

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FOC 3872/06-07/GP (3)

In the matter between:

J P H VICTOR

Complainant

and

TECTUM PORTFOLIO SERVICES (PTY) 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 Mr J P H Victor ('Victor') a businessman of Tandjiesberg Laan, 6, GLENVISTA, 2091.

[2] The Respondent is Tectum Portfolio Services (Pty) Ltd ('Tectum'), a registered company and an Authorised Financial Services Provider with its place of business at Suite 102, Stats Building, 2, Fore Street, ALBERTON, 1449. Tectum is represented herein by its director, Mr Gideon Bosman.

B. THE BACKGROUND

[3] During or about September, 2005, Victor insured his 2005 KIA K2700 Workhorse (Kia) vehicle for business purposes with ABSA Insurance Company Limited (ABSA). His insurance broker was the Respondent.

[4] About a year later, on 12th September, 2006, the vehicle was stolen and Victor duly submitted a claim for compensation. ABSA repudiated the claim on the grounds that the insured had failed to abide by a policy condition which provided:

'Cover excluded i.r.o. hijacking and theft until Absa Insurance Company is provided with the necessary tracking device certificate.'

[5] Victor lodged a complaint with the Ombudsman for Short Term Insurance. The complaint was specifically directed against the Insurer and not against Tectum. The Short Term Insurance Ombudsman found for the insurer and referred the Complainant to this Office as he was of the view that the Complainant may have a valid case against the broker (Respondent).

The relief sought by Complainant

[6] The Complainant wishes to recover the monetary value of the vehicle which was stolen. The value at the time it was insured was stated to be R135 000.00.

Investigation by this Office

[7] The Respondent was informed of the complaint and asked for its reaction. Respondent's director, Mr Bosman, raised several issues and disputed that Tectum was negligent in rendering the financial service to the Complainant. In essence he says:

7.1 When Complainant approached him to have the Kia insured, several quotes were obtained from different insurers including one from ABSA dated 22 September 2005. The quote did not have a proviso that a tracking device must be installed for theft and hijacking cover;

7.2 Complainant was happy with the quote and a proposal form was completed and forwarded to ABSA by Bosman. He says the proposal form mentions that only a gear lock was installed in the Kia '*and nothing else*' while a 'Tracker' would be installed in an Isuzu vehicle which was also to be insured. He is puzzled why the tracker was stated as a condition for insuring the Kia when that is not what was mentioned in the proposal form;

7.3 He also found it 'mysterious' that a quote was prepared in which a 'Tracker Retrieve' was added and also why it was not forwarded to him by ABSA. (This latter quote was provided to this Office by ABSA and it was in turn forwarded to Respondent for its comments);

7.4 In any event, says Bosman, Respondent's consultant at ABSA, Igor Wilson and *'many other staff at ABSA telephonically told us that a vehicle with an insured amount less than R150 000.00 did not require a tracking device, this was even told to us by the claims department when the claim was submitted, only to later change!!'* ;

7.5 Bosman concludes his response by saying that Respondent informs its clients in letters asking them to read through the policy schedule and see if it meets with the client's approval.

[8] Bosman was then asked by this Office to pertinently deal with the issue that the policy schedule sent by ABSA to Respondent (for onward transmission to the insured) clearly sets out, *inter alia* the following endorsement (which also appears on two further policy schedules sent by ABSA to the Respondent on 12 April and 22 June 2006 respectively) as a condition for cover for theft and hijacking:

'ENDORSEMENT FROM 2005/10/10

COVER EXCLUDED I. R. O. HIJACKING AND THEFT UNTIL ABSA INSURANCE COMPANY IS PROVIDED WITH THE NECESSARY TRACKING DEVICE CERTIFICATE'

No Response was received from Bosman.

The Issues

- [9] The crisp issue to be determined is whether the Respondent had made the Complainant aware of the material terms and conditions of the insurance policy; more pertinently the requirement for a tracking device to be installed in the vehicle before the insured would be covered for theft and hijacking.

C. DETERMINATION AND REASONS THEREFORE

- [10] 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) whenever reasonable and appropriate, provide to the client any *material contractual information*...in the possession of the provider;

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

[11] The Respondent refers to the several quotes from ABSA which had different anti-theft and hijacking requirements and also a 'mysterious' quote. What is important in my view is that when the Respondent received the first policy schedule (Bosman does not deny receiving any of them) it was incumbent upon it to ensure that it was in accordance with its client's instructions. Where the insurer included additional terms or conditions for cover or for any specific type of cover it was essential that the Respondent bring this to the attention of the insured within a reasonable time. Respondent's attitude in an undated letter to this Office but with a fax date of 27 February 2007 is that:

*'...with each and every schedule that gets posted to our clients we clearly notify them that it is up to **them** to ensure that their items are correctly insured, besides this being "highlighted" in the schedule by ABSA themselves...we include an individual letter asking our clients to read through their schedules and then check whether everything is on cover to their approval...'*

There is no specific admission or denial about whether the Complainant specifically was ever advised about the insurer's requirement. This Office asked Respondent to respond to this specific issue. No response was received. In my view the Respondent's explanation does not accord with the requirements of section 7 of the Code which imposes a duty on the financial

services provider to explain material terms to the client. Respondent does not specifically state nor is there any evidence that when the endorsed schedule was received from ABSA on three separate occasions it was brought to the attention of the Complainant.

[12] It was incumbent upon the Respondent to pertinently draw the Complainant's attention to the requirement endorsed on the policy schedule which was not included in the quotations so that he could make 'an informed decision' on whether he was prepared to accept the term added by the insurer.

[13] Even if the Respondent sends 'an individual letter' to each client, he has provided no proof that he in fact sent it to Complainant in the face of the latter's assertion that he did not receive it. In fact Respondent has not provided us any record of advice which it is required to keep in terms of section 9 of the Code. Apart from its letter to this Office referred to above it has only provided copies of two emails dated 27 and 28 September 2005 respectively; the former from ABSA to Respondent and the latter from Respondent to ABSA and a (one page) copy of a policy schedule in which the requirement of the tracking device is mentioned. As mentioned in par 10 above, the Respondent does not deny receiving the schedules.

[14] Complainant says he always ensured that he complied with the requirements of an insurer regarding other vehicles and items he had insured and would have done so in this case, had he been made aware of them.

[15] In the result Respondent's negligent failure to properly and timeously inform Complainant of the insurer's requirement ultimately led to the repudiation of the theft claim by the insurer.

Quantum of Complainant's Loss

[16] Complainant paid R135 000.00 for his vehicle. ABSA Insurance was asked what it would have paid if it had admitted the claim. It informed this Office that the quantum would have been R87 300.00 (net of R9700.00 excess). I have no reason to question the amount.

Accordingly, I make the following order:

1. The complaint is upheld.
2. Respondent is ordered to pay Complainant an amount of R87 300.00 within fourteen days of date of this order.
3. Interest on the said sum at the prescribed rate from fourteen days after date of this order to date of payment of the capital sum.

4. Respondent is ordered to pay the case fee of R1 000.00 plus value added tax.

DATED AT PRETORIA THIS 13th DAY OF FEBRUARY 2008.



CHARLES PILLAI

OMBUD FOR FINANCIAL SERVICES PROVIDERS