

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

**CASE NUMBER: FAIS 08635/12-13 MP 3**

**In the matter between:-**

**COOLMAC FIRST FOR SERVICE**

**MPUMALANGA (PTY) LTD**

**Complainant**

**and**

**ANSHE KRUGER**

**Respondent**

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**DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY  
AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')**

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**A. THE PARTIES**

1. Complainant is a company which calls itself, Coolmac First For Service Mpumalanga, (Pty) Ltd (registration number 2010/007298/07), a company duly incorporated in terms of South African laws, with its principal place of business situated at 26 Van Riebeeck St, Groblersdal, 0470, Mpumalanga.  
Complainant is represented by its financial director, Ryan Scaterfield.

2. Respondent is Anshe Kruger, an adult female and authorised financial services provider in terms of the FAIS Act, with license number 9033. Respondent's place of business is 8 Klaat Street, Phalaborwa, Mpumalanga.
3. The records of the registrar of financial services providers indicate that respondent's license was issued on 25 November 2004 and is in force. Respondent is licensed to furnish advice and intermediary services in respect of short term personal and commercial insurance.

## **B. COMPLAINT**

4. On or about 13 January 2013, complainant filed a complaint with the Ombudsman for Short Term Insurance, (OSTI) against the insurer. Having concluded that it could not fault the Santamer for rejecting the claim, OSTI referred the matter to this Office for a possible enquiry into the broker's conduct.
5. Complainant's case is contained in his letter of complaint. Essentially, complainant accuses the respondent of failing to advise him, the result of which, led to complainant's claim being rejected by his insurers, Santam., Complainant further charged that, to add insult to the injury, respondent had never even spoken to him, hence she could not advise him.

## **C. BACKGROUND**

6. A substantial part of the complaint is in Afrikaans; what follows is the translated version.

7. The complaint arises out of the rejection of complainant's claim by Santam. Complainant had lodged the claim following the theft of his tools from his vehicle. Santam had initially refused the claim on the basis that the theft was not accompanied by actual visible forcible means of entry into or out of the building, which they said was a pre-requisite in terms of the policy. In further communication sent to this Office, probably upon becoming aware that the items were stolen from a vehicle, Santam subsequently cited the failure to specify the items as their reason for rejecting the claim. The items had to be specified within the All Risk section of the policy.
8. Attaching a quotation from a broker, (the initial broker), complainant wrote on 17 November 2011 to a gentleman by the name of Hennie Jacobs, (Jacobs) an employee of Sanlam at the time, seeking his help. The email reads:

*'Hi Uncle Hennie,*

*Would you mind having a look at the attached quote? This is insurance for a business I have shares in 40 %. It is based in Nelspruit and is an Aircon and Refrigeration business. We currently have one vehicle (not owned by the business) which we are using to do repairs, services. We transport aircons, and expensive tools. I am worried if the vehicle gets into an accident, the aircons, tools will might get damaged. I need insurance for this..Plus theft. It is also stored in my partner's garage at night. So some type of household insurance would also be needed. The business is about a year old and it is doing well. We will be purchasing an additional vehicle and employing an additional technician soon. I'm just worried if something goes wrong it could wipe us out.*

*Please let me know what you think. It is not urgent.'*

*Thanks Regards,*

Ryan Scarterfield (*copied as is from the complaint*)

9. Jacobs in turn wrote to the respondent,

*'Look at this and see if we can do the same or improve on it. I suggested that they draft a rental agreement between him and his partner and the business for the office and the storage space at his house. I do not believe that they will then require other insurance for the household content for the business. It will then be the decision of this partner whether he will require insurance for himself. Let me know.'*

10. Several e-mails were exchanged between Jacobs and respondent. At some point respondent had made it clear to Jacobs that she could not improve on the quote because, as she put it, *'This quote is from Santam, therefore I cannot quote another one. The one quote from Santam is not allowed to exceed the other.'* Jacobs however was unrelenting, he wrote back:

10.1 *'Hallo you two blondes, the client wants to make use of our services. That quotation is already 30 days old. Get new quotes for the same or adjust the insured amounts. The offices are rented so the fire is only applicable for the contents on the premises. The office equipment as well as the stock is included. Let us think outside the box. There is plenty of business still to be generated.'*

11. Finally, respondent, without having had any contact with complainant, drew up a quote, which she later referred to Jacobs with a Letter of Broker appointment. She requested that the quote be signed as at 22 November 2011.

12. The contract of insurance began on 1 December 2011.
13. On 1 October 2012, complainant went to work at one of his clients' premises, OBC chickens in Mbombela. Upon returning to their work premises and as they were about to offload their tools, the workers reported that the tools were missing and the canopy lock had been broken<sup>1</sup>.
14. The theft was reported to the South African Police Service, (SAPS) and a claim lodged with Santam. Santam however, rejected the claim as set out in paragraph 7 of this determination.

#### **D. RELIEF**

15. Complainant had initially asked for relief in the amount of R50 000, which was later reduced to R18 000.

#### **E. REFERRAL TO RESPONDENT IN TERMS OF RULE 6 (b)**

19 February 2013

16. On 19 February 2013 and in compliance with Rule 6 (b) of the Rules on Proceedings of the FAIS Ombud's Office, (the Rules), the complaint was referred to the respondent to resolve it with her client, within the six weeks period allowed in the Rules. Respondent was further advised that in the event the complaint was not resolved by 5 April 2013, she had to revert to this office

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<sup>1</sup> The van had lockable canopy.

with her full version of events, including a copy of the file of papers relating to the complaint.

2 April 2013

17. On 2 April respondent filed her response. As background, respondent first adverted to a verbal business arrangement she had with Jacobs in terms of which Jacobs referred clients for short term insurance to her. She paid Jacobs a certain percentage of commission for every business lead.
18. Further in terms of the business arrangement, respondent could not contact any of Jacobs' clients directly. All business had to be done via Jacobs, including collecting information. Respondent surmises, this was to minimize her chances of poaching Jacobs' clients.
19. With regard to the complaint, respondent submitted that Jacobs had forwarded her a quote from another broker<sup>2</sup> and asked whether respondent could do the same thing or do better. She states that she had explained to Jacobs that it was impossible to obtain a cheaper quote as the first quote was from Santam<sup>3</sup>. She further added she was not allowed to work on the quote as the first quote was from a broker in the same town. The only way to work on the quote was to have the complainant sign a Broker Letter of Appointment. This letter was signed by the complainant on 24 November 2011.

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<sup>2</sup> This is the quote from the initial broker.

<sup>3</sup> Respondent was also selling Santam insurance.

20. She stated she had worked on the basis that the quote forwarded to her by Jacobs was correct and in accordance with complainant's requirements.
21. On 6 February 2012 her office had mailed a comprehensive schedule of insurance to the complainant. The schedule however, was returned to them as the address was incorrect. Upon obtaining the correct address, Respondent mailed it again. On that score, respondent states that complainant never came back to her to report that the tools were not insured.
22. Sometime during 2012 Jacobs resigned from Sanlam and her arrangement with him was cancelled. The relevance of this detail is that respondent was now at liberty to contact those clients that were referred to her by Jacobs.
23. On 6 August 2012, complainant contacted respondent's office to change the name of the company and bank details. Respondent learnt for the first time from complainant that he resided in Phalaborwa and not in Nelspruit. Following this interaction, complainant's risk address was changed on 22 August 2012 and an updated schedule posted. Respondent once again highlights that complainant had not informed her that tools were not insured.
24. On 18 October 2012 complainant called and reported the theft of the tools. Her office immediately informed complainant of the claims' procedure.
25. As a final point, respondent expresses her disquiet regarding the claim:

- 25.1 For example, with regard to the late reporting of the claim to SAPS, and complainant's response that he was busy, respondent asks, *'How could he still perform the work if his tools had been stolen?'*
- 25.2 *Why did it take 8 days after the theft to report such an important case to the police?*
- 25.3 *Why was it necessary for all the workers to be present with him inside the shop when he went to sign the paper work? Surely it had nothing to do with them<sup>4</sup>.*
- 25.4 *Where are the invoices and proof of the repairs done to the lock of the canopy?*
- 25.5 *If the business is now approximately two years old, where is the proof of payments for the purchase of the tools?'*
26. After asking the questions, respondent then concludes, *'I feel that the client is a well-informed person who would have clearly understood his policy and made inquiries if it did not comply with his requirements. He neglected to study the policy and now wants to put the blame on me. I never spoke to the client myself and everything was handled by my office. I believe that my clerk understood that everything was in place after the quote was accepted and signed and that she requested the list of tools via Mr Jacobs.'*

## **F. UNDISPUTED FACTS**

27. Following an in-depth analysis, the following are undisputed and as such are common cause:

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<sup>4</sup> In his complaint, complainant had stated that after finishing the work, they loaded the tools into the back of the van, locked it and then went back to the office to sign the paperwork.



27.1 It is an undisputed fact that respondent never made any contact with complainant prior to the conclusion of the contract; not face to face, by e-mail, telephone or ordinary mail.

27.2 Respondent made no attempt to gather appropriate and available information regarding her client's financial situation, financial product experience and objectives to enable her to provide the client with appropriate advice. Without further enquiry, respondent relied on the quotation that was emailed by Jacobs<sup>5</sup>.

27.2 No effort was made to identify the financial product or products that will be appropriate to the complainant's risk profile and financial needs<sup>6</sup>. This appears to be in contrast with respondent's own marketing statement, which appears at the foot of her business e-mails. Respondent's marketing statement states:

*'I believe it to be my responsibility to fulfil the needs of my clients to the best of my ability.'*

27.4 At no stage did respondent advise the complainant.

27.5 On her own version, no material disclosures were made to complainant.

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<sup>5</sup> Part VII section 8 (1) (a) of the General Code for Authorised Financial Services Providers and Representatives, (the Code)

<sup>6</sup> Section 8(1) (c)

27.6 Without confirming her client's correct contact details, respondent nevertheless mailed the insurance schedule. Complainant's risk address had to be corrected on 22 August 2012; eight months after the contract came into existence.

27.7 Respondent did not advise complainant that the tools, which complainant carried to the various clients' sites, had to be listed in the All Risk section of the policy in order to be properly covered.

27.8 On her own version, respondent did not know her client.

## **G. INVESTIGATION**

15 May 2014

28. On 15 May 2014, this Office referred a notice in terms of section 27 (4) of the FAIS Act to the respondent. The notice informed the respondent that the complaint had been accepted for investigation and invited respondent to provide a response, this time, having regard to her duties as a provider as set out in the General Code of Conduct for Authorised Financial Services Providers and Representative, (the Code).
29. Respondent's attention was drawn to specific areas of her initial response, in particular the claim that she could not access complainant and as a result worked on limited information because of her business arrangement with Jacobs.

30. Respondent's attention was drawn to the requirements of section 8 (1) (a)-(c) of the Code along with section 7 (1) (a) of the Code.
31. Respondent's attention was further drawn to section 2 of the Code, challenging that her opting to adhere to her business arrangement with Jacobs would have seen her violate the provision. Respondent was asked to demonstrate how she could meet the demands of the Code while observing her arrangement with Jacobs. Her response was due on 29 May 2014.
32. In her response of 29 May 2014, respondent failed to provide details of how she complied with the Code while rendering financial services to complainant. Respondent however, mentioned that she only had sight of complainant's initial e-mail to Jacobs after the claim had been rejected.
33. She claimed she had informed Jacobs that if the client wanted to specify the tools he should have supplied her office with a list and proof of purchase.
34. Respondent also commented on her arrangement with Jacobs. It is perhaps worth reproducing her justification of her failure to personally contact the complainant. *'it was general practice to accept clients for short term insurance from colleagues, but not to have direct contact as we are in competition with one another as far as life insurance is concerned.'*
35. Respondent finally remarked, complainant *'has never indicated on any record a proof of loss'*. *'No proof of purchase before the loss was supplied to us'*.

36. In an attempt to challenge complainant's right to lodge the complaint, respondent asked, '*Why did he report the case to the Ombud if he is not even a member of the CC.....*'

#### **H. DETERMINATION**

37. Despite diligent search, there is not a shred of evidence which suggests that respondent was concerned with the law when she sold the policy to complainant. Highlighted hereunder, are few of respondent's actions, which were bound to cause harm to complainant, one way or the other:
38. Acting on Jacobs' instruction and without any reference to her client, respondent promptly tied complainant to a contract with Santam without concerning herself with the consequences of such unconscionable conduct.
39. The material terms of the contract were unknown to the complainant. For example, complainant had no idea of the special terms or conditions, exclusions of liability, excesses, restrictions or circumstances in which the benefits would not be paid.
40. Complainant's address was incorrect from the start and only corrected eight months after the contract was concluded with Santam. Even then, fortune was on complainant's side, because he made the call that led to the correction.

41. Respondent was not only concerned with her business arrangement with Jacobs, she also alluded to what appears to be an anti-competitive practice, which dictated to her that she could not work on the quote as another broker in the same town had already dealt with the client. The client's interests had clearly taken the backseat as respondent had her own in mind. This marks a violation of the Code<sup>7</sup>. Needless to say, there was no legal basis for such anti-competitive practice, and it failed to take into account the interests of clients of financial services.
42. As for the statements about a Santam quote which is not allowed to exceed another; this makes a mockery of the FAIS Act and undermines the integrity of the financial services industry.
43. Such business arrangements as described by the respondent fall foul of the letter and spirit of the FAIS Act. Parties cannot enter into business arrangements that purport to absolve them of compliance with their obligations as set out in the FAIS Act. On the one hand, the business arrangement between the respondent and Jacobs, and the anti-competitive practice among brokers in the same town, as punted by the respondent, on the other hand, cannot trump the provisions of the FAIS Act. Such private arrangements among brokers cannot excuse non-compliance with the financial services providers' obligations as spelled out in the FAIS Act. To the extent that such

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<sup>7</sup> See section 3(1)(c) (i)

private business arrangements and practices among brokers, contradict the requirements of the FAIS Act, they are unlawful, void and unenforceable.

44. It is disturbing that the respondent appears to rely on her unlawful business arrangement with Jacobs and the anti-competitive practice as justifying her unlawful conduct. The respondent's failure to contact the complainant was bound to result in the latter's prejudice. Whichever way one views the respondent's conduct, it fails the bare minimum threshold of advice as defined in the FAIS Act. It is difficult to see how an authorised financial services provider in the position of the respondent could justify her failure to contact the complainant. It will be recalled that the respondent had obtained commission from her purported rendering of financial advice to the complainant. However, as the respondent's own version amply illustrates, her advice of the complainant did not comply with the basic requirements of advice as contemplated in the FAIS Act.

45. A fair amount of respondent's effort in responding to this Office went towards sullyng complainant and even blaming him for the rejection of the claim. See in this regard paragraphs 25 and 26 of this determination. While some of these may have relevance in validating the claim, they are of no assistance in resolving the questions whether:-

45.1 The respondent acted professionally and ethically whilst rendering financial services to complainant;

45.2 She disclosed any conflict of interest she may have had in the transaction and ensured that her client is treated fairly;

- 45.3 Respondent acted in line with her client's interests;
  - 45.4 All mandatory disclosures were made to complainant, including the limitations that may be imposed on the respondent in terms of her contract;
  - 45.5 Respondent discussed the possible options to address complainant's needs and, using her skill, guided the client by recommending the financial product that is most suitable to address those needs; and,
  - 45.6 Whether complainant was put in a position to make an informed decision.
46. The above is by no means an exhaustive list of the requirements of the Code. As a licensed financial services provider, the respondent is duty bound to comply with the Code when rendering financial services. Regrettably, there is no reference to upholding the General Code. Instead, respondent in her response, churlishly defended the very practices that the FAIS Act aims at eradicating.
47. On her own version, respondent showed no regard for the Code.

## **I. CAUSATION**

48. Santam rejected complainant's claim because the tools were not specified. Based on respondent's version, she failed to advise complainant of this requirement. In an attempt to escape liability, respondent cited her arrangement with Jacobs as the reason she could not access complainant. Conveniently, respondent referred to messages she had conveyed to Jacobs

regarding the need to have the tools specified; and complainant's failure to mention that the tools were not insured. None of these excuses will assist respondent after electing to jettison the Code.

49. The undisputed fact is that respondent had made no attempt to contact complainant to ascertain his instructions. She chose to act in line with her business arrangement with Jacobs than in the interests of her client. Respondent's conduct was the cause of complainant's loss.

#### **J. THE ROLE OF HENNIE JACOBS**

50. There is no question whether compliance with the Code rested with the respondent as the person who rendered financial services to complainant; however, a comment is warranted on Jacobs' role. On at least two occasions, complainant wanted to hear from Jacobs after the claim had been rejected.

51. On 17 October 2012, complainant wrote to Jacobs forwarding the respondent's email of the same day. In that e-mail respondent sought to justify her conduct and blamed complainant for the failure to properly insure the tools. Jacobs was quick off the mark in his replying e-mail of 18 October. He wrote,

*'Hi Ryan, See attached email where I explained to them your needs which they acknowledged. I am not a financial advisor for short term insurance and it is there responsibility to ensure everything is done according to client's needs. I just refer to them and they are responsible to see that all requirements are adhered to. The emails show all the correspondence with me and nowhere did they ask for any information. You are their client and they received the commissions on the premium. In my opinion they did not do what you have requested and although you have*



*excepted the quotation they were supposed to explain to you what you are buying.*

*Sorry for the inconvenience*

*HENNIE JACOBS' (copied as is)*

52. On 23 April 2013 this Office referred the response of the respondent to complainant and invited his comments in terms of Rule 5 (g) of the Rules on Proceedings of the Office, (the Rules). Complainant forwarded that response to Jacobs and invited him to comment. Jacobs, replied:

*'Hi Ryan,*

*All I can say is that the email that I forwarded to them contains your request to which they were supposed to respond. I never refused that they contact my clients neither did I mentioned that in my email to them. The fact that they said you did not insured your tools is debatable because Machinery and Equipment per definition could also be tools unless explained otherwise. They never asked me for a list or specification of the above, only for a brokers note and then they forwarded the quote to me for you to sign off*

*Regards HENNIE JACOBS'*

53. Jacobs had clearly forgotten that he had referred complainant to respondent in the first place. Complainant had no chance; he was on his own.
54. Quite clearly, and this is evident from Jacobs' first e-mail to respondent, he had his own interests in mind. The referral to a clearly incompetent respondent could not have been about complainant's interest. Jacobs' instruction to respondent was that she should look at either matching or making things better or even revising the insured amounts. Now he wants to have nothing to do with

the result he had so enthusiastically engineered. This is the kind of conduct that must be condemned. It is inimical to the efforts of law abiding financial services providers, who seek to add value to their clients' lives.

#### **K. QUANTUM**

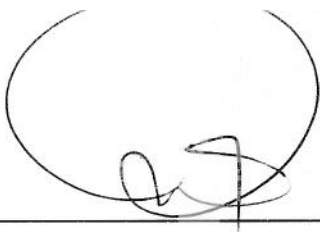
55. Having revised the quantum, complainant could only prove R17 756 worth of damage. It must be stated that notwithstanding respondent's utterances, she has not forwarded any evidence to support her gratuitous attack against the complainant that the claim may be fraudulent in any way. The claim at this stage stands at R17 756 and this is the amount this office is prepared to allow.

#### **L. ORDER**

56. In the premises the following order is made:

1. The complaint is upheld;
2. Respondent is hereby ordered to pay to complainant the amount of R17 756.
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 24<sup>th</sup> of AUGUST 2015**



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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**