And that after all appears to be the true test,
would a *reasonable man* consider that the fact was one material to be known by the
insurer, or a fact that in the words of Lord Black-BURN might influence the
underwriter's opinion as to the risk he is incurring?

[30] Whilst considering the actual duty to disclose material facts Joubert JA in the
Mutual and Federal case went further and at (432 E – F) stated:

There is a duty on both insured and insurer to disclose every fact relative and
material to the risk (*periculum or risicum*) or the assessment of the premium. This
duty of disclosure relates to material facts of which the parties had actual knowledge
or constructive knowledge prior to conclusion of the contract of insurance. Breach of
this duty to disclose amounts to *mala fides* or fraud, entitling the aggrieved party to
avoid the contract of insurance.

[31] In the case of *Commercial Union Insurance Company of South Africa Ltd vs
Lotter (1999) 1 (SCA) All SA 235 (A)* Farlam AJA in enunciating the test for
material non disclosure makes reference to its consideration in the

⁴ Joel vs Law Union & Crown Insurance Co (1908) 2 KB 863 (CA)

The test of materiality for non-disclosure in our insurance law ...is: whether a reasonable man would consider that the information in question, which was not disclosed, should have been disclosed to the insurer so that he (or she) could form his (or her)own view as to its effect.q

[32] The views as set out in the aforementioned cases were essentially codified, with the amendments to the Short Term Insurance Act 1998 (Act No. 53 of 1998) by the Insurance Amendment Act 2003 (Act No. 17 of 2003).

[33] In particular I refer to Section 53 (1) (a) (iii) which requires that the:

representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concernedqas well as Section 53 (1) (b), The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have correctly disclosed to the short term-insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.q

[34] According to Ms Moonsamy the break in occurred at a door about a metre left of the main/only entrance point.qI have examined the photographs provided by respondent and note that the door is a fairly conventional outside door, slatted on the outward facing side and with what appears to plain wood sheeting on the interior. There is a normal mortise lock as well as a deadbolt



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ars that some form of lever or crowbar has been
s to gain access.

[35] Whilst Ms Moonsamy and complainant contend that they were under the impression that the door had been sealed there is absolutely nothing in the pictures that could lead to this conclusion. The mere fact that no key had been provided by the landlord is insufficient in this regard.

[36] It goes without saying that the parties are in agreement that no security door existed at this point.

[37] Complainant has attempted to explain his non disclosure in this regard by referring to his use of the term *entry points* meaning, as he puts it, *doors that can be entered from* I note that at this point in the conversation the consultant was questioning complainant about burglar guards on the windows and had not mentioned the door. It was complainant who introduced the door into the conversation and in an assertive tone offered the assurance *'No all entry points are actually burglar guarded'* and *'No, all, all. From my door to my big windows, everything.'* Complainant clearly uses door and entry point indistinguishably. The common interpretation or to use the term reasonable man understanding of a door is in fact an entry point. Whether the door is locked or otherwise has no bearing on the ordinary interpretation thereof.

to the subject asked about security gates on doors
entry points. The terminology is clearly plural and
the mere fact that he gives examples and mentions front, back and side does
not mean that there can only be one front door given that he asks about all
doors in virtually the same breath.

[39] In terms of the FAIS Act I am of course compelled to consider whether
complainant (via Ms Moonsamy) is in fact correct in the assertion that
consultant failed to ask questions in a manner which would have elicited the
necessary disclosure. Ms Moonsamy has made mention of his lack of
familiarity with insurance products, and as previously mentioned the Code in
Section 3 (1) (a) (ii) and (iii) requires that the representations:

must be provided in plain language, avoid uncertainty or confusion and not be
misleading and must be adequate and appropriate in the circumstances of the
particular financial service taking into account the factually established or reasonably
assumed level of knowledge of the client.

[40] In summary the interaction must be carried out in such a manner so as to
avoid confusion, taking into account client's level of knowledge.

[41] Having listened to the recording several times I note that all information is
conveyed in a clear and unhurried manner and in unambiguous terms. There
is no attempt to pressurise complainant into purchasing the product. On the

be a genuine attempt to ensure that the product is
\$ needs and that complainant is made aware of his
rights and obligations. The transaction took place over two days, which would
have given complainant more than ample opportunity to consider the contract
that he was entering into. Respondent did not merely gloss over the security
issue but went into detail and returned again to confirm his understanding that
security gates were in place. In addition during the second conversation he
made it clear that any changes in security needed to be communicated to
respondent. I am therefore comfortable in finding that the questions were
both adequate and appropriate and could in no way be construed as
confusing.

[42] Complainant's attempt to use semantics to explain his failure to disclose that
there was no security gate on the door through which the burglars gained
entry to the premises does not hold water.

[43] Ms Moonsamy provided this office with an e-mail from Mr. George Marsh
dated 9 January 2008 at respondent wherein he states, ~~it~~ is clear in his mind
that the house had only one point of entry. We have taken this up with
Santam in an endeavour to reach a speedy resolution to this claim. q Whilst
this appears to have been a well intentioned effort to assist complainant it
does not change the fact that this misunderstanding cannot be attributed to
any other party than himself.

raction from the perspective of the FAIS Act I once
d the codification thereof as contained in the Short
Term Insurance Act. There can be no doubt that the non disclosure in this
instance is ~~material~~and meets the requirements of Section 53 (1) (a) (iii) in
that it ~~affected~~ the assessment of the risk under the policy concerned.qThe
burglars gained entry through the very door that did not have a security gate.

[45] The reasonable man test as enunciated by Farlam AJA in the *Commercial Union* case was taken a step further with the amendments to the Short Term Insurance Act, in that it moved from the reasonable man to that which a ~~reasonable~~, *prudent person*' (own italics)should have correctly disclosed to the short-term insurer so that the insurer could form its own view.q

[46] It would be difficult at the best of times to argue that a reasonable man in the circumstances would think it unnecessary to disclose the lack of a security gate. With the addition of the word prudent to the section I have no option but to find that complainant failed to meet the necessary disclosure to respondent. Whilst this test may at first blush seem harsh it must be remembered that it is tempered to a large degree by the provisions of the FAIS Act. Unfortunately for complainant in this instance respondent acted correctly and as such fulfilled the requirements of the Act.

uments continues to be problematic in a number of
Martin Zackey T/A Colour City Paint & Hardware v

CDI Brokers CC and Quicksure Commercial (PTY) LTD FOC 867/06-07/GP

(3) the policy wording only reached complainant after the loss thus depriving him of the opportunity to acquaint himself with the policy requirements.

[48] Fortunately whilst in this instance respondents ~~Eventslog~~ appears to be in order and I could find no problem with complainant's postal address I am not required to make a finding on whether the policy wording was received. The policy wording as opposed to policy schedule has no impact on the facts at issue. It is the policy schedule that contains the specific security requirements applicable to complainant, the policy wording containing what might be termed standard terms with no bearing on the matter before me. The policy schedule was e-mailed to complainant on 13 November 2007 and the break in occurred on 22 December 2008. In short there was sufficient time to consider the document and hence for the reasons enunciated herein no loss can be attributed to respondents' provision or otherwise of the documentation.

[49] There can be no doubt that complainant failed in his obligations to disclose that there was no security gate on the kitchen door. All attempts to explain this omission and attribute the blame on respondent are without merit. I have no hesitation in dismissing the complaint.

FINAL ORDER IS MADE

1. This complaint is dismissed in terms of Section 28 (1) (b) of the Rules on Proceedings of this Office.

2. Respondent is ordered to pay case fees of this Office in an amount of R1 000.

Dated at PRETORIA this 6th day of February 2009.



CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS