

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FOC3818/06-07 WC 3

In the matter between:

ZULUIGA PAULSE

Complainant

and

**ROGER WILCO TRADING 117 CC/
TRADING AS AUGUSTA MOTORS**

Respondent

DETERMINATION IN TERMS OF SECTION 28(1) (a) of the FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002 (Act No. 37 OF 2002) ('FAIS Act')

A. THE PARTIES

[1] The complainant is Zuluiga Paulse an adult female residing in Sarepta, Kuilsriver in the Western Cape.

[2] The respondent is Roger Wilco Trading 117 CC trading as Augusta Motors a close corporation and a duly authorised financial services provider, carrying on business at the corner of Digtebij and Van Riebeeck Streets, Kuilsrivier, Western Cape. While the complaint is directed at respondent, it essentially relates to a financial service rendered

by a key individual of the business, one Mr. Benjamin Petrus van der Merwe (Van der Merwe).

B. THE ISSUE

[3] The issue revolves around whether Van der Merwe complied with the provisions of the FAIS Act, when he sold a Mechanical Breakdown Insurance Policy (Policy) to the complainant simultaneously with the sale of a motor vehicle.

[4] In particular, the issue is whether Van der Merwe fully disclosed all fees and charges as required by The General Code of Conduct for Authorised Financial Services Providers and their Representatives (the Code). The need to maintain a record of advice and at the same time render the financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry is also applicable.

[5] Complainant has also raised an issue around the charges for the registration and number plates for the motor vehicle. This aspect falls outside the jurisdiction of this forum and will not be dealt with further.

C. COMPLAINANT'S VERSION

[6] Complainant's version is as follows:

[6.1] On 25th January 2006 she purchased a motor vehicle from Respondent;

- [6.2] Included in the contract was a policy 'which Augusta Motors included without my knowledge that it was optional.' 'The amount for the warrantee (sic) was R3 355.20 and the captured amount on my contract was R3995.00.'
- [6.3] No disclosure was made in respect of fees or charges.
- [6.4] The policy document under the heading 'Premium Details' reflects an amount of R3 355.20 inclusive of VAT, and the WesBank hire purchase agreement states 'warranty R3, 995.00'.
- [6.5] She sold the motor vehicle six months later, and as she had never claimed on the policy was entitled to be refunded a portion of the policy charges.
- [6.6] The refund amount was calculated on the R3 355.20 and not the R3 995.00' reflected in the WesBank document. Upon seeking an explanation from respondent as to why these figures differed, complainant was advised by Van der Merwe that the difference of R639.80 reflected his commission.
- [6.7] This as complainant put it 'did not make sense' and she proceeded to make telephonic enquiries which revealed that the 'commission' of R639.80 was over and above the commission already incorporated within the policy purchase price of R3 355.20.
- [6.8] Complainant's attempts to recover this additional commission were unsuccessful and in this regard she states: 'I refer (sic) my complaint to SA

Warranties and Wesbank but both companies referred me back to Bennie v/d Merwe who refuses to pay me back.'

[7] Complainant then referred the complaint to this Office.

[8] Complainant has specifically stated that she is only bringing the complaint in respect of the R639.80 and has specifically requested that we only deal with this issue.

D. INVESTIGATION BY THIS OFFICE

[9] The complaint was referred to respondent with the request that they investigate the matter and revert with their version of events as well as copies of all documentation.

[10] As no reply was received, telephonic enquiries were made with Van der Merwe. He confirmed receipt of the complaint and advised that he had already forwarded his response. He further stated that the commission charge was a standard practice within the motor industry. There being no indication of a response actually having been received by the office respondent was requested to resubmit his response.

[11] Notwithstanding further reminders no response was received.

[12] Enquiries with the product administrator confirmed that; **'the gross premium of R3355.20 is already inclusive of dealer's commission.'** [my emphasis]

[13] Neither the policy document, nor the sale agreement discloses the commission charged.

[14] On complainant's version she was not made aware of any fees or charges at point of sale and only became aware of the commission upon making enquiries as to why the refund had not been based on the greater amount of R3, 995.00'

E. DETERMINATION

[15] In spite of being afforded ample opportunity to respond to the allegations respondent has failed to do so.

[16] In the circumstances there is sufficient authority to accept complainant's version due to the fact that it has not been challenged. Extrapolating the principle espoused in *Absa Bank v W Blumberg and Wilkinson 1997 3 SA 669 at 673 H* where the court stated, 'Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or admitted shall be deemed to be admitted.'

[17] I accept that respondent admits complaint's version.

[18] Section 7. (1) (c) (vi) of the Code requires full and appropriate information as to the: 'nature, extent and frequency of any incentive, remuneration, consideration, commission, fee or brokerages' ("valuable consideration"), which will or may become payable to the provider...'

[19] On the documentation and other evidence before me no such disclosure has been made. There does not even appear to be a method or means to ascertain the commission encompassed within the R3 355.20 much less the fact that the larger figure reflected on the hire purchase agreement comprised an additional commission.

[20] First and foremost it is required of a provider that they 'must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients..' The very fact that respondent saw fit not to disclose the primary or the additional commission must in itself raise questions as to the honesty and integrity of the respondent.

[21] It goes without saying that no record of advice as required by the code is evident.

[22] Having already ascertained that respondent has failed to comply with the provisions of the FAIS Act I must next ascertain whether as a result thereof complainant has suffered or is likely to suffer financial prejudice or damage.

[23] Whilst the failure to disclose, at the very least deprived complainant of the ability to make an informed decision it does not follow ipso facto that this resulted in a loss.

[24] In this instance however, the mere fact that the complaint found her way to this Office after she became aware of the additional commission indicates that had she been properly informed at point of sale she would not have accepted the policy. Supporting this is complainant's instruction to only deal with the additional amount.

[25] No doubt respondent would have been aware of this and hence the most likely reason for non disclosure.

[26] In conclusion I find that the failure to disclose is directly related to the loss. There is every indication that had complainant been placed in a position where she could have

made an informed decision, she would not have taken the policy with the additional commission.

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 R639.80 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 3rd DAY OF DECEMBER 2008



Charles Pillai
OMBUD FOR FINANCIAL SERVICES PROVIDERS