

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FOC 4674/09-10/MP/3

In the matter between:-

AFRIKEET WILDLIFE PROMOTIONS C C

Complainant

and

COVERALL INSURANCE BROKERS (PTY) LTD

1st Respondent

KEVIN VERMEULEN

2nd Respondent

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

A. THE PARTIES

[1] Complainant is Afrikeet Wildlife Promotions CC, a close corporation duly incorporated in terms of South African laws with its principal place of business at 3883 Olifant Drive, Marloth, Park, Mpumalanga. Complainant is represented by Ian GavinStyer, (Styer) a member and an authorised representative of the complainant.

- [2] First respondent is Coverall Insurance Brokers (Pty) Ltd, (Coverall), a company duly incorporated in terms of South African laws with its principal place of business at unit 6 Ferndale Mews, 15 Dover Road, Ferndale, Gauteng. First respondent is also a licensed financial services provider in terms of the FAIS Act with license number 17614.
- [3] Second respondent is Kevin Vermeulen (Vermeulen), an adult male and key individual and authorised representative of 1st respondent. At all times material hereto, complainant dealt with Vermeulen. I refer to the 1st and 2nd respondents collectively as respondent in the determination. I also refer to Styer as complainant for the purpose of convenience.

B. THE BACKGROUND

- [4] During or about 1 July 2008 complainant purchased a supermarket business in Marloth Park. He estimates stock to have been about R1000 000.00 when he started. In order to insure the business assets, he called upon respondent, his broker of about 20 years. Respondent requested that complainant e-mail him a list of the assets and stock to be insured. This, complainant did. There is an allegation made by respondent (which is denied by complainant) that he e-mailed a quotation to complainant and upon acceptance of the quotation, placed cover. It is common cause that cover was provided by Zurich and in the same month a policy schedule was forwarded to complainant.
- [5] In December 2008, complainant increased his investment in the business by adding a bottle store to the same premises. Items added included cool rooms,

walk in freezers and stock. Complainant once again called upon respondent to assist him with insuring the additional assets. Updated documentation was forwarded to complainant. On 16 March 2009, a fire broke out from a shop next door to the complainant's supermarket. The fire was of such a magnitude that the entire shopping centre was a constructive total loss in less than one hour. A butchery, hardware store, restaurant and a bar in the same centre all burnt down. Complainant says, 'I lost my entire investment.'

[6] On 17 March 2009 complainant called respondent to inform him about the fire and was told that they (respondents) would arrange for an assessor to visit the premises. Respondent also indicated that they would handle the claim. On arrival, the assessor raised the point that the policy document did not state anywhere that the building had a thatch roof. Complainant apparently explained that he was never asked by anyone what the structure of the building was and neither was there any mention of the structure of the building in the policy schedule. Complainant explained that he was renting the building and had only insured his assets. In a letter dated 18 May 2009, Zurich informed complainant of the rejection of his claim due to non disclosure.

[7] On 20 May 2009, complainant received an urgent letter from respondent requesting certain information which respondent intended to use in preparing a motivation report to the insurers. The letter read:-

'Please let me have the following info urgently to enable us to prepare a motivation report to Zurich:

1. Date that the business was bought by you

2. *Date that you physically took business over*
3. *Did the business operate under a different name or did you retain the same name*
4. *Who were the existing/ previous Insurers of the business when you took it over*
5. *What fire prevention was in place (e.g. lightning conductors, roof coatings, fire walls etc)*
6. *Names of other shops/businesses in the centre/complex*
7. *Which of these were affected by the fire*
8. *Please draw a rough sketch layout of the centre/complex showing each shop*
9. *As far as you know, how was the fire started*
10. *ANY OTHER RELEVANT INFO.'*

[8] In response complainant acknowledged the e-mail and gave an undertaking that he would reply to the questions. However, complainant required some explanation from respondent. Thus, he wrote:

'Please explain to me what: by reason of non-disclosure means- non disclosure of what and by whom? Also we make no admission regarding your claim what does this mean?'

Respondent wrote back on the same day stating:

'Elize, as you know, Zurich are saying that you at no stage disclosed that the premises was a Thatched structure. This is material to the rating of the policy, as the Fire rate is loaded by as much as 300%for thatch risks depending on type of structure, protections etc). The second phrase means that they accept no liability at this stage, due to the non disclosure or any other reason.'

[9] In his reply complainant thanked respondent but pointed out that at no stage did respondent or anyone else enquire about the structure of the building and nowhere in the policy document is there reference to a thatch. Complainant once again questioned how he can be blamed for non disclosure. Respondent wrote back stating that they, (referring to himself and complainant) needed to convince the insurers that the non disclosure was not the contributing factor to the loss that occurred. He further added that with the information he requested for the motivation report, they could potentially make 'a pretty strong argument' in favour of the complainant.

[10] Further correspondence was exchanged between the parties with some letters directed to the insurer in which complainant queried the basis for the rejection of his claim. The matter however, was still not resolved. In a letter to the respondent dated 29 May 2009, complainant makes this point,

'You also fail to indicate what was not disclosed as I am not aware of any disclosure that I was required to make that I failed to make nor could I find any restrictions on the claim circumstances in the policy document provided to me.'

C. COMPLAINT

[11] The complainant's complaint may be summarised as follows:

[11.1] His relationship with respondent's Vermeulen dates back to about 20 years wherein complainant had been a client both in his personal capacity and in respect of his businesses.

[11.2] Upon purchasing the supermarket business, he called on respondent to assist him with insuring his stock and other assets for the business. All that respondent required of him was an e-mail setting out the items to be insured. When he expanded the business to include a bottle store, respondent sent him updated documentation. Complainant was satisfied that his assets were insured.

[11.3] When the fire broke out and destroyed the entire centre, complainant's claim was rejected on the basis of non disclosure. Complainant insists that he had no idea as a client what he needed to disclose. He, as requested by respondent, e-mailed to him the list of what he needed to insure and at no stage did the question of the structure or thatch ever arise during the rendering of the financial service. In addition, complainant states that he relied on the respondent as a professional to advise him of what he was required to disclose.

[11.4] Complainant further states that as a result of respondent's conduct, he has been denied indemnity under the policy. As far as complainant is concerned, he furnished respondent every detail he had requested in order to have his assets properly insured.

[11.5] As a result of respondent's failure to properly advise him and properly insure his assets, complainant claims he has lost an amount of R1 500 000.00 worth of assets.

[11.6] Complainant holds respondent liable for the loss of his life savings in the amount of R800 000¹.

D. RELIEF SOUGHT

[12] The complainant wants respondent to pay his claim of R800 000.00.

E. RESPONDENT'S VERSION

[13] This complaint was first referred to the Ombudsman for Short Term Insurance(OSTI). A detailed response was sent by respondent to that office. What follows is a summary:-

[13.1] Styer(the complainant) has been a client of the respondent both in his personal capacity and in respect of his business,Starpro marketing. His personal policy was underwritten by Zurich. In 2006,Styer relocated to Marloth Park where he purchased a house. When his first house was processed for the House Owner's cover, he queried the very high premium that was charged. Respondent explained to him that because the property had athatched roof the premium is loaded, and this would apply to the contents cover as well. During that time, complainant

¹ In order to bring the amount claimed within the jurisdiction of this Office, complainant decided to abandon the amount of R700 000.00.

mentioned that cover was too expensive. Respondent however recalls that cover was placed with Zurich. He concludes that 'he was therefore aware of the fact that Thatch risk carries a higher premium rate.'

[13.2] During August 2008 complainant called and informed respondent that he was purchasing a supermarket in the area and that he required a quotation to insure the business. Details of complainant's needs were relayed by complainant over the phone and a quotation was sent to him on 13 August 2008. Respondent further makes the point that there was never any mention that the premises had a thatch roof. Had he mentioned, respondent claims, he would have needed to know what protections were in place and the premium rates would have been suitably loaded as is the norm. The quotation was accepted on 28 August 2008.

[13.3] It was only on the 16 of March 2009 when fire broke that respondent first learnt that the premises had a thatch roof.

[13.4] In response to this Office, in his covering e-mail, Vermeulen stated that he was of the firm belief that Styer did not deliberately withhold the fact that the premises had a thatch roof from him or even Zurich. He believes it was just an oversight on his part as he was not insuring the building, but merely his own risk exposure, the contents of the premises. Respondent further adds that complainant mentioned this to him.

[13.5] He further states that complainant accepted the quotation on 29 August 2008. No proposal form was required as this was a business policy.

Closing instructions are prepared by the broker and presented to the insurer to issue the policy. Therefore, the policy was in accordance with the risk presented to them by Styer.

[13.6] Respondent further avers that Styer stated that 99 % of properties in Marloth Park are thatched. He questions why Styer did not mention this to him. He states that he is not familiar with the area. Respondent further clarifies the issue regarding the questions he asked after the fire. He states that the point of asking the questions was to prepare a motivation to Zurich. It was not a case of being 'WISE after the event.'

[13.7] Respondent concludes by stating that it could not be categorically proven that the existence of the thatch roof was a contributing factor in the entire complex being destroyed by the fire. The investigations showed that the fire was so intense that the complex would have burned down whether it had a thatch roof or not. He is still of the belief that the claim should be entertained by Zurich.

[13.8] Respondent further states that Zurich insures thatch risks. The businesses where the fire originated were insured with Zurich and the claim were settled.

[13.9] Respondent also mentioned that he responded to a single need in terms of the information provided and was not requested to provide advice or recommendation.

[13.10] He acted purely on Styer's instructions and therefore the provision of the clause 8 (1) (b) and 8 (1) (c) of the General Code of Conduct, (the

Code) do not apply in this instance. He further mentioned that Coverall does not have recording facilities hence he could not provide same.

F. ISSUES

[14] The issues are:-

[14.1] Whether there was a violation of the General Code of Conduct, (the Code) on the part of the respondents when rendering the financial services to complainant? Specifically, were any of respondents' duties as a provider rendering the financial services to complainant breached?

[14.2] Did such breach cause complainant's damage?

[14.3] Quantum

COMPLIANCE WITH THE GENERAL CODE

[15] It is now common cause that respondent never advised the complainant. On his own version, he merely asked complainant to send him the sums insured and values he required for insurance. To this end, respondent states that he acted purely on Styer's instructions, therefore clause 8 (1) (b) and 8 (1) (c) of the Code are not applicable. Respondent is missing the point here. The Code in clause 8 (4) (a) (i) to (iii) clearly states that where the provider has been unable to conduct such an analysis because of circumstances surrounding the case there was not sufficient time to do so, the provider must fully inform the client and ensure that the client understands that an analysis could not be

performed and there may be limitations on the appropriateness of the advice provided and that the client should take particular care to consider on its own whether the advice is appropriate considering the client's objectives, financial situation and particular needs.

[16] It is further common cause that no documentation was maintained in relation to the rendering of the financial service. In this regard, there is no proposal form, no quotation and no document of any sort to indicate the verbal communications between complainant and respondent. Respondent has indicated that no proposal form was required in the process as the policy in question was a business policy. He states that closing instructions are prepared by the broker and sent to the insurer to issue the policy. An unsubstantiated claim has also been made by respondent that he sent a quotation to complainant and upon acceptance placed the insurance. Complainant has denied this. The quotation furnished to this office is annexed hereto and marked "A" It is undated and there's no proof that it was ever sent to complainant. Not only is respondent admitting to having failed to advise complainant, I am also struck by the complete absence of any indication that he is aware of his duties as a provider when rendering a financial service to a client. On his own version, he did not comply with the Code.

[17] For his part, complainant has contended that it is respondent's failure to properly render the financial service that led to the insurers denying him the indemnity he would have enjoyed had respondent carried out his duties in accordance with the general duty of providers.

[18] Part II, section 2 of the Code provides that:

providers must at all times render financial services honestly, fairly, with **due skill, care and diligence, and in the interest of the clients and the integrity of the financial services industry.**

Section 3 (2) (a) (i) of the Code provides that providers must have appropriate procedures and systems in place to record such **verbal and written communications relating to a financial service rendered to a client** as are contemplated in the Act, this Code and any other Code drafted in terms of section 15 of the Act.

Part VI, 'Information about financial service', section 7 (1) provides that providers must:

(a) Provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision;

(b)

(c) In particular, at the earliest reasonable opportunity, provide where applicable full and appropriate information of the following:.....

(vii) concise details of any special terms of or conditions, **exclusions of liability**, waiting periods, loadings, penalties, excesses, **restrictions or circumstances in which benefits will not be provided.**

[19] On his own version, Respondent did not ask complainant anything regarding the nature or the structure of the building out of which the business is carried out. He asked complainant for a list of items and prices relevant to each item. When complainant expanded his business to include a bottle store, it still did not occur to the respondent that he had to do more than to request a list of what was being insured. Most importantly, complainant has made the point that it would not have occurred to him that he needed to mention anything about the building as he was only insuring his assets and not the building.

[20] In *Stander v Raubenheimer*², the court found that the broker was under a duty to elicit all material information from the insured and to convey that to the insurer. The court held that the broker knew that the contents of the plaintiff's house would not be covered if they were damaged or destroyed in a house with a thatched roof, but failed to ascertain from the insured whether his house had a thatched roof. The court's decision was that the broker breached its contractual obligation to ensure that the plaintiff's goods were covered.

As a professional broker of more than fifteen years, Respondent knows or ought to have known that one of the material issues that could affect cover is a thatch roof where such is not disclosed. Therefore, he ought to have pertinently asked complainant whether the premises have a thatched roof and further disclosed to complainant that cover may be denied if the structure has a thatched roof where such detail is not disclosed to the insurers. The responsibility to elicit this information rested solely with the respondent as a provider.

2. 1996 (2) SA 670 OPD

In his e-mail to complainant of 20 May 2009, respondent explains to complainant,

'Elize, as you know, Zurich are saying that you at no stage disclosed that the premises was a Thatched structure. This is material to the rating of the policy as the Fire rate is loaded by as much as 300 % for thatch risks depending on the of structure, protections etc)'. Disclosure of material information cannot be done when a claim is refused. Instead of vacillating between accusing complainant of withholding material information from the insurers (refer to paragraph 13.1 of this determination) and entertaining the idea that it was an oversight on complainant's part and not a deliberate act that the thatch was not disclosed, (paragraph 13.4), respondent must take responsibility for failing to discharge on his duties as a provider.

[21] In his letter to OSTI, respondent makes the statement that as early as 2006, complainant was aware that 'a Thatch risk carries a higher premium'. There are at least two problems with the statement. One, it simply does not absolve respondent from carrying out his duties as a provider. Two, the statement is not supported by anything. On his own version, it was in 2006 when complainant queried the high premium of his house. At that point he explained that, 'because the property had a thatched roof the premium is loaded and this would apply to the contents cover as well'. This statement cannot be construed to mean that complainant knew that he had to inform respondent when he was insuring his stock and assets that the premises of the supermarket had a thatched roof. No evidence has been submitted to this Office indicating the questions that were specifically put to the complainant as means of eliciting appropriate information in order to arrive at a solution that

would address the needs of the complainant. The only rational conclusion to draw, and this is supported by respondent's version, is that no attempt was made to disclose any material information. Respondent in my view failed in his duty as a provider to render the financial service in line with the general duty as set out in section 2 of the Code.

G. FINDINGS

[22] Respondent failed to elicit material information from complainant, during the rendering of financial services, including the nature of the building out of which complainant ran his supermarket business.

[23] Respondent failed to comply with the provisions of the code in particular the duty to render financial services honestly, fairly, with due skill, care and diligence.

[24] Respondent failed to ensure that complainant's assets were properly covered.

[25] On the facts before this Office, there is no evidence contradicting complainant's claim that had respondent rendered the financial service properly, complainant would have enjoyed indemnity under the Zurich policy. Accordingly, respondent's unlawful and negligent conduct was the sole cause of the insurer's rejection of complainant's claim. Respondent is liable to compensate complainant.

H. QUANTUM

[26] Complainant had insured his assets for R 1500 000. He has agreed to abandon the amount of R700 000 to bring the complaint within the jurisdiction of this Office. Respondents have advanced no contradictory evidence to this Office with regard to the amounts claimed.

THE ORDER

In the premises, the following order is made:

1. The complaint is upheld;
2. Respondents are hereby ordered to pay, jointly and severally, the one paying the other to be absolved, to complainants the amount of R800 000;
3. Interest at the rate of 15.5 % , seven (7) days from date of this order to date of final payment;
4. Respondents are to pay a case fee of R 1000, 00 to this office within 30 days of date of this order.

DATED AT PRETORIA ON THIS THE 4th DAY OF OCTOBER 2011.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS