

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

CASE NO: FAIS 07648/12-13 FS 3

In the matter between:

WILTASH MUSIEK CC

Complainant

and

TENEO FINANCIAL SERVICES CC

First Respondent

CHRISTIAAN STEPHANUS LESSING

Second Respondent

**DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL
ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS Act')**

A. INTRODUCTION

- [1] Complainant is a provider of musical performances, in particular Gospel music. This requires frequent travel around South Africa. The necessary equipment is transported in either Complainant's vehicle or attached trailer.
- [2] Whilst so engaged and overnighting at a guesthouse in a small town, Complainant's musical equipment was stolen out of a locked Mercedes Benz Vito vehicle. The vehicle had been parked outside the guesthouse on the evening of the 22nd September 2012.

- [3] The subsequent claim was rejected by the insurer, Mutual & Federal, on the basis that the insured property had been left in the vehicle overnight, without the vehicle being housed in a securely locked building, as required by the policy terms and conditions.
- [4] Respondent was Complainant's financial adviser in respect of the Mutual & Federal policy.
- [5] Due to the nature of Complainant's work, it was material that such an eventuality be covered.
- [6] The crux of the complaint therefore relates to the advice which Complainant received from Respondent. In particular the allegation by Complainant that it was advised and assured by Respondent on numerous occasions, that it mattered not where the vehicle was parked, merely that the motor vehicle or trailer was locked and that there was forced entry.
- [7] The rejection of the claim not only resulted in a loss but compromised Complainant's income generation ability going forward. Complainant holds Respondent accountable for the amount which would have paid out had the claim been successful.

B. THE PARTIES

- [8] Complainant is Wiltash Musiek CC, a close corporation with its registered office address being, 73A Bree Street Parys. Complainant is represented by Mr Willem Johannes Joubert an adult male, whose further particulars are known to the office.

[9] For convenience I refer to Complainant and representative collectively as Complainant.

[10] First respondent is Teneo Financial Services CC, a close corporation duly incorporated in terms of South African laws, with its registered address being 1027 Martha Street, Eldoraigne, Centurion. Teneo is a registered financial service provider with license number 31735.

[11] Second respondent is Mr Christiaan Stephanus Lessing, a member and representative¹ of first respondent; residing at 1027 Martha Street, Eldoraigne, Centurion. At all material times, second respondent rendered advice to Complainant on behalf of the first respondent.

[12] For convenience I refer to the first and second respondent collectively as Respondent.

C. THE COMPLAINT

[13] The very nature of Complainant's business is key to the complaint. In this case, the musical equipment needs to be transported to various venues throughout the country. It is the risks posed, both during conveyance and whilst overnighting, which Complainant sought to insure.

[14] Accordingly, Complainant contends that from the very inception of its dealings with Respondent, these risks, in particular the manner in which it might be exposed at shopping malls and guest houses were imparted to Respondent.

[15] Accommodation would usually be provided by those engaging Complainant's

¹ At all relevant times the 2nd Respondent was also a key individual of the 1st Respondent

services at any particular time. For the most part Complainant had to accept what was provided, and was in no position to prescribe the quality or security thereof.

[16] It is for this reason that Complainant engaged Respondent to ensure that its equipment was covered for all eventualities and circumstances. In the result, the equipment was insured under the Electronic Equipment section of a Mutual & Federal Multimark policy.

[17] Respondent assured Complainant on numerous occasions that having confirmed it with Mutual & Federal's head office, Complainant was covered no matter where it parked regardless of whether the equipment was in the trailer or vehicle. The only prerequisite being that the vehicle or trailer be locked and that there be forced entry.

[18] At no stage was Complainant informed that the trailer had to be in a locked building, nor was any discussion held as to a specific clause pertaining thereto.

[19] This type of cover was not available with Complainant's previous broker. Being sceptical, Complainant on many occasions reaffirmed the terms of cover with Respondent.

[20] Prior to this, Complainant was in the habit of always offloading its equipment and storing it in the house or guesthouse.

[21] The theft occurred on the night of the 22nd September 2009 whilst Complainant stayed overnight in a guesthouse in Lady Grey. Complainant's vehicle, which was parked outside, was broken into and musical equipment stolen.

[22] The ensuing claim was rejected in a letter from Mutual & Federal dated the 12th

November 2012. The basis of the rejection being that;

‘the vehicle was left outside in the open yard overnight and not housed in a securely locked building. As such, section 10 (a) of the Electronic Equipment Section of the Multisure policy became applicable. This reads as follows:

‘10. The company shall not indemnify the insured for the theft of the property insured from any motor vehicle where the property insured has been (a) left in the motor vehicle overnight unless the vehicle is housed in a securely locked building and entry to such building is accompanied by forcible and violent entry or exit...’

[23] Complainant contends that that Respondent expressed surprise when informed that the assessor had an issue with the vehicle not being in a locked building and appeared to be unfamiliar with the relevant clause.

[24] Complainant holds Respondent accountable for its loss.

[25] Having been unable to resolve the matter with Respondent, Complainant then submitted a complaint to the FAIS Ombud.

D. RESPONDENT’S REPLY

[26] In compliance with Rule 6 (b) of the Rules on Proceedings of the FAIS Ombud’s Office, (the Rules), the Office referred the complaint to Respondent in order to afford them an opportunity to resolve the complaint. The complaint remained unresolved; and Respondent was then required to revert to the Office with its full version of events, including a copy of the file of papers relating to the complaint.

[27] Respondent’s version follows:

- 27.1. Being fully aware that Complainant would from time to time travel away from the risk address, and being unsure on how to advise the client regarding its electronic equipment, Respondent engaged a manager of Mutual & Federal about Complainant's risk and insurance needs.
- 27.2. To this end Respondent provided a copy of its email to Mutual & Federal dated the 10th March 2009 and the subsequent reply on the 11th March 2009.
- 27.3. The relevant portion of Respondent's email makes mention of up to R250 000 Rand's worth of sound equipment being used away from the premises. It goes on to state that the equipment is transported in one of the trailers and enquires as to how it should be covered.
- 27.4. The Mutual & Federal reply of the 11th March 2009, as directly translated from Afrikaans reads as follows:
- 'Attached quotations as requested. The electronic equipment is covered away from the premises, I attach the policy wording details of cover.'*
- 27.5. Having taken Complainant's needs into account in terms of section 8(1) of the Code, the sound equipment was covered under the electronic equipment section of the Mutual & Federal policy. The only requirement being that it needed to be kept in a locked vehicle, behind a locked gate, with either forced entry/exit to the gate or vehicle²;
- 27.6. In an earlier response of the 7th March 2013, Respondent states that; *'The Complainant read and understood that his music instruments will only be*

² As per Respondent's version dated the 23rd July 2014

covered if: These electronic equipment are locked up overnight in locked up premises as per Section 9³ of the Application which he and his Accountant wife signed.' (copied verbatim)

- 27.7. Respondent refers to information having been gathered regarding Complainant's insurance history and needs, as well as a copy of what Respondent terms a personal fact finder with any extra information not mentioned on the old and existing policy schedules.
- 27.8. Respondent submits that there were shortcomings in Complainant's previous insurance, including an issue of apparent non-disclosure by the Complainant. Additionally Respondent submits that the existing policy at the time only provided for domestic use and not commercial. In effect Complainant was uninsured, so contends Respondent.
- 27.9. Having pointed out these issues to Complainant, Respondent in turn proposed a Mutual & Federal Multimark policy to cater for Complainant's requirements plus as a Mutual & Federal Allsure Domestic policy to cover the Household Contents as well as all risk items;
- 27.10. All documentation was signed and completed on the 18th March 2009. In terms of the 'Client Advice Record', the client acknowledged that the quotes were explained and all main terms and conditions were identified as required by Section 7(1) (c) (vii) of the Code. The client initialled at each of these statements;

³ The correct reference is section 10 as referred to by Mutual & Federal, Respondents reference to section 9 is an understandable error. The number 10 for some reason seems to be missing on the Respondents doc.

- 27.11. Complainant's Policy Wording and Schedule were hand delivered on the 13th May 2009. The cover letter specifically requested that Complainant peruse the documents to ensure that they met requirements. Complainant was also requested to familiarise itself with the terms and the exclusions.
- 27.12. On the 24th June 2009, Respondent's office sent an email to Complainant with a list of the specified electronic equipment. I note that whilst this email attached the conditions of the policy relating to the exclusions under section A thereof, it makes no reference to these exclusions within the body of the email;
- 27.13. During April 2012 the Respondent visited Complainant in order to review the policy.
- 27.14. In conclusion Respondent submits that the advice rendered was fully in line with all compliance documentation. Further, that Complainant has benefited from said advice in the amount of R215 568.74, being claims which paid out, as opposed to being rejected as would have occurred prior to Respondent's intervention.

E. DETERMINATION

[28] It is common cause that one of the primary identified needs was for coverage of Complainant's musical equipment whilst away from the main premises. That Respondent was alive to these concerns, is not in dispute.

[29] In any event the very nature of Complainant's business, namely, that of a travelling professional musician made such risks self-evident. It would be

expected that these risks be discussed as part of the information gathering process required in terms of section 8 (1) (a) of the Code. This requires that a provider prior to providing a client with advice:

'take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;'

[30] What is in dispute however, is Complainant's version that it was assured that its musical equipment was covered whilst at a guest house, so long as it was in a locked vehicle or trailer and there was forced entry. This contrasts with Respondent's version that Complainant was aware of the requirement that the equipment would only be covered if 'locked up overnight in locked up premises.'

[31] This requirement is indeed contained within paragraph 10 (a) of the electronic equipment section of the policy and is the basis for Mutual & Federal's letter of rejection dated the 12th November 2012. Please refer to paragraph 22 hereof.

[32] That paragraph 10 (a) was a material term of relevance to Complainant's particular circumstances is irrefutable.

[33] Without a discussion thereof, there is simply no way in which Respondent could have been said to have taken:

*'reasonable steps to ensure that the client understands the advice and that the client is in a position **to make an informed decision**'(my emphasis)*

[34] Further the above aligns with the requirements of section 7 (c) (vii) that the

⁴ Section 8 (2) of the Code.

provider;

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

*(vii) concise details of any special terms or conditions, exclusions of liability, waiting periods, loading, penalties, excesses **or circumstances in which benefits will not be provided;**' (my emphasis)*

[35] I have intentionally highlighted the requirements that Complainant be in a position to make an informed decision and that of providing full and appropriate information of circumstances in which benefits will not be provided.

[36] Given the relevance thereof, I would expect to see a reference to this as required by section 9 of the General Code. Section 9 (1) requires that:

'A provider must, subject to and in addition to the duties imposed by section 18 of the Act and section 3(2) of this Code, maintain a record of the advice furnished to a client as contemplated in section 8, which record must reflect the basis on which the advice was given, and in particular –

(a) a brief summary of the information and material on which the advice was based'

Yet nowhere in the record of advice or any documentation provided does it show instances in which Complainant will not be covered.

[37] The fact that Complainant wishes to ensure that his musical instruments are insured whilst on tour does not even appear to be recorded as part of the Record of Advice. The only reference to this requirement appears in Respondent's email

to Mutual & Federal dated the 10th March 2009 and the subsequent reply on the 11th March 2009⁵.

[38] The reply from Mutual & Federal states that the electronic equipment is covered whilst away from the premises and attaches a copy of the policy wording. No reference is made to the exclusions or how this might pertain to Complainant's circumstances.

[39] Respondents' version in paragraph 27.10, states that, in terms of the 'Client Advice Record' the client acknowledged that the quotes were explained and all main terms and conditions were identified as required by Section 7(1) (c) (vii) of the Code. This pertains to a generic pre-printed document. That the client initialled at each of these statements in no way indicates that the material aspects at issue were actually discussed.

[40] The relevant exclusion clauses are not discussed, highlighted, underlined or even signed.

[41] The duty to demonstrate that material terms were discussed rests with Respondent.

[42] The only apparent reference to exclusions is contained in the letter of the 13th May 2009 wherein Complainant is asked to familiarise itself with the terms and exclusions of the policy. In no way is Complainant's attention drawn to the material clauses.

[43] In light of all of the above I am not persuaded that as required by section 3 (1)

⁵ Paragraph 27.3 and 27.4

(a) (iii) of the Code that representations made and information provided to the client by Respondent are:

'adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client'

[44] Complainant argues that had it been so properly advised, he would have made arrangements to secure the equipment overnight in compliance with the policy terms and conditions.

[45] It is the failure of Respondent to render appropriate financial service that is in line with the requirements of the FAIS Act and Code that has caused Complainant's loss.

[46] For the record and Respondent's claim that had the equipment been insured under the all-risk section of the policy, the rate would have been 68.5% more expensive, it must be mentioned that enquiries were directed to Mutual & Federal. Their reply indicated that whilst the terms of the all-risk section may have made provision for cover in Complainant's circumstances, this was not assured in that underwriting requirements may have excluded such cover. This possible option is again not discussed or mentioned in the client advice record.

[47] All that remains is the consideration of quantum.

F. QUANTUM

[48] Mutual & Federal has provided the Office with a copy of its Assessor's report

dated the 2nd November 2012.

[49] A copy thereof was provided to Respondents for any comments they wished to make in respect thereof. With nothing forthcoming from Respondents, it would appear that the assessed amounts are in order.

[50] The report reflects a claim in the amount of R140 794.26, which after application of the applicable excess results in an assessed loss of R127 080.11.

G. ORDER

[50] In the premises the following order is made:

1. The complaint is upheld;
2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to Complainant the amount of R127 080.11.
3. Interest on the aforesaid amount at the rate of 9%, per annum, seven (7) days from the date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 5 DAY OF NOVEMBER 2015



NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS