

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FOC 2460/07-08/GP 3

In the matter between:-

QUINTANIE CC

COMPLAINANT

and

SENCLA FINANCIAL SERVICES CC

FIRST RESPONDENT

JOSE BAZ CORTIZO

SECOND 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 Quintanie CC, a close corporation duly registered in terms of the Close Corporations Act of 1984, and having its principal place of business at Rosemary Street, Lynnwood, Pretoria, Gauteng Province.

[2] The complainant is the owner of a superette, trading under the name Lynnwood Galleries Superette. The superette sells groceries and food products. The members of the close corporation are Quinton Brink and Jeanne Brink. At all material times relevant hereto, the complainant was represented by Quinton Brink (Brink).

- [3] The first respondent is SENCLA Financial Services cc, a close corporation duly registered in terms of Close Corporations Act of 1984, with its principal place of business at 1021 Shirley Road, Eldoraigne Ext 1, Centurion, Gauteng. The respondent is an authorised Financial Services Provider (FSP 2994) in terms of the FAIS Act. At all material times hereto, the first respondent was represented by its sole member, Mr. Jose Baz Cortizo (Cortizo).
- [4] The second respondent is Jose Baz Cortizo, an authorised financial services provider and a sole member of the first respondent. The second respondent shares the same address as the first respondent.
- [5] For convenience, and where appropriate, I refer to the respondents interchangeably simply as Cortizo, or respondent.

B. THE COMPLAINT

- [6] In January 2005, Brink and his wife purchased Lynnwood Galleries Superette, a supermarket operating in Lynnwood, Pretoria. Cortizo was invited to the store to assist the new owners with their insurance requirements as Cortizo had assisted the previous owners who had also recommended him to the complainant.
- [7] Brink states that they instructed Cortizo to provide “comprehensive cover most suitable to [their] needs” and that “stock and materials in trade would not be excluded from [their] policy.”¹ Cortizo pointed out to Brink and his wife

¹ Section C of the Complaint Registration Form.

the risk of losing stock with the insured refrigerator and freezer because of the quantities of stock they hold. The freezer stores various perishable goods, including poultry, fish and meat. Brink agreed with Cortizo's assessment and instructed Cortizo to specify the fridge and freezer against risk and failure.

[8] With the assistance of Cortizo, cover was placed with Santam. The policy inceptioned on 1 February 2005. Since then, Brink confirms that he had received regular policy schedules since February 2005, and had on occasion made amendments to the insured items and sums insured.

[9] When Brink opened the store at about 07h00 on the morning of 17 July 2007, he noticed that the walk-in freezer appeared not to be functioning properly. The freezer temperature was at 0 degrees Celsius and the stock was already thawing out. Brink immediately called a repairer who goes by the name "Cool-it Commercial Refrigeration", to attend to the freezer. According to Brink, the repair was done and "everything seemed to be working as the temperature was starting to go down." The technicians reported that they would return on the 18 July 2007 to replace a damaged component. When Brink closed the store at 20h30 on the 17th, there seemed to be no problem with the freezer.

[10] However, when he arrived at 07h00 on the morning on the 18th, Brink found "lots of water and blood" that had come from the defrosted products in the same freezer. On the same day, the repairers returned to repair the machine. A report of the incident prepared by Cool-it Commercial Refrigeration recorded the faults as:

“The overload protector was faulty; the defrost timer was faulty; A 25 watt fan motor needed replacement; Re-gas was needed for the system. The parts for this job could only be obtained on the morning of the 18th of July. The parts were installed on the 18th of July during the morning, and the machine was functional after the job was completed.”

[11] According to Brink, they were unable to sell the products as the cold chain had been broken. Brink then telephoned Cortizo and notified him of the damage to the freezer and the stock and requested Cortizo to institute a claim for the breakdown of the machinery and the deterioration of stock. A list of damaged stock was sent to Cortizo. Brink alleges that at this stage (prior to the submission of the claim), Cortizo expressed doubt that the claim would be successful. The claim included R2 354.10 for the repairs to the freezer and loss of stock totalling R33 695.00. On 25 July 2007, Brink received notification from Santam that the claim had been declined.

[12] Brink then lodged a claim against Santam with the Ombudsman for Short Term Insurance. Santam eventually agreed to honour the claim for the machinery breakdown. However, the claim for deterioration of stock was rejected on the basis that this cover was only added to the policy on the morning of 18 July 2007, *after* the loss had occurred. It appeared that Cortizo had only added cover for the deterioration of stock under the “machinery breakdown” section of the policy on the morning of 18 July 2007. This aspect of the complainant’s claim was referred to this Office by the Ombudsman for Short Term Insurance.

[13] In the complaint to this Office, Brink alleged that Cortizo had been instructed in January 2005 to provide comprehensive cover most suitable and applicable to complainant's business, which was described in the policy as "Supermarkets/hypermarkets (including risks like Spar's and other similar superettes)". According to Brink, stock and material in trade were stipulated and provisions were made for "special perils" and that the danger or risk of losing stock would not have been excluded as this is a risk that could be expected in this kind of business.

[14] Brink vehemently denies that Cortizo had been instructed to add additional cover after the loss had occurred.

C. THE RELIEF SOUGHT

[15] Brink avers that as a result of Cortizo's failure to cover the supermarket for deterioration of stock following mechanical breakdown, they suffered financial loss. Brink is therefore seeking relief of R33 964.88, being the cost of the damaged stock.

D. INVESTIGATION

[16] The Complaint was forwarded to Cortizo requesting him to either resolve the matter with Brink, alternatively to revert to this Office with his full version of events as well as copies of his file of papers.

[17] Cortizo could not resolve the matter with Brink and instead filed a response with documents purporting to support his version.

The Respondent's version

[18] Cortizo states that in January 2005 when Brink and his wife purchased the business from his (Cortizo's) existing clients, "all available sections under the commercial policy were explained to [Brink] and his instructions [were] reflected in the quote that was provided." The quotation in respect of sections allegedly selected by Brink to be insured was faxed to him on the 10th and 24th of January 2005.

[19] Cortizo states that at this point Brink elected to insure only two compressors under the Machinery breakdown section. He alleges that Brink was aware that the other machinery/equipment and deterioration of stock was insured under the Fire section for fire, lightning or thunderbolt, explosion, additional perils (i.e. earthquake), and Special Perils Extension as per policy wording. Brink did not specify all the compressors in the store under the machinery breakdown and did not take deterioration of stock following machinery breakdown due to price constraints. According to Cortizo, Brink also stated that deterioration of stock following machinery breakdown would not occur as the store is open 7 days a week. In support of this, Cortizo attached a quotation dated 10 January 2005 and two facsimile transmission reports of the faxed quotation dated 10 and 24 January 2005 respectively.

[20] According to Cortizo, on 28 January 2005, Brink signed acceptance of the quote and disclosure letter/statutory notice. In support of this, Cortizo attached a Santam proposal form and disclosure note both signed by Brink.

[21] Cortizo then stated that Brink received the complete policy schedules and policy wording and was requested to verify these schedules. In that regard, Cortizo furnished this Office with information on various revisions to the policy and two claims made by Brink. The first claim made on 4 November 2005 was for equipment damage, the cause being lightning. Cortizo states:

“Please take note the equipment, (not specified elsewhere or in the clients words: “comprehensively insured”), damaged by lightning was claimed under the Fire Section.”

[22] The second claim made on 25 August 2006 was also a claim for equipment damaged, the cause being lightning. Cortizo states:

“Refrigeration equipment was claimed for under the Fire Section. This refrigeration equipment was not insured under the machinery breakdown section. In other words the client was aware what covers were in place at the time and this once again negates the client’s allegations that he requires “suitable comprehensive cover”. The client elected not to insure additional equipment under the machinery breakdown section as this would have entailed an additional premium.”

[23] After setting out various other amendments to the policy, Cortizo turns to the subject of the present complaint, viz. the claim for deterioration of stock.

[24] Cortizo states that on 18 July 2007 at 09h15, Brink requested the addition of deterioration of stock following machinery breakdown to the value of (sum insured) R20 000.00. In support of this, Cortizo referred to three documents viz:

[24.1] E-mail from Cortizo to Top Exec, the underwriting managers of Santam dated 18 July 2007 (time 09h15am) wherein Mina Liebenberg is instructed to

PLEASE ADD THE FOLLOWING WEF: 18.07.2007

DETERIORATION OF STOCK

SUM INSURED R20 000.00

[24.2] Email from Top Exec to Cortizo dated 18 July 2007 (time 02:20 PM) confirming:

*DETERIORATION OF STOCK ADDED TO MACHINERY
BREAKDOWN*

[24.3] Correspondence to Brink dated 18 July 2007 attaching the amended policy schedule and confirming the additional cover for deterioration of stock.

[25] Cortizo then states that he informed Brink at 14h15 on 18 July 2007 that his earlier instruction had been complied with. He alleges that Brink requested

various sections of the policy to be amended. The sum insured for deterioration of stock should be increased to R40 000.00. The two compressors insured under the machinery breakdown section were to be increased in value to R15 000.00 each. In support of this, Cortizo refers to his telephone record for the 18th July 2007. Cortizo highlights a call to Complainant's telephone number which he made at 14h15 and which lasted for some 11 minutes and 52 seconds. This call, Cortizo contends, "negates the [complainant's] allegations that he requested the cover in respect of deterioration of stock following machinery breakdown on inception of policy." [Cortizo's emphasis].

[26] Cortizo concludes as follows:

[26.1] Complainant did not request additional sections to be insured. Complainant's allegation that he requested comprehensive cover is untenable. The full policy and each section thereof, was explained in detail to him.

[26.2] Complainant selected and was aware that only two compressors were specified under the Machinery Breakdown Section. He was also aware that other non-specified equipment and Deterioration of Stock was covered under the Fire section for certain events. Proof of this is by the claim that occurred on 25th August 2006 when lightning damaged refrigeration equipment. The claim was allocated under the Fire section and settled by Santam.

- [26.3] Complainant's allegation, that for approximately two and a half years after various policy revisions and amendments, he was not aware of the cover in place in respect of the superette is totally untenable.
- [27] Cortizo also addressed the validity of the complainant's claim as a whole. Later in this determination, I deal with this aspect of Cortizo's response.
- [28] After receiving Cortizo's response, this Office requested that he furnished a copy of his record of advice and/or a copy of the needs analysis conducted at the time the financial service was rendered.
- [29] Cortizo filed his response through his attorneys, stating *inter alia* that:
- [29.1] He was not liable towards complainant;
- [29.2] It would be more appropriate for the matter to be decided by way of an alternative dispute resolution process i.e. litigation.
- [29.3] If they accept that complainant was not insured in accordance with his instructions (which is denied), it is necessary to have regard to the policy provisions. If the fridge was not properly maintained in the first place, the insurer would have been entitled to reject the claim in any event even if Mr Brink had cover for deterioration of stock.
- [29.4] Brink failed to take reasonable steps to minimise the loss and if he had done so he would not have suffered any loss. The insurer would have been entitled to reject the claim even if Brink had cover for deterioration of stock.

[29.5] A cost order against the complainant be granted given the fact that Brink persuaded this Office as well as the Ombudsman for Short Term Insurance that his loss occurred on the 16th/17th of July 2007, whereas in actual fact the loss only occurred between 17 and 18 July 2007, after he had already known of the fact that the fridge was malfunctioning.

[30] Notwithstanding the above allegations, Cortizo failed to provide the requested record of advice or needs analysis.

E. THE ISSUES

[31] The following issues arise for determination:

[31.1] Did Cortizo render financial services in compliance with the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and Representatives (the Code)?;

[31.2] In the event it is found that the services were rendered in violation of the FAIS Act and the Code, did such violation occasion complainant's loss?;

[31.3] The quantum of financial prejudice or damage suffered by complainant.

F. DETERMINATION AND ITS REASONS

Whether the respondent acted in a manner which was not in compliance with the FAIS Act.

[32] Cortizo alleges that the available options on the policy were all brought to Brink's attention. However, he asserts that Brink was motivated by price constraints and therefore chose not to take cover. He alleges that Brink did not request comprehensive cover and furthermore Brink was aware that he did not enjoy any cover for deterioration of stock following machinery breakdown.

[33] There are various provisions of the Code which are apposite to the present matter. I deal with some of these provisions below and later discuss their relevance to the present matter.

[34] Clause 8(1) of the General Code provides the following:

(1) A provider other than a direct marketer, must, prior to providing a client with advice-

(a) take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;

(b) conduct an analysis, for purposes of the advice, based on the information obtained;

(c) identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the

limitations imposed on the provider under the Act or any contractual arrangement.”

[35] Clause 9 of the General Code provides:

“(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;*
- (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.”*

[36] In order to demonstrate compliance with the above, a provider is required in terms of clause 3(2)(a)(i) to have appropriate procedures and systems in place to record such verbal and written communications relating to a financial service rendered to a client. In the present matter, the only records furnished by Cortizo to this Office relating to financial services rendered in January

2005 (when Complainant purchased the business) are the quotation, Santam proposal form, Disclosure document and Statutory Notice.

- [37] Cortizo also failed to provide the Office with copies of his file notes. However, the earliest record relating to the complainant 's business is dated 24th February 2005 and merely states:

“24/2/05...Lynnwood Galleries-schedule and wording”

- [38] None of these documents comply with the provisions of clause 9 of the General Code. Although, quite strangely, the Disclosure Document under the heading “Disclaimer” states:

*“The financial analysis/recommendation is based on the information that you supplied, which is assumed to be correct...you should also ensure that you understand the characteristics of the particular product recommended, such as benefits and features included and excluded, any cover limitations that apply and the risk incidental to the specific products. **You should not follow any recommendation contained in this report/analysis unless you understand the specific characteristics of the product.**”* (my emphasis)

- [39] The implication in the above-quoted passage is clearly that a report was compiled or that some analysis was conducted or at the very least, should

have been conducted. Significantly, Cortizo has failed to provide any proof that such a “report/analysis” was ever conducted. When this Office requested a copy of this report/analysis, Cortizo referred us back to the above-mentioned quotation.

[40] In the absence of any such report or analysis, it would therefore appear that Cortizo requested his client to sign the disclaimer as a matter of course and that a report/analysis does not in fact exist.

[41] Cortizo also alleges that Brink chose not to take into account the deterioration of stock cover and was motivated by price constraints. Cortizo has not provided any evidence supporting his allegations. In fact, had a record of advice been kept in terms of the Act, such record would have clearly indicated what the complainant chose.

[42] In any event, in order to test Cortizo’s allegations, this Office requested from Santam a breakdown of the premium which would have been payable, had Brink chosen the deterioration of stock cover.

[43] Santam provided a schedule which was issued on 18 July 2007 when the deterioration of stock was added. According to Santam, based on the sum insured being R20 000.00 the premium payable amounted to R25.00 per month. When the sum insured was subsequently increased to R40 000.00, the premium payable increased to R50.00.

[44] In response to this, Cortizo stated that at the time when Brink purchased the business, the insurance was placed directly with Santam and the rates were “obviously higher”. No documentation in support of this contention was

offered, not even a quote drawn at the time to demonstrate the “obvious higher” premium.

[45] How then did Cortizo ascertain what the premium would have been? On what basis did Brink allegedly conclude that the premium was too high, as asserted by Cortizo? As stated above, Cortizo has not furnished the Office with any documentation in support of his allegations.

[46] In the absence of the record of advice, one is unable to agree with Cortizo’s assertion. In the light of information furnished by Santam, which was made available to Cortizo for his comment, it appears highly improbable that Brink would have been motivated by “price constraint” not to take the cover for an additional premium of only R25.00. The probability is that this cover was not offered to Brink. As pointed out, in the absence of record of advice, one can conclude that Cortizo never offered this to Brink.

[47] Santam was also requested to provide this Office with a copy of the previous owner’s insurance schedule just prior to the purchase of the business by Brink. Santam provided the policy schedule that was issued to the previous owners on 13 January 2005. Cortizo was again requested to furnish his comments in that regard. This schedule was in force immediately before Brink took over the business. From a perusal of the policy schedule, it appears that the previous owner also did not have deterioration of stock cover following machinery breakdown.

[48] Save for the document referred to in paragraph 33, this Office has not been furnished with any other document in relation to this matter to support

Cortizo's contention that he complied with the FAIS Act whilst rendering financial service. There is no evidence that:

[48.1]an analysis of the complainant's needs was undertaken;

[48.2]Cortizo recommended cover for deterioration of stock following machinery breakdown, in line with the complainant's need for comprehensive cover;

[48.3]the complainant was even aware that he was not comprehensively covered.

[49] In my view, Brink was rightly assured that Cortizo, being familiar with the business, would in fact have brought to his attention and notice that he was not comprehensively covered.

[50] Had Cortizo taken into consideration the complainant's needs, he would have recommended cover for deterioration of stock following machinery breakdown. This much flows directly from the nature of complainant's business. The fact that the previous owner also did not enjoy this cover points to the possibility that Cortizo was either not diligent in his handling of the superette's insurance needs, alternatively that he did not appreciate that either owner needed such cover. In both instances, Cortizo's conduct violated the Code of conduct.

[51] Cortizo has also alleged that Brink added on the cover on the morning of the 18th July 2007 (an allegation which is vehemently denied by Brink) and then sought to institute a claim.

[52] I find it implausible that Brink would request cover to be put in place and then shortly thereafter (3 hours later) institute a claim for a loss which on the complainant's version, occurred the previous day. This argument is counterintuitive. Further if Brink intended to submit a fraudulent claim, why would he request cover for a lesser amount than what he intends claiming. In other words, why would he ask for cover for R20 000 stock and a few hours later submit a claim for R33 964.88

[53] I pause to emphasise that all these allegations would not have arisen had Cortizo kept proper records of advice. He failed to do so, and that opened the way for wild allegations to be hurled and speculation to be indulged in. That is precisely what the legislature sought to prevent. In any event, the issue turns on whether Cortizo complied with the Act. There is no doubt that Cortizo failed to keep proper records of advice. On that score, it would be futile to indulge in speculation as to what might have happened. Once Cortizo's breach of the Act has been proven, the next question becomes whether such non-compliance caused or resulted in complainant's loss. In what follows, I turn to deal with this issue.

Did the alleged breach occasion complainant's loss?

[54] A reasonable broker would have ensured that the respondent was comprehensively covered. Unfortunately, the complainant's claim was turned down because he was not comprehensively covered. The complainant's loss is as a result of his claim being rejected on the grounds that there was no cover in place for deterioration of stock following machinery breakdown.

Cortizo's failure to ensure that the complainant was comprehensively insured resulted in the complainant's loss.

[55] Cortizo submitted that Santam would have been entitled to decline the claim even if deterioration of stock cover was in place, as the complainant:

(a) had failed to maintain the fridge.

(b) had failed to take reasonable steps to minimise the loss, and if he had done so, he would not have suffered the loss.

[56] Cortizo seeks a cost order against the complainant on the grounds that the complainant was not truthful about his claim.

[57] I have already mentioned, that Santam honoured the claim for the machinery breakdown upon receipt of proof of regular maintenance of the freezers. There is no basis to Cortizo's contention that Brink failed to maintain the fridge.

[58] Cortizo questions why Brink kept the stock in the freezer during the evening of the 17th/18th July even though a damaged component still needed replacing. Cortizo alleges that Brink deliberately tried to manipulate the facts so as to institute a claim against Cortizo. Cortizo further alleges that Brink was negligent and did not exercise due care. He claims that Brink attempted to disguise the situation as if he had suffered a genuine loss but it was his own election to leave all stock in a freezer which he knew had a damaged component that could only be replaced the next day. Cortizo maintains that the loss occurred during the evening of the 17th July to the morning of the 18th July due to complainant's own negligence. Cortizo alleges further that Brink

had failed to undertake regular maintenance of the freezers and had he done so, machinery breakdown would not have occurred.

[59] Complainant, on the other hand, is adamant that his loss in fact occurred during the evening of 16th to 17th July. He explains that on the morning of the 17th July the cold chain had been broken and the stock was no longer suitable for retail as it was already soft and thawed. Refreezing the stock would have posed a health risk to complainant's customers.

[60] Brink states that the stock was kept for inspection by Sanlam's assessors. However, when no assessor was sent and the claim was rejected, Brink had no alternative but to dispose of the stock.

[61] Regarding Cortizo's allegation that the complainant was not truthful about his claim, for the reasons stated above, I am of the view that Brink has not attempted to mislead this Office and that as mentioned above, his loss occurred during the evening of the 16th/17th July 2007.

[62] In any event, it bears emphasizing the fact that Santam paid the complainant's claim for machinery breakdown after they had inspected the fridge and found proof that the freezer was properly maintained. This aspect has not been disputed or challenged by the respondent. Nor has the respondent substantiated his allegation that the freezer was not properly maintained. It follows then that the respondent failed to ensure that the complainant was comprehensively insured. The respondent failed to comply with the FAIS Act when he advised the complainant. The respondent's failure to properly advise the complainant led to the latter suffering financial loss.

G. QUANTUM

[63] I have already pointed out that this Office requested Santam to furnish a quote indicating what the premiums payable by the complainant would have been had he been adequately insured. It is common cause between the parties that the complainant's stock which was in the freezer amounted to R33 964.88.

H. ORDER

In the result I make the following order:

1. The complainant is upheld;
2. The respondents are jointly and severally liable, the one paying, the other one to be absolved, for the loss sustained by the complainant;
3. The respondents are jointly and severally ordered to pay the complainant the amount of R33 964 88;
4. The respondents are jointly and severally liable for the payment of interest on the amount of R33 964 88 at a rate of 15.5 % from the date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 5th DAY OF OCTOBER 2012.

A handwritten signature in black ink, consisting of a large, loopy initial 'M' followed by a cursive name, all enclosed within a large, hand-drawn oval.

NOLUNTU BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS