FAISOmbud
Office of the Ombud for Financial Services Providers

Our Reference: FAIS-03057-18/19-NW 6

29 March 2021

TO: COLONIAL 1952 (PTY) LTD

ATTENTION: Ingrid Janse Van Rensburg, Esme Esther Pretorius & Jan Daniel Jakobus van den Berg

Per email: ingrid@colonial.co.za; leeann@colonial.co.za

Dear Sir/Madam

Daniel Steenkamp (first complainant) and Larissa Steenkamp (second complainant) v Colonial 1952 (Pty) Ltd (respondent)

RECOMMENDATION IN TERMS OF SECTION 27 (5)(c) OF THE FAIS ACT, (ACT 37 of 2002)

A. THE PARTIES

1. First complainant is Mr Daniel Steenkamp, an adult male whose full particulars are on file with this Office. Second complainant is Mrs Larissa Steenkamp, an adult female whose full particulars are on file with this Office. First and second complainant are married to each other.

2. The respondent is Colonial 1952 (Pty) Ltd, a private company duly incorporated in terms of South African law, with registration number 2013/117353/07. The first respondent is an authorised financial services provider (FSP) (licence number 45457) with its principal place of business noted in the Regulator's records as Colonial Office Block G, Beethoven Street, Wellness Corporate Park, Ifafi, 216. The licence has been active since 9 September 2014.

B. THE COMPLAINT

3. During July 2017, the first and second complainant met with one of the respondent's brokers, Juanine Bouwer, seeking advice on the best medical aid to meet their needs. At the time, the second complainant was pregnant and the complainants indicated that they wanted a medical aid plan that would adequately cover their baby from birth. At the time, the complainants had a medical insurance plan and had learnt that the policy would not offer them the cover they required for their child.

4. Following this meeting in July 2017, the respondent's broker presented a few medical aid options from different medical aid schemes to the complainants. From these options, the complainants selected the Delta Core Plan from Discovery. The complainants were advised that the second complainant would have to be a member of the Discovery medical aid scheme and that the complainant's child would be added as a dependant to the plan selected by the complainants after his birth. The medical aid plan incepted on 1 August 2017 with the second complainant as a main member. The complainants' child, baby Steenkamp, was born on 16 September 2017 but was only added to the medical aid policy as a dependant effective 1 February 2018, more than 120 days after baby Steenkamp's birth.

5. The complainants allege that they were advised, during the consultation that took place in July 2017, that their child would enjoy cover from the medical aid for 90 days, from the date of his birth, and that this cover would be free. The complainants claim that the respondent's advisor

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informed them that the child would then, after the 90-day period, have to be added to the policy as a dependant.

6. On 11 November 2017, the second complainant sent an email to the respondent in which she indicated that the complainants wanted to add baby Steenkamp to the plan. The exact words used by the second complainant were '*ons wil asb vir Malan by sit*'. The complainant immediately followed this email with another in which she asked the advisor to notify her when respondent needs baby Steenkamp's birth certificate and added '*dan sal ek hom vir julle email*'. Within an hour of receiving these emails, the advisor responded to the second complainant's instructions by attaching an application form from Discovery and informing the second complainant that this was the form she was meant to complete. The advisor ended the email by indicating that '*ek sal uitkyk vir jou terugvoer*'. The respondent sent the complainants the form to add a dependent even though the request to add baby Steenkamp to the plan was made within 90 days of birth. This means that baby Steenkamp could have been added to the plan without underwriting, subject to the condition that he be added to the scheme from the date of his birth and that the contributions are backdated to the date of his birth. There seems to have been no further correspondence exchanged between the parties after that until they met on 22 December 2017.

7. According to the complainants, the second complainant did not complete the application form after she received it because she did not know how to and required the assistance of the advisor in order to complete the form. The complainants claim that the second complainant was unable to reach the advisor and that each time the second complainant called the advisor, the phone was

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answered by an assistant who informed the second complainant that the advisor would call back but that she never did. When the parties met on 22 December 2017, they completed the application form received from Discovery and indicated that the preferred date for baby Steenkamp to enter the plan was 1 January 2018.

8. However, by 8 January 2018, baby Steenkamp had still not been added to the plan. The complainants were alerted to this because the second complainant noticed that the contributions had not been adjusted to account for baby Steenkamp having entered the plan as a dependent. The complainant sent an email to the advisor, on 8 January 2018, enquiring about why her contributions for the medical aid plan had not increased even though they were supposed to have increased. In this email, the second complainant indicated that baby Steenkamp was meant to go to scans for his skull and asked '*is hy nie al op die plan nie?*'

9. In response to the query, the advisor informed the complainants that Discovery had raised some questions regarding the pre-exiting conditions which the advisor incorrectly indicated baby Steenkamp had when she completed the application form on 22 December 2017. The advisor corrected the errors she made and sent back the revised application form to Discovery during January 2018. On 15 January 2018, the advisor informed the complainants that the inception date for baby Steenkamp to be added to the plan could either remain 1 January 2018 or could be amended to 1 February 2018. The complainants were advised that if they opted to keep the start date as 1 January 2018 that they would be required to pay both the contributions for January and February, in January. The complainants selected the start date as 1 February 2018 but claim that

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they did so because at the time, they were unaware what the implications of this decision would be.

10. During January 2018, baby Steenkamp was seen by a nurse at a health and wellness aby clinic for a 'routine vaccination' and during this visit, the nurse who saw to baby Steenkamp raised a concern about his cranial sutures. The nurse noticed that the formation of the skull had changed and that there were two bumps his head. The nurse referred baby Steenkamp to a doctor for further assessment. Baby Steenkamp was seen by a doctor on 18 January 2018 and the doctor also noticed some irregularities with his skull and advised that he would be required to undergo a CT scan. The CT scan was done on 6 February 2018 and baby Steenkamp was diagnosed with a medical condition known as Craniosynostosis. Craniosynostosis is a birth defect in which the bones in a baby's skull join together too early. This happens before the baby's brain is fully formed and as the baby's brain grows, the skull can become more misshapen. If left untreated, Craniosynostosis can lead to serious complications, including head deformity, possibly severe and permanent, and increased pressure on the brain[1].

11. Baby Steenkamp's treating doctor informed the complainants that baby Steenkamp would have to undergo surgery in order to treat the condition. On 21 February 2018, the surgeon who was meant to do the procedure required to correct the condition, requested authorization from Discovery to proceed with the procedure. On 13 March 2018, Discovery rejected the request. Discovery advised that its decision to remove baby Steenkamp from the policy was informed by

[1] https://childrensnational.org/visit/conditions-and-treatments/genetic-disorders-and-birth-defects/craniosynostosis.

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the fact it was apparent that the second complainant had known about baby Steenkamp's symptoms before his date of entry onto the medical aid plan and before the request for authorisation for hospitalisation was made on 06 February 2018.

12. The complainants were thus required to cover the cost of the surgery from their own pockets and claim that the respondents are to blame for this because (1) they did not inform the complainants that the baby was meant to be registered as a new born within 90 days from the date of his birth in order for the policy to incept without underwriting and that (2) the respondent incorrectly completed the application form to add baby Steenkamp to the scheme which the complainants claim resulted in the inception date being postponed and that the advisor did not apprise them of the consequences of amending the start date from 1 January 2018 when she presented them with the option to do so.

13. The complainants attempted to resolve the complaint with the respondent prior to approaching this Office but on conclusion of a six-week investigation into the complaint, the respondent denied liability and the complainants lodged the present complaint with this Office.

14. The complainants claim that the respondent is thus liable for the loss they incurred when they had to cover the costs of baby Steenkamp's treatment out of their own pocket and as a resolution to their complaint, the complainants want to be reimbursed, in full, for the costs of the operation and for the consequent medical costs.

C. RESPONDENT'S VERSION

15. In essence, the respondent denies liability for the loss claimed by the complainants because the respondent claims (1) that the complainants were aware of the '90-day rule' since they make mention of this in their complaint and (2) it was the complainants who elected to amend the date on which baby Steenkamp was to be added to the plan from 1 January to 1 February 2018 because they did not want to pay the contribution for both months in January 2018. The respondent also makes mention of the fact that the complainants were aware of baby Steenkamp's symptoms before he was added as a dependent on the plan but failed to disclose this.

16. In response to the complaint, in an undated letter, the respondent denied that the complainants were not advised that they were required to register baby Steenkamp within 90 days of his birth if he was to be added to the plan without underwriting. The respondent claims that during the first consultation between the complainants and the advisor, that the advisor informed the complainants that '*Discovery gives parents 90 days to register their new born but that payment of premiums will be backdated to the date of birth'*. According to the respondent, parents must request the addition and provide the baby's birth certificate.

17. The respondent states that the complainants knew that baby Steenkamp was not covered on expiry of the 90 days and that the complainants willingly chose for baby Steenkamp to be covered from 1 January 2018. The respondent claims that the complainants did not expect for cover to start before 1 January 2018. The respondent states that even if cover had incepted on 1 January 2018, that Discovery would not have authorised the procedure given that there is evidence of

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non-disclosure of material facts to the scheme. The respondent avers that despite the complainants' claims and notwithstanding the statement received from the doctor who referred baby Steenkamp to the CT scan, that it was only on 18 January 2018 that baby Steenkamp was suspected to suffer from an abnormality of his skull, that the second complainant's email of 8 January 2018 contradicts this.

18. The respondent claims that the complainants were given the correct information on when the baby must be added to the plan if this was to be done without underwriting. The respondent claims that if the complainants had disclosed to the advisor that baby Steenkamp may have a medical condition that they would have been able to recommend medical aid with another scheme that accepts babies who have pre-existing medical conditions at time of application to the medical aid scheme. The respondent claims that the complainants did not place them, the FSP and the broker, in a position to assist them according to their needs.

19. The respondent claims that the complainants are the ones who were negligent and that it is their own negligence that caused baby Steenkamp to not be covered in time and that the complainants were the ones who failed to disclose material information to Discovery which resulted in the rejection of the request for authorisation. The respondent claims that it is clear that it was only after the complainants were alerted to the possibility of their baby suffering from a medical condition, in November 2017, that they made it a priority to add baby Steenkamp to the medical aid plan. The respondent thus denies that it is liable for the loss claimed by the complainants.

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D. INVESTIGATION

20. On receipt of the complaint, this Office forwarded same to the respondent in accordance with the Rules on Proceedings of the Office of the Ombud for Financial Services Providers (the Rules) under cover of a letter dated 6 September 2018. The respondent was advised that the complaint was being sent to it in accordance with Rule 6(c) of the Rules and was informed that it could either resolve the complaint with the complainants or respond to the allegations levelled against in the complaint. The respondent was advised that in the event it elected to resolve the complaint with the complainant that it would have to submit the required documentary evidence to support such response.

21. The respondent elected not to resolve the complaint with the complainants and to instead respond to the allegations. This response was received from the respondent on 17 October 2018. In its response to this Office, the respondent primarily repeated the statements and claims it made in the response it sent to the complainants and in fact requested this Office to read these responses together. The respondent maintained that it was not to blame for the loss suffered by the complainants.

22. Having considered the response, this Office was of the view that the response was inadequate, that it failed to adequately address the allegations raised by complainants and since the matter remained unresolved, this Office recommended to the respondent that it settle the matter with the complainants. The respondent was advised that this Office was of the view that it had failed to discharge the duties placed on it by some of the provisions of the General Code of Conduct for

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Authorised Financial Services Providers and Representatives (the General Code). In particular, the respondent was advised that it appeared from the complaint and consequent responses that when the broker rendered the financial service to the complainants that she did not comply with sections 2 and 3(1)(d) of the General Code. This recommendation to the respondent is dated 17 January 2019 and the respondent was given until 31 January 2019 to respond. The respondent was advised that should the matter not have been resolved by 31 January 2019, that this Office may issue a notice in terms of section 27(4) of the FAIS Act.

23. On 30 January 2019, this Office received a response to its recommendation of 17 January 2019. In this response, the respondent denies that it failed to render the financial service to the complainants in accordance with the General Code. The respondent claims that the advisor had taken the complainants' financial position into consideration when it recommended the medical aid plan from Discovery and indicated that the complainants were aware of the waiting periods applicable to the cover. This Office however only has documentary proof of the disclosures that were made to the complainants, regarding waiting periods, when the second complainant's application to join the medical aid scheme was approved and therefore only has evidence of the complainants receiving an explanation of the waiting periods as they concerned the second complainant's membership. The disclosures not only preceded baby Steenkamp's birth but also bear no relevance to the complaint because they related to a known pre-existing condition.

24. The respondent also referred to how the complainants were immediately provided with the application form to add a dependent when it was requested from the advisor. According to the respondent, this is evidence that the advisor 'fulfilled her duty and acted with due care, skill and

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integrity'. The respondent claims that the duty to act with care and skill does not mean that parents are divested of the responsibility they bear to ensure that their child has medical aid cover if the parent can afford the medical aid cover. The respondent however later admits that the form was not completed correctly after the complainants sought the advisor's help in order to complete the form but was silent on how soon after the application form was sent to Discovery after it was completed. The relevance of this will become apparent later in this recommendation.

25. According to the respondent, it was '*under no duty and had no responsibility to add Malan as a dependent within the 90 days, as the Steenkamps did not select the option to activate this cover*'. To support this claim, the respondent refers to the fact that the application form was only completed in December 2018 and that when it was completed, the complainants selected to have the policy start in January 2018. The respondent makes this claim even though the complainants not only expressed a desire to add baby Steenkamp to the plan within the 90 days, on 11 November 2018, but that the email from the complainant constituted an instruction to the respondent to add their child as a dependent on the plan. It is therefore untrue that the complainants had never indicated to the advisor that they wish for the plan to commence before 1 January 2018.

26. Having reviewed the respondent's response of 30 January 2019, this Office was of the view that the respondent's assertions again, did not adequately address the complaint. This Office thus issued a notice to the respondent in terms of section 27(4) of the FAIS Act, dated 7 May 2019, in which notice the respondent was advised that the complaint had been accepted for a formal

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investigation, that the respondent was required to provide this Office with its formal statement and that on receipt of the said statement, this Office would commence its investigation of the matter. This Office, in the section 27(4) notice, again referred the respondent to the provisions of the General Code of Conduct with which its advisor was required to comply when rendering the financial service to the complainants and which this Office was of the view the respondent had failed to discharge.

27. In response to the section 27(4) notice (the notice), the respondent repeated the statements it had already made to this Office. These included that the complainants were allegedly advised that baby Steenkamp must be registered with the medical aid within 90 days of his birth, that the complainants were not provided with a 'new-born registration form' when they informed the advisor that they wanted to add baby Steenkamp to the medical aid plan because the contributions would have been backdated to baby Steenkamp's date of birth, that the complainants selected the most affordable plan and the advisor was cognisant of their financial constraints which is why she provided them with the form that would not require that the contributions to the medical aid be backdated.

28. The respondent also refers to an email the advisor sent to the complainants on 14 July 2017 in which the complainants were advised that '*Malan sal wel dadelik dekking geniet ek het dit so bevestig*'. Translated this means 'Malan will enjoy cover immediately I confirmed it that way'. The respondent claims that while this statement can be construed negatively against it, that if the statement is read with the discussions that the complainants had with the advisor, that it shows '*that our advisor did everything possible to explain to the first-time parents exactly what they*

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needed to know considering their product experience and objectives'. Except, this Office has never received copies of these discussions that the respondent has repeatedly referred to even though the respondent has been advised, repeatedly by this Office, that it was mandated by sections 3(2)(a) and 9 of the General Code to keep these records. Rather than make the records available, the respondent claims that the complainants' actions are 'evidence enough'. In saying this, the respondent seems not to understand that in light of the veracity of the complaint and previous correspondence sent to it by this Office, that it bears the burden of proof and remains steadfast in its view that it dutifully discharged the duties placed on it by the General Code even though it has failed and/or refused to provide this Office with the proof required to prove this.

E. ANALYSIS

29. There are in essence two questions that need to be decided in this complaint, the answers to which will reveal whether the respondent should in deed be held liable for the complainant's loss or not.

30. The first is whether the complainants are to blame for the loss because:

    (a) they opted to have baby Steenkamp added to the plan effective February 2018 and not January 2018, when the option to change the date was presented to them; and/or

    (b) they did not disclose to Discovery that they had received medical advice regarding baby Steenkamp's cranial sutures before the date on which he was added to the plan.

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31. The second question is whether the complainants were advised of the ’90-day rule’ by the respondent in the manner envisaged by the General Code and if they were not, whether this is what caused the complainant’s loss.

Non-disclosure of material information before adding baby Steenkamp to the medical aid plan

32. Baby Steenkamp entered the plan on 1 February 2018, but prior to that, there were already noted concerns about the way his cranial sutures were healing and he was already primed to undergo a CT scan. None of this was however disclosed to Discovery before 1 February 2018. Discovery only learnt that baby Steenkamp presented with symptoms for Craniosynostosis before the date of entry when it investigated the request it received from baby Steenkamp’s doctor for baby Steenkamp to undergo surgery to treat the deformity. Discovery submitted the request to its Non-Disclosure Team and asked that they investigate whether the complainants had failed to disclose information material to their application for cover. Discovery requested the investigation because the request for the treatment had been received only 7 days after baby Steenkamp’s entry to the plan.

33. On conclusion of its investigation, the Non-Disclosure Team found that the initial comments from the nurse who attended to baby Steenkamp during his 14-week visit constituted a ‘diagnosis’. Discovery therefore found that baby Steenkamp was first diagnosed with Craniosynostosis before his entry on the plan. The Non-Disclosure Team found that the diagnosis was however not disclosed to Discovery at application stage. Instead, the initial form on which the advisor had

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disclosed that baby Steenkamp had pre-existing medical conditions had been amended to read that he had none.

34. In light of these findings, Discovery rejected the request for authorisation, found that the non-disclosure was material and voided the cover in respect of baby Steenkamp from inception. The complainants lodged an appeal against the decision on the grounds that at the date of entry onto the plan, baby Steenkamp had not been diagnosed with Craniosynostosis but that the diagnosis came after 1 February 2018, after the CT scan. The complainants argued that neither the nurse who referred baby Steenkamp to a doctor nor the doctor who prescribed that he undergo a CT scan, diagnosed baby Steenkamp with Craniosynostosis and that all they did was raise concerns about how his cranial sutures were healing. Discovery however upheld its decision to both reject the request for authorisation and remove baby Steenkamp from the plan because even though the diagnosis was only made in February 2018, the complainants were aware of the symptoms before the date of entry but made no point to disclose this in the application form or before the date of entry, as required of them.

35. According to the respondent, the complainants are entirely to blame for Discovery's decision to reject the request for authorisation and to cancel the cover because the respondent claims that the complainants did not disclose the information to them either. Except, in the email the advisor received from the second complainant on 8 January 2018, in which the second complainant queried whether baby Steenkamp had been added to the plan or not, the second complainant followed her question by stating that baby Steenkamp '*has to undergo scans for his head*' (translated from Afrikaans). The respondent acknowledges that the advisor received and read the

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email and the respondent was therefore at least aware that there were concerns regarding baby Steenkamp's health from 8 January 2018. Yet, the advisor did not probe further and enquire from the complainants 'why' baby Steenkamp was required to undergo 'scans'. No additional information was sought from the complainants regarding baby Steenkamp's health including whether the 'scans' were a precautionary measure or were necessitated by a suspected health condition.

36. Instead, the advisor sent the application form completed in December 2017, as is, to Discovery. The advisor did this even though she not only had an opportunity to update the application form but was required, by section 7(1)(d)(i) of the General Code, to inform the complainants of their obligation to provide all materials facts related to the application, to Discovery. Section 7(1)(d)(i) of the General Code provides that a provider of financial services, other than a direct marketer must '*fully inform a client in regard to the completion or submission of any transaction requirement that all material facts must be accurately and properly disclosed, and that the accuracy and completeness of all answers, statements, or other information provided by or on behalf of the client, are the client's own responsibility*.' There was no correspondence received from the respondent in which compliance with section 7(1)(d)(i) of the General Code is shown.

37. The advisor had a duty to ensure that the representations made to Discovery were correct but did not amend the application form even though she knew that the information which she had now become aware of was not disclosed in the application form and even though she knew that the information **must** be disclosed. It is therefore untruthful for the respondent to state that the

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advisor was not aware that there might be some concerns regarding baby Steenkamp's health before the form was sent to Discovery and the claims that the complainants discovered that baby Steenkamp had a 'health condition' while the second complainant was pregnant are also unfounded. It is more probable, in keeping with the respondent's allegations, that if the complainants knew about the defect prior to the birth, that they would have reacted with as much haste then as they seem to have responded when the concerns were brought to their attention.

38. The respondent was in possession of the information prior to submission of the application form and amended the application form before it was sent to Discovery but did not caution the complainants as the General Code required. How, in the absence of this, could the complainants have known that they were obligated to make the disclosure to Discovery? I would posit that, no, the complainants would not have known that they were obligated to make the disclosure to Discovery unless advised to do so by the respondent. The complainants relied on the advisor to assist them complete the application form, trusted that the advice they had received on how this must be done was accurate and shared the information requested from them with the advisor, before the form was submitted to Discovery. The complainants were completely reliant on the advisor.

39. This Office enquired from Discovery if the authorisation would have been granted if the date had not been amended to February 2018 and Discovery advised that it cannot say with certainty whether or not the request would have been approved. Discovery advised that the request would have been submitted to its Non-Disclosure Team, given how soon the request would have come after the start date, and that the Non-Disclosure Team would have '*probed deeper to determine*

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if the member knew about the symptoms prior 01 Jan 2018 or prior to the date of confirmation that the "yes" answers on the Health Application were incorrect'.

40. While there is no evidence that the complainants knew or suspected that baby Steenkamp had a birthing defect before 1 January 2018, it is also unlikely that an investigation by the Non-Disclosure Team in January 2018 would have led to the same findings as the February 2018 investigation if the application form had been submitted during December 2017 since there concerns raises by the nurse would have come after baby Steenkamp's entry to the scheme. It seems unlikely then that the request for authorisation would have suffered the same fate.

41. The next vital question to answer in this complaint is whether the advice the complainants received from the respondent was appropriate to their need for a product that would cover their child from birth.

42. We understand from information provided by Discovery and from the respondent's admissions, that the assurance the complainants sought from the cover required that baby Steenkamp enter the plan within 90 days of his birth and that the complainants pay the contributions from the month during which he was born. On the one hand, the respondent avers that the complainants were advised of the above and that they failed to 'indicate' that they wanted to exercise this option. No records evidencing these claims were however forthcoming from the respondent. On the other hand, the respondent claims that the advisor sent the form to add a beneficiary when the complainants informed her that they want to add baby Steenkamp to the plan instead of the form to add a new-born baby because the complainants did not have the means to pay the

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backdated premiums. The respondent claims that the advice from the advisor took into account the complainant's financial position and thus claims that the advice was appropriate. The complainants however deny that they would have been unable to afford the contributions and claim that they acted on the advice they received because they did not understand the implications of doing so.

43. What is most alarming to me is that the advisor did not so much as place the option to add baby Steenkamp to the complainants when she ad an opportunity to do so. Even if the advisor was of the view that it was best for the complainants not to pay backdated contributions because of their financial circumstances, she still had a responsibility to place the options before the complainants, to inform the complainants of her recommendation as it concerns these options and then to allow the complainants to decide for themselves whether to accept the recommendation/s or not. The advisor was also required to ensure that the complainants understood the advice and that they were placed in a position to make an informed decision.

Were the complainant advised of the '90-day rule' in the manner envisaged by the General Code

44. The complainants' description of what they understood about the 90-day rule is a far cry form what it actually is. So even if, as the respondent claims, the complainants were advised about the rule, given what the complainants understood about it, the advisor seems not to have taken the time to ensure that they understood what it actually was. In light of this, how can it be said that the complainants understood the advice and that they were placed in a position to make an informed decision?

45. The respondent's responses over time are weighed down by inconsistency. The respondent makes one allegation in a response and a different allegation in another response. As such, rather than lead this Office to the conclusion that the respondent is being truthful, the responses do the opposite. It does not aid the respondent that it is not in possession of the documents it needs to support its averments. Documents it is required by law to keep. The 'proof' that the respondent has sent include the invite to the initial meeting that took place between it and the complainants, the quotations received from the various medical schemes and the email in which the advisor informed the complainants that 'Malan will enjoy coverage immediately, I confirmed it that way' (translated from Afrikaans). The allegation that the complainants were provided with accurate information regarding the '90-day rule' can quite clearly not be found in any of the aforementioned 'proof'.

46. In light of the above, I am not satisfied that the respondent discharged the duties imposed on it by the General Code and are of the view that it contravened various sections of the General Code including the following sections; 3(2)(a), 7(a)(1), 8(2), 9 and 2. That alone is however not enough to determine that the respondent must be held liable for the loss suffered by the complainants. There remains the question of whether or not the respondent's failure to comply with the General Code caused the complainants to suffer the loss complained of.

F. CAUSATION

47. As indicated above, the respondent denies that it is the cause of the complainants' loss but claims that the complainants, through their decisions, caused their own loss. To determine if the

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respondent caused the loss, we must first consider if, 'but-for' the actions or omissions of the respondent, the loss would have ensued. If the question is answered in the negative, then the respondent cannot be said to have caused the loss. If the question is however answered in the positive, we must turn to the second part of the causation enquiry which asks whether the respondent's actions or omissions are not too remote from the loss suffered by the complainants.

48. In the preceding paragraphs, I have made repeated reference to the duties that the respondent bore when providing the financial service to the complainants, including the duty to advise the complainants of the rule applicable to adding a new-born baby to an existing medical aid policy if the main member intends to do so without the baby being subject to medical underwriting. I have also mentioned that while the respondent claims that this information was provided to the complainant, the information which the complainants claim was provided to them differs materially from that which the respondent claims was provided to the complainants. The respondent has been unable or unwilling to provide the record of the advice provided to the complainants which would settle the dispute regarding which of the versions offered by the parties is true and which is not even though the respondent has a legal obligation to do so.

49. In addition, the respondent did not timeously execute the instruction received from the complainants in that the application form to add baby Steenkamp to the policy was only sent to Discovery in January 2018 even though it was completed in December 2018. The apparent failure to provide advice on the 90-day rule and/or to timeously submit the application form are evidently a factual cause of the complainants' loss. Whether or not the respondent is the legal cause of the

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loss depends on whether there is a sufficiently close relationship between the factual cause and the consequent loss to give rise to legal liability[2]. If the respondent's responses to the complaint and the correspondence addressed to it by this Office are to be accepted, even if it is the factual cause of the loss, the complainants are the legal cause of the loss. According to the respondent, the complainants are the ones who failed to act on the alleged advice given to them by the respondent regarding the 90-day rule and chose to have the start date amended to February 2018 in order to avoid paying double premiums in January 2018.

50. There is however no evidence that the complainants received the alleged advice and when the inception date was amended, the policy had already incepted and the benefits had become available to baby Steenkamp. Yet, the respondent still asked the complainants if they wished to amend the date and did so it seems, without advising them of the consequences. Contrary to the respondent's claims then, it does not seem that there was any act or failure to act by the complainant, which sufficiently removed the respondent's actions from loss so as to render the respondent's actions too far removed from the loss. The complainant's sought out the cover prior to their child's birth because, as the both the complainants and the respondent agree, they wanted to ensure that baby Steenkamp would have access to the medical care he may need from birth. It was understood that the second complainant was not the intended recipient of the medical cover but her application to Discovery was intended as a conduit to ensure that baby Steenkamp had the cover sought by the respondents. Even though this was well known to the respondent, its actions do not point to the fact that the care that should have been taken to

[2] Guardrisk Insurance Company Limited v Café Chameleon CC [2021] 1 All SA 707 (SCA).

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provide the cover the complainants needed was taken. I am satisfied that the respondent is both the factual and legal cause of the complainants' loss and as such make the following recommendation.

E. RECOMMENDATION

51. The FAIS Ombud recommends that respondents compensate the first and second complainant for their loss in the amount of 168 054,33.

52. The respondents are invited to revert to this Office within TEN (10) working days with their response to this recommendation. Failure to respond with cogent reasons will result in the recommendation becoming a final determination in terms of Section 28 (1) of the FAIS Act[3].

Kind regards

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THOBILE MASINA
ASSISTANT OMBUD

[3] *"The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5)(c) has not been accepted by all parties concerned, make a final determination, which may include-*
(a) the dismissal of the complaint; or
(b) the upholding of the complaint, wholly or partially…."

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