

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 07999/13-14/GP 3

In the matter between:-

NEIL VENTER

Complainant

and

DAIJA INVESTMENTS CC t/a AB INSURANCE BROKERS

1ST Respondent

AHMED BAYAT

2ND 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 Neil Venter, an adult male, residing in Vereeniging, Gauteng.

[2] First respondent is Daija Investments CC t/a AB Insurance Brokers (registration number 1997/032891/23), a close corporation duly incorporated in terms of South African law, with its principal place of business at 440 Jabu Ndlovu Street, Pietermaritzburg, 3201. At all material times hereto, 1st respondent was

an authorised financial services provider in terms of the FAIS Act (license number 35682). The license was issued on 9 July 2008.

- [3] Second respondent is Ahmed Bayat a key individual and authorised representative of the 1st respondent. For convenience, I refer to 1st and 2nd respondents as the respondent.

B. INTRODUCTION

- [4] The complaint relates to the rejection of an insurance claim by complainant's insurer, Saxum Insurance Ltd ('Saxum'), pursuant to the theft of his Toyota Hilux 2.7 VT hereinafter referred to as the ('Hilux'). Saxum rejected the claim on the basis that complainant failed to test the tracking device installed in his Hilux. Saxum relied on the following clause in the policy wording –

'TRACKING WARRANTY

It is warranted that a tracking device approved by the company be installed in the vehicles(s). Should such device(s) not be installed and maintained there shall be no cover for theft in terms of this section of the policy.

It is warranted that the tracking system should be **tested every six months** and proof supplied that system was tested produced at time of claim.....' (Own emphasis)

- [5] Aggrieved by the rejection of his claim, complainant lodged a complaint with this Office for an investigation into the conduct of the intermediary, the respondent.

C. COMPLAINT

[6] The complaint may be summarised as follows:

- 6.1 In July 2011, the respondent rendered financial services to complainant as a result of which complainant obtained insurance for his Hilux with Saxum. The policy incepted on 7 July 2011.
- 6.2. On 2 March 2013, complainant's Hilux was stolen at a retail store in Bedworth Park. He immediately reported the theft to Altech Netstar ('Netstar'). Nestar could not locate the Hilux due their inability to pick up the signal from the tracking device installed in the Hilux.
- 6.3 Saxum subsequently turned down complainant's claim on the basis that complainant had failed to adhere to the policy condition relating to the testing of the tracking device¹.
- 6.4 Complainant contends that it was respondent's non-compliance with the provisions of the FAIS Act and negligent failure to disclose the material term relating to the testing of the tracking device that led to the denial of his claim.

D. THE RELIEF SOUGHT

[7] Complainant seeks an order compelling respondent to pay him an amount of R167 000. The amount represents the extent to which the insurer would have indemnified complainant had the terms of the contract been complied with.

¹ See paragraph 4

Complainant contends it was as a result of respondent's failure to properly discharge his duties under the General Code of Conduct for Authorised Financial Services Providers ('the Code') that he did not meet the terms of the contract.

E. RESPONDENT'S RESPONSE

[8] In terms of the Rules on Proceedings of the Office, (Rules) the complaint was referred to respondent to resolve. As the complaint could not be resolved, respondent was requested in terms of Section 27(4) of the FAIS Act to provide his response with a copy of his file of papers to this Office. What follows are the pertinent aspects of the respondent's response. Comment is made where necessary.

8.1 Respondent asserts that he was requested by a vehicle dealership to source cheap insurance cover for clients. One of the dealership's clients was the complainant who upon being presented with insurance quotations selected the Saxum quotation.

8.2 Respondent refers to the proposal form that was completed by complainant and the proviso that stipulates that the onus is on the insured to avail himself of 'ALL TERMS AND CONDITIONS' of the policy. He contends that there are hundreds of insurance clauses in an insurance contract and it could not be expected of brokers to explain each and every clause to clients.

8.3 The respondent goes on to argue that statutory disclosure documents² were sent to the complainant; he was requested to read all the documents including the policy schedule. The critical part to note is that respondent has chosen not to provide any details as to what stage of rendering the financial service to complainant were the statutory documents sent him.

8.4 Respondent emphasises that the tracking warranty clause is prominently displayed on page 4 of the policy schedule. Therefore, complainant ought to have been aware of the term. The admission here is that the material term relating to the testing of the tracking device was not disclosed prior to concluding the contract as the General Code demands. In short, complainant was not placed in a position where he could make an informed decision about the transaction.

F. INVESTIGATION:

[9] This Office made enquiries with Netstar regarding the tracking of this vehicle and what actually led to their inability to pick the signal. Tracker explained that-
'Without the actual unit being available, we cannot provide a definitive reason for the vehicle not being recovered or signals not being received. The theft of a vehicle occurs in circumstances which are highly unpredictable and the reasons for non recovery range from the unit being removed or damaged by the perpetrators to the vehicle being taken into an area where signal is not available and these occurrences

² The statutory disclosure documents include the following:

- Intermediary Disclosure; - Client Mandate and Letter of Disclosure; and
- Welcome letter.

may happen notwithstanding the unit being tested by the customer.....' (Copied as is from the original response)

[10] There is no indication from Netstar that the tracking unit was faulty.

G. DETERMINATION AND REASONS THEREFORE

[11] Section 7 of the General Code of Conduct for Authorised Financial Services Providers and Representatives ('the Code') provides -

'(1) Subject to the provisions of this Code, a provider...must-

(a) provide a reasonable and appropriate general explanation of the nature and **material** terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an **informed** decision;

(b)

(c) in particular, at the earliest reasonable opportunity, provide, where applicable, full and appropriate information of the following:

(i).....

(vii) **concise details** of any **special terms** or **conditions**, exclusions of liability...restrictions or circumstances in which benefits will not be provided' (own emphasis)

[12] When required to provide proof that the material term in question had been disclosed to the complainant, respondent argued that providers cannot be expected to explain each and every clause of a policy to clients. Clearly, respondent fails to grasp the issue. Section 7 does not postulate an advisor explaining all the terms and conditions in a policy to a client. Section 7 is about enabling customers to make informed decisions and this is inherent in the

principle of treating the customer fairly. Customers should not discover at claim stage that they are bound by provisions of which they were not aware. It is the duty of the provider to disclose all material provisions of a policy to the client and in the circumstances of this case, respondent failed to discharge that duty.

[13] It was incumbent upon respondent to explain to the complainant the consequences of failure to adhere to the material terms and conditions of the policy. In this case, the consequence of not complying with the material term of testing is that the policy would not respond to a theft claim. Simply put, the provision carried grave consequences for complainant in the event of non-compliance. Had respondent disclosed the provision and taken the time to ensure that complainant understood, it would have placed him in a position where he was able to choose to adhere to the provision or obtain alternative cover.

[14] It is further apparent from respondent's version that no advice was afforded to complainant. His version is that the motor dealership requested him to find cheap quotations for insurance for its clients and complainant was one of those clients. At no stage does respondent allude to seeking pertinent details from the complainant for the purpose of advising him. It is no wonder that respondent failed to provide this Office with a record of the advice as required by Section 9 of the Code. As for the explanation that the onus was on the insured to avail himself of 'ALL TERMS AND CONDITIONS' of the policy, this simply shows respondent's disregard for the General Code. As to how he justifies being a holder of a license as an FSP when he has no regard for the FAIS Act is incomprehensible. The respondent fails to appreciate that he is bound by the

provisions of the Code and cannot simply abdicate his duties and expect his client to fulfil them.

H. THE CAUSE OF LOSS

[15] It was incumbent upon the respondent to disclose the material term to the complainant. As a result of the respondent's failure to discharge on this duty, complainant remained oblivious to this material requirement. Accordingly, respondent's failure to comply with the Code occasioned complainant's loss and the complaint must succeed.

I. QUANTUM

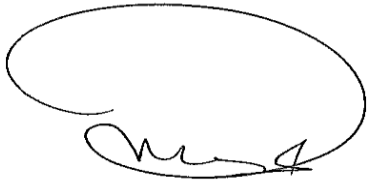
[16] Saxum confirmed that had the claim been admitted, it would have paid the complainant R189 400 (net of excess). I therefore intend to make an order in the amount of R189 400.

J. ORDER

[17] In the premises, the following order is made:

1. The complaint is upheld;
2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay complainant the amount of R189 400;
3. Interest at the rate of 9%, per annum, seven (7) days from date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 11 DAY OF DECEMBER 2014.

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

NOLUNTU N BAM

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