

**IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS**

**PRETORIA**

**CASE NUMBER: FAIS 00753/17-18/ KZN 3**

**In the matter between:**

**KLOOF PLANT HIRE CC**

**First Complainant**

**KRISH MOODLIAR**

**Second Complainant**

**and**

**CDK EVENT SOLUTIONS T/A CDK BROKERS**

**First Respondent**

**RENETA NAIDOO**

**Second Respondent**

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

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**A. INTRODUCTION**

[1] The complainant holds a commercial insurance policy with Western National Insurance Company Limited (Western National). The complaint arises from the rejection of a claim following the theft of a vehicle insured under the policy. The basis for the rejection was that the vehicle was not fitted with the appropriate tracking device.

[2] On 25 April 2017 and after a complaint against the insurer was dismissed by the Ombudsman for Short Term Insurance, the complainant lodged a complaint with this Office against his financial services provider. The complaint is that the respondent failed to advise the complainant of the correct tracking device that had to be installed in his vehicle.

## **B. THE PARTIES**

- [3] The first complainant is Kloof Plant Hire CC, a close corporation with registration number 1994/10201/23 which it principal place of business in the Kwazulu Natal area. The second complainant is Mr Krish Moodliar, owner of the first complainant, whose particulars are on file with this Office.
- [4] The first respondent is CDK Events Solutions (Pty) Ltd, a company with registration number 2014/180109/07, duly incorporated in terms of the company law of South Africa. The first respondent is a licensed financial services provider, with number 45729. The regulator's records confirms their address as 13 Oribi Crescent, Sarnia, 3615. The first respondent's license was approved on 10 February 2015.
- [5] The second respondent is Reneta Naidoo, an adult female key individual and representative, whose address is the same as that of the first respondent.
- [6] "Complainant" and "respondent" must be read to mean all the complainants and respondents, unless otherwise stated.

## **C. COMPLAINT**

- [7] The complainant stated that he knew the second respondent from a previous brokerage where he was her client. Around 2009, the second respondent opened her own brokerage, and moved his portfolio with her. At the time, he was insured with another insurer, and the second respondent also moved his policy to Western National. He operates a transport company and has a fleet of vehicles insured on the said policy.
- [8] The complainant had approximately 29 vehicles and trailers insured on the policy at the time. The complainant claims that the same vehicle tracking device was installed on the whole fleet of vehicles, which comprised of a "Vigil Lite" only monitoring system and a "Sleuth" back-up system, installed by Altech Netstar. The complainant confirmed

that at no time since the inception of the Western National policy, was he informed that the tracking device that he had in his vehicles, were not sufficient.

[9] During September 2015, the complainant purchased a 2015 Toyota Hilux bakkie, which he requested the respondent to add to his policy. Similarly, this vehicle was fitted with the Vigil Lite and Sleuth systems.

[10] In e-mail correspondence of 21 September 2015, the respondent confirmed that the Toyota Hilux was added and an amended policy schedule was attached noting the new premium. The e-mail further stated that:

*“Please note that all vehicles over the value of R150 000 are required to have an Approved Satellite Tracking Unit fitted. (my emphasis)*

*Should you wish for a Tracker or Netstar consultant to contact you with regards to the different products they offer, please advise me accordingly.*

*Kindly forward me Tracking Certificates for all the vehicles over R150 000.*

*Should you not comply with this requirement please note that in some cases your claim will not be entertained or a separate excess will apply.”*

[11] On 11 February 2016, the Toyota Hilux was reported stolen. At the time, the vehicle was driven by the complainant's son. Altech Netstar performed a ground and air search, however, the vehicle was never recovered. Upon submission of a claim to the insurer, the complainant was informed that the claim is rejected on the grounds that the tracking system installed did not meet its requirements of an “early warning system”.

[12] The complainant stated that the respondent failed to advise him that the early warning system was a requirement. He was not prepared to risk non-payment of a claim on his fleet of vehicles, therefore, had he been aware of the requirement, he would have fitted

the required device. In addition, the complainant claimed that the systems he fitted in the vehicles were more expensive than the early warning system that was required.

[13] The complainant holds the respondent liable for the loss that he suffered, owing to the incorrect advice provided.

#### **D. RELIEF SOUGHT**

[14] The complainant seeks repayment of the insured value of the vehicle, being R344 697.16.

#### **E. REFERRAL TO RESPONDENT**

[15] During May 2017, the complaint was referred to the respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office, to resolve it with the complainant. The respondent replied on the 31<sup>st</sup> of May 2017. The essential parts of the response is summarised as follows:

15.1 The phrase "*approved satellite tracking unit*" is not a particular type of unit, but a mere reference to all types of satellite tracking units in general. The only requirement is that the satellite unit must be approved by the insurer.

15.2 The aforesaid sentence is further clarified where the respondent's employee stated that a Tracker or Netstar consultant can contact the complainant with regards to the different products on offer, should he so wish.

15.3 The respondent further refers to an e-mail sent to them by Altech Netstar on 10 March 2016 where it is stated that the complainant did approach Netstar and was advised of all the options available to him, but the unit that was fitted is what the client (complainant) selected. The respondent claimed that the complainant did not consult their office or the Netstar consultants to confirm if the selected device complies with the requirements of the insurer.

- 15.4 The respondent further stated that despite requests for a copy of the tracking certificate, same was only provided during the claims process. As a result, they were not aware which device was installed, and could therefore not have insisted on the installation of the early warning system.
- 15.5 The complainant informed them telephonically that he went to Netstar and fitted the tracking device, which is the device he allegedly instructed Netstar to install without considering the other options, or so says the respondent.
- [16] A letter sent to the respondent on 7 May 2018 recommending settlement of the complainant's claim, was rejected. In short, the respondent was of the view that they complied with the requirements of section 7 (1) (a) of the General Code of Conduct (the Code), in that an appropriate general explanation of the material terms of the contract (an approved tracking device) was provided to the complainant. In substantiation of this argument, the respondent referred to page 13 of the Tradesure Trucks policy wording where reference is made to vehicles with a sum insured in excess of R150 000 requiring an approved tracking device, without which there would be no cover for theft or hijacking.
- [17] The respondent maintained its submission in this reply that they were not provided with the tracking certificates, and could therefore not comment on the devices that were installed. The complainant was informed of the consequences of non-compliance (the submission of the tracking certificate), and failed to adhere to instructions given to him to ensure that the correct tracking device was installed. This was instrumental in the rejection of the claim.
- [18] A notice in terms of section 27 (4) of the Act was sent to the respondent on 30 May 2018. The respondent, with the assistance of attorneys appointed by his professional

indemnity insurers, submitted a response. Much of the earlier responses were repeated, and the following emphasized:

18.1 It was the complainant's "indifference and carelessness" to submit the tracking certificates, which resulted in the respondent's inability to advise whether the correct device was installed in the vehicle. The respondent could therefore not take any further action to appropriately advise the complainant.

18.2 The complainant had no excuse for not complying with the requests, given his history of familiarity with the insurance of motor vehicles of these types.

18.3 The submission that the respondent failed to make full and frank disclosures, is without substance and thus rejected.

18.4 It is the respondent's view that it fully complied with its "FAIS obligations", and the suggestion that it failed to do so, is unsustainable.

## **F. DETERMINATION AND REASONS**

[19] The issues for determination are:

19.1 Whether the respondents in rendering financial services, complied with the provisions of the FAIS Act and the General Code of Conduct, (the Code).

19.2 Whether respondent's conduct caused the complainant's loss.

19.3 Quantum of such loss.

### ***The FAIS Act and the Code***

[20] It cannot be disputed that at all material times, the respondent provided financial services to the complainant. The specific form of financial service that this complaint is concerned with, is advice. Advice in terms of section 1 of the Act, includes any recommendation, guidance or proposal of a financial nature furnished to a client. The advice has to meet the standards prescribed in the Code.

[21] Section 2 of the Code provides that a provider must 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.

[22] More particularly, section 7 (1) (c) (vii) states that a provider must in particular provide full and appropriate information of the following: concise details of any special terms or conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided.

***The policy wording***

[23] The respondent's entire argument rests upon non-compliance by the complainant to adhere to the request to submit the tracking certificate. The respondent argued that had this been adhered to, they would have been in a position to advise the complainant, *ex post facto*, that he did not comply with the requirements of the insurer.

[24] This argument is totally misplaced. The Code obliges a financial service provider to place his client in a position to make an informed decision. This can only be done if the client is provided with the required information upfront. This is further enforced by section 7 (1) (c) (vii) which requires disclosure of any special terms or conditions where liability will be excluded, or where excesses apply.

[25] Even if the complainant submitted the tracking certificates after the devices had already been installed, he could have incurred the costs and inconvenience of installing an incorrect advice. How this amounts to acting fairly and with due diligence towards the complainant, the respondent has not explained. In fact, had the respondent understood the intricate product they sold to their client, they would have been aware of the specific requirements of the policy in question, and explained it properly to their client.

[26] I refer in this regard to page 13 of the policy wording, upon which the respondent relied. However, page 14 of the policy wording which seem to have been missed by the respondent, states the following:

***“Additional Theft and Hijack Excess (cumulative to the above)***

*Vehicles valued R150 000 and over:*

***If not fitted with an Advanced Early Warning Tracking Device:***

- ***No cover***

*If fitted with an Advanced Early Warning Tracking Device:*

- *5% of claim with a minimum of R5000”*

[27] Page 15 of the wording provides even more limitations to cover, and specific requirements with which the insured must comply with. It is also noted on this page that an advanced early warning tracking device is a standard motor security requirement. (my emphasis).

[28] That there is a difference between a satellite tracking device, and an advanced early warning tracking device, is clear from the requirements of the insurer. Whilst a satellite tracking device would have sufficed for vehicles under R150 000, in addition, the early warning system is required for vehicles exceeding this value. It is this requirement that the respondent was duty bound to disclose to her client.

[29] Furthermore, what the complainant installed was not necessarily incorrect, since it is a requirement on page 15 of the wording that the vehicles be fitted with a fleet management system and be monitored on a 24 hour basis. This is what the Vigil Lite system is for. It is however unlikely that the respondent explained the additional requirements, limitations and excesses on this policy to her client.



### **Record of advice**

[30] The Record of Advice is maintained by providers in compliance with Part VII, section 9 of the General Code. The provisions of section 9 states as follows:

- “(1) A provider must, subject to and in addition to the duties imposed by section 18 of the Act and section 3 (2) of this Code, maintain a record of the advice furnished to a client as contemplated in section 8, which record must reflect the basis on which the advice was given, and in particular-*
- (a) a brief summary of the information and material on which the advice was based;*
  - (b) the financial products which were considered; and*
  - (c) the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the client’s identified needs and objectives.”*

[31] Despite requests for the aforesaid documentation, the respondent failed to provide any records that would confirm adherence to the Code. This includes confirmation that the tracking requirements (other than noted in the e-mail), and other relevant limitations and conditions were explained. The respondent therefore failed to comply with section 9 of the Code.

[32] It should be noted that it is not the duty of the Netstar consultants to advise a client of the appropriate device to install. The requirements of insurers in all likelihood differ, which is why it was the responsibility of the intermediary who collects commission from her client, to ensure that they provided their client with the correct information.

### **G. CAUSATION**

[33] The questions that must be answered is whether the respondent’s materially flawed advice and actions caused the complainant’s loss, and secondly, whether the non-compliance of a provision of the Code can give rise to legal liability, whether in contract or delict.

[34] I refer in this regard to the decision of the Appeals Board<sup>1</sup> in the matter of *J&G Financial Service Assurance Brokers (Pty) Ltd and another v RL Prigge*<sup>2</sup>. The Board noted the following:

*“The liability of a provider to a client is usually based on a breach of contract. The contract requires of a provider to give advice with the appropriate degree of skill and care, i.e., not negligently. Failure to do so, i.e., giving negligent investment advice, gives rise to liability if the advice was accepted and acted upon, that it was bad advice, and that it caused loss. And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.*

*In the case of a provider under the Act more is required namely compliance with the provisions of the Code. Failure to comply with the code can be seen in two ways. The Code may be regarded as being impliedly part of the agreement between the provider and the client and its breach a breach of contract. The other approach is that failure of the statutory duty gives rise to delictual liability.*

*In both instances the breach must be the cause of the loss.....”*

[35] There is sufficient information to suggest that the respondent failed to appropriately apprise her client of the specific terms of the insurance contract that could affect his cover. Consequently, as a result of the respondent’s failure to adhere to the Code, the complainant did not install the early warning system. The respondents’ conduct is the sole cause of the complainant’s loss.

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<sup>1</sup> Effective 1 April 2018, the Board is now called the Financial Sector Tribunal

<sup>2</sup> FAB 8/2016, paragraphs 41 – 44

## H. QUANTUM

[36] The amount payable to the complainant is calculated on the basis of what the complainant would have received, had the correct tracking device been installed<sup>3</sup>:

Insured value:	344 697.16	
Less basic excess (5%):	17 234.86	(PMV / LDV first amount payable)
Less theft excess (5%)	<u>17 234.86</u>	(sum insured > R150 000)
TOTAL:	310 227.44	

## I. ORDER

[37] In the premises the following order is made:

1. The complaint is upheld.
2. The respondents are hereby ordered jointly and severally, the one paying the other to be absolved, to pay the complainant the amount of R310 227.44
3. Interest at the rate of 10% per annum, seven (7) days from date of this order to date of final payment.
4. The respondents are further ordered to refund the commission received in respect of this transaction.

**DATED AT PRETORIA ON THIS THE 4<sup>th</sup> DAY OF DECEMBER 2018**



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**NARESH S TULSIE**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**

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<sup>3</sup> This information was provided by Tradesure and confirmed in writing.