

OUR REFERENCE: FAIS 00086/16-17/ WC 3

7 March 2018

**Attention: Mr Jacques Carstens & Mr Hendrik Thiersen
Horn Carstens & Thiersen Brokers (Pty) Ltd**

Per e-mail: info@hct.co.za

Dear Mr Carstens and Mr Thiersen

Miss Diandra Laura Adams v Horn Carstens & Thiersen Brokers (Pty) Ltd t/a HCT Konsult & Mr Jacques Carstens & Mr Hendrik Thiersen: Recommendation in terms of Section 27 (5) (C) OF THE FAIS ACT, (ACT 37 OF 2002)

A. THE PARTIES

1. Complainant is Miss Diandre Laura Adams, an adult female, of 29 years of age, whose full details are on file with this Office.
2. First Respondent is Horn Carstens & Thiersen Brokers (Pty) Ltd t/a HCT Konsult, a company duly incorporated in terms of South African law, with registration number (1996/001062/07). First Respondent is an authorised financial services provider (FSP) (licence number 3411) with its principal place of business noted in the Regulator's records as Langstraat, Morreesburg, 7310.
3. Second respondent is Mr Jacques Carstens a key individual and representative of first respondent. Second respondent's place of business is the same as that of first respondent.
4. Third respondent is Mr Hendrik Thiersen a key individual and representative of first respondent. Third respondent's place of business is the same as that of first respondent.

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Fairness in Financial Services: Pro Bono Publico

5. I use respondent/respondents interchangeably in this recommendation. Where appropriate, I specify which respondent is being referred to.

B. THE COMPLAINT

6. Complainant on 4 January 2013, at the age of 23, purchased a 2013 Chevrolet Aveo 1.6L 5 Door. On the same day, complainant applied for a comprehensive short term insurance policy with Mutual & Federal¹. Complainant was assisted by a member of the dealership in securing the policy with Mutual and Federal.
7. During 2014 complainant approached respondent and dealt with one of its representatives, a Mr Willie Van Zyl ('Willie'), from whom she requested a quotation from SANTAM. The quotation was accepted by complainant and the policy with SANTAM incepted on 1 August 2014.
8. ON 16 January 2016 complainant was involved in a motor vehicle accident, and the vehicle was written off. Upon the submission of the claim, complainant became aware that respondent's representative had incorrectly insured the vehicle as a 2003 Chevrolet Aveo 1.5, with an insured value of R30 000, as opposed to a 2013 Chevrolet Aveo 1.6L 5 Door.
9. Complainant was subsequently provided with an Agreement of Loss from SANTAM for R26 500, which was the insured value of R30 000 less the basic excess of R3 500. Complainant rejected this offer and refused to sign the document. She claimed that respondents were negligent in rendering financial services to her. For the record, complainant's vehicle was prior to this insured by Mutual and Federal for the retail value of R123 100.
10. Complainant approached this Office with the request that respondents be ordered to settle the claim in full for the correct value of the vehicle at the time of the accident. The retail value was R95 100 at the time of the claimed event.

¹ Policy No. 612537488

C. RESPONDENT'S VERSION

11. Respondents' reply was received on 17 October 2016 following this Office's Rule 6 (b) letter of 11 October 2016. The salient features of respondents response appear in the paragraphs immediately below:

11.1 Respondents claim that it had enquired from complainant about her existing policy in order to compare the quotation. Complainant allegedly denied having any insurance.

11.2 Respondent claims that complainant was uncertain as to the year model of the vehicle and allegedly claimed that she wanted it covered for R30 000. (Note: The vehicle at the time was insured with Mutual & Federal for its retail value of R123 100. No documentation provided by respondents shows that any attempt was made to comply with section 8(1) (c) of the General Code of Conduct for Authorised Financial Services Providers and Representatives ('the Code'). Furthermore, even if we accept that this had been complainant's instruction, there is no documentation in support of respondents having complied with section 8(4)(b) in having cautioned complainant with regards to the risks involved in not adhering to the recommendation provided.)

11.3 Respondent claims that complainant did not have any documentation with her to verify the year model, and it had no idea that the vehicle had been financed. I note that it was respondent's duty to establish this information prior to advising his client. A Financial Services Provider ('FSP') is required in terms of section 8(1) (a) of the Code to obtain all relevant and available information from the prospective client. Determining whether the vehicle was financed or not, has significant implications on any future recommendation, and cannot be ignored.

11.4 Respondent does however acknowledge that it was ultimately provided with a licence that recorded the VIN and Engine Number of the vehicle, but that it could not locate the vehicle's year model on the document

11.5 The response provided refers to the fact that complainant received a number of policy schedules whereby she could have confirmed the correctness of the information contained therein. I reject this argument, as respondent is transferring its responsibilities in terms of the Code to the complainant.

11.6 A copy of the 'Client Advice Record' is provided, however it does not provide any information that advances this matter, and it certainly does not provide any record of the respondent's representative having complied with the above-mentioned sections of the Code. Certainly, there was no documentation in compliance with sections 3 (2) and 9 of the Code to indicate what was discussed with complainant and what information was requested from complainant to have allowed respondent's representative to have made an appropriate recommendation.

D. RULE 5(g) RESPONSE

12. The response received from respondent was directed to complainant in accordance with Rule 5(g) of the Rules on Proceedings of this Office, on 27 October 2016. A response was received on 11 November 2016, the salient point being:

12.1 Complainant rejects the claims that she had requested that the vehicle be insured for R30 000, and claims that this information was never requested from her. She confirms respondent's statement that he was provided with the licence document and so had all the required information.

E. INFORMAL RESOLUTION

13. In an attempt to resolve the matter informally, additional correspondence was directed to respondent on 2 November 2016 where this Office raised concerns with regards to the representative's apparent non-compliance with section 2 and section 8 (1) (c) of the Code. Respondent was requested to respond to the concerns raised and that should it be unable to, it

should reconsider its stance and look to resolve the matter with complainant. A response from respondent was received on 29 November 2016, where respondent denied any liability and responded as follows:

- 13.1 Respondent reiterated the fact that complainant had not informed him that the vehicle had been financed, or that she had existing cover in place with Mutual & Federal.

Section 8 (1) (a) of the Code requires that an FSP obtain all relevant and available information to ensure that an appropriate recommendation can be made in compliance with section 8(1) (c), of the Code. It was not complainant's duty to inform respondent, but for respondent to have complied with the provisions of the Code.

- 13.2 Respondent claims that complainant was not interested in financial planning and that she was only interested in insuring her vehicle and household contents, and later on specified items.

The question of whether or not complainant had required financial planning is a moot point, as in accordance with the relevant section of the Code, the respondent's representative still had a duty to obtain all relevant and available information to ensure that the cover provided was appropriate to her needs and circumstances.

- 13.3 Respondent believes that this Office should not lose sight of the fact that its representative tried to obtain the relevant vehicle documentation to confirm both the VIN and Engine Number.

Whilst this information was provided, complainant did not provide the year model of the vehicle.

- 13.4 Respondent makes the allegation that complainant appears to have approached it with a preconceived reason and that she had purposefully withheld information to her ultimate

advantage. In any event respondent also reiterated its stance that complainant had sufficient opportunity to have noted the error after having received numerous policy schedules.

F. INVESTIGATION

14. In the interests of resolving the complaint this Office sent a notice to the respondent in terms of section 27 (4) of the FAIS Act (the Notice), on 2 February 2017 informing respondent that the complaint had not been resolved and that the Office had intention to investigate the matter. Respondent was invited to revert to this Office with its statement in terms of section 27(4) of the FAIS Act together with all documentation, including any documents in supports of its version and subsequent compliance with the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and Representatives, ('the Code'). A copy of the Notice is annexed to this recommendation.

15. Respondent provided a response to the Section 27(4) Notice on 3 February 2017, and subsequent responses were provided up to and including 10 February 2017. The responses provided are summarised below:

15.1 It is confirmed that the responses received are simply repetitions and affirmations of what has already been recorded in this recommendation. Respondent is of the view that it complied with complainant's request and that it must assume that this Office is not interested in the fact that it had sent her numerous policy schedules.

15.2 Respondent confirms that the matter was being directed to its Professional Indemnity insurers.

Rights and Duties of a Respondent

16. Before I proceed with this recommendation it is important to address the fact that the recordings of the conversations between the respondent's representative and the two consultants from SANTAM, referred to in the paragraphs below, were not highlighted by or let alone provided by respondent in

its responses to this Office. It was only as a result of additional investigations conducted by this Office that the existence of these recordings became known. This raises serious concerns with regards to the actions of respondent and its adherence to its duties in terms of the Rules on Proceedings of this Office ('Rules'). Rule 6 (f) requires that a respondent is required to act professionally and reasonably and to cooperate with a view to ensuring the efficient resolution of the complaint. In so doing respondent was further required to submit any fact, information or documentation in relation to the complaint and to disclose relevant information or documentation to the Ombud in terms of Rule 6 (d). Respondent by withholding any information with regards to the existence of the recorded conversations failed in its duty to cooperate in the efficient resolution of this complaint.

G. ANALYSIS AND RECOMMENDATION

17. During the investigation of this complaint, this Office approached SANTAM, the insurer, to determine how the policy had incepted. It was established that respondent's representative, Willie, had telephonically contacted the insurer to obtain a quotation and subsequent to that had contacted the insurer to accept the quotation on behalf of complainant. This Office was as a result provided with the recordings of these conversations, and this recommendation shall focus on the telephonic conversation that took place between respondent's representative and the insurer, when the request for a quotation was made. The salient details are captured below:

17.1 The discussion surrounding the motor vehicle commences 6:27min into the recording with the insurer's consultant, requesting that respondent's representative provide the insurer with the make and year model of the vehicle.

17.2 Willie is clearly heard confirming that the vehicle is a 2013 model, and that it is a Chevrolet Aveo 1.6 hatch. (Note: Despite the numerous claims made by respondent that its representative had been unaware of the year model, Willie is heard in the recording providing a precise description of the vehicle.)

17.3 Willie then confirms that the vehicle is to be insured for R40 000, to which the consultant questions him with regards to the year model and whether it is a 2003 or a 2013 model as

R40 000 seemed a little low. Willie is once again heard confirming that it is indeed the correct year model.

17.4 Once again the consultant questions whether the value of R40 000 correlates with a 2013 year model, and confirms that her system indicates that the retail value of a 2013 model is R102 600. Willie's response is that it cannot be and that it must then be a 2003 model, adding 'I think she (Complainant) got it wrong'. This is at 8:17min into the recording.

17.5 Willie then asks the consultant what the value of a 2003 model is, the consultant confirms that it is R30 000 and that the full description was a Chevrolet Aveo 1.5 5d. This is accepted by Willie who confirms that he will go and check on these details with complainant. This is at 09:20min into the recording. (Note: Not only did respondent's representative unilaterally change the year model and specifications of the vehicle, but there is no evidence that this was ever discussed with or verified with complainant. The second recording provided to this Office records Willie confirming with a consultant of the insurer that he is confirming acceptance of the quotation on the very same details.).

H. FINDINGS

18. On the basis of the reasoning set out in this recommendation, it is evident that there was a violation of section 8 (1) (a-c) of the Code. Even if we were to consider that complainant had insisted on the vehicle being insured for R40 000, or for any amount lower than the retail value or the outstanding finance owed to Wesbank, and assuming that she had been made aware of the obvious dangers of doing so, respondent was still obliged to comply with record 8 (4) (b) of the Code.

19. In addition to this there is are numerous violations of section 2 of the Code which requires that an FSP must act with the required due skill care and diligence in the interests of the client, in this instance the complainant. The failure to confirm the year model with complainant and the unilateral action taken to change the vehicle details during the quotation and application stage were detrimental to the needs of complainant. Respondent's actions were negligent.

20. Respondent also contravened section 3 (2) and section 9 of the Code.

I. CAUSATION

21. The question must still be answered whether respondent's failure to comply with the provisions of the Code caused the loss.

22. The actions of respondent amount to a breach of the Code and consequently, a breach of respondent's duty to appropriately advise complainant. See also J & G Financial Services Assurance Brokers (Pty) Ltd & O v Dr Robert Ludolf Prigge²; Case No FAB 8/2016 – para 43 to 44:

'43....In the case of a provider under the Act more is required namely compliance with the provisions of the Code. Failure to comply with the code can be seen in two ways. The Code may be regarded as being impliedly part of the agreement between the provider and the client and its breach a breach of contract. The other approach is that failure of the statutory duty gives rise to delictual liability.

44. In both instances the breach must be the cause of the loss. We stress this point because the Ombud's reasons give the impression that any breach of the Code makes a provider liable for damages without due regard to this aspect of causation, namely did the failure to comply with the Code cause acceptance of the advice.'

23. There is no doubt that respondent's negligence in unilaterally altering the year model of the complainant's vehicle on the policy, and his failure to have adequately advised complainant thereby failing to have acted in her interest, caused the loss.

J. QUANTUM

24. This Office has received confirmation from SANLAM that the retail value of the vehicle at the time of the accident was R 95 100 (SANTAM have confirmed that there no concerns with regards to the condition and or mileage, and that the vehicle should therefore have been insured for this value).

² J & G Financial Services Assurance Brokers (Pty) Ltd & O v Dr Robert Ludolf Prigge Case No FAB 8/2016 – para 43 to 44

25. SANLAM have also confirmed that the only excess applicable would have been the basic excess in the amount of R3 500.
26. Complainant would then be required to accept the offer of settlement from SANTAM for R26 500.

K. RECOMMENDATION

27. The FAIS Ombud recommends that respondent pay complainant's loss in the amount of R65 100.
28. Respondent is invited to revert to this Office within TEN (10) working days from date hereof with a response to this recommendation. Failure to respond with cogent reasons will result in a final determination being made in terms of section 28 (1).

Yours sincerely



MARC ALVES
TEAM RESOLUTION MANAGER