

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

Case Number: FOC 3629/06-07/KZN (3)

In the matter between:

ANANG KONSTRUKSIE (HAROLD WYNAND KRIEL)

Complainant

and

CONRAD SCHOEMAN MAKELAARS

Respondent

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

A. INTRODUCTION

Parties

- [1] The Complainant is Anang Konstruksie, duly represented by Mrs Lizeka Kriel, engaged in building construction, of 23 Kenneth Street, Oak Park, Pietermaritzburg, Kwa-Zulu Natal. From the documents at my disposal it would appear that Anang Konstruksie is the trading name of Mr Harold Wynand Kriel, the husband of Lizeka Kriel.
- [2] The Respondent is Conrad Schoeman conducting business as Conrad Schoeman Makelaars, a firm, which is an authorised financial service provider ('FSP') in terms of the FAIS Act, carrying on business as such at 36 Murray Street, Bethlehem, Free State.

B. THE BACKGROUND

[3] The complainant had in place a short-term insurance policy, namely, business insurance whilst Mrs Kriel had a personal insurance policy in her personal capacity. The business policy was in the name of Anang Construction.

[4] There were two complaints.

4.1 One, that complainant had not been sufficiently covered under the theft section of the business policy. He suffered financial loss when he lodged a claim and was only partially compensated by the insurer.

4.2 The other, that a motor vehicle that complainant's wife used for business purposes had been covered under the personal insurance policy for about a year. He alleges that had a claim arisen it would have been repudiated and he would have suffered loss. He alleges negligence on the part of the respondent in rendering the financial service.

[5] The cover for theft on the business policy was limited to R5 000.00. A condition of the theft cover was that there be violent and forced entry into, or exit from, the premises when theft occurred.

[6] The complainant moved from Cape Town to Pietermaritzburg in April 2006. Between the evening of 15 September 2006 and the morning of 16 September certain equipment was apparently stolen from the site where complainant was contracted to do construction work.

[7] The complainant lodged a claim with Mutual & Federal Insurance Company ('M&F') for R52 257.60 for the equipment. M&F conducted an investigation into the circumstances surrounding the theft. The investigation revealed that an employee (one Botha) of the complainant had, under false pretences, obtained from the foreman the keys to the site where the equipment was kept,

removed various items and disappeared together with his employer's vehicle which he had been allowed to use in the course of his employment.

- [8] Botha was subsequently arrested by the police and the vehicle recovered.
- [9] Of the various items stolen, only one was covered under the 'All Risks' section of the policy. M&F compensated the complainant for only the one item in the amount of R5 625.00. M&F held that since there was no forced or violent entry to the site no claim could be entertained under the theft section of the policy for the balance of the equipment. However, upon intercession by the respondent, M&F made a further *ex-gratia* payment of R10 000.00 to the complainant.
- [10] Complainant says he does not blame M&F but lays the blame squarely on the respondent for his loss as far as the business policy is concerned and for potential loss as far as the personal policy is concerned.
- [11] Complainant lodged complaints with the Ombudsman for Short Term Insurance who in turn referred them to this Office as they appeared to be advice related matters.

The relief sought by Complainant

- [12] The complainant seeks compensation for the difference of the amount of his loss and the amount he received from the insurer due to theft of various items under his business policy. He also wants the premiums paid under the personal policy for his wife's car to be refunded by the respondent.

Investigation by this Office

- [13] The respondent was asked to comment on the complaint. He furnished his version of events which were referred to the complainant. Complainant disputed some aspects of respondent's version but, as will be apparent later in this determination, ultimately they are not material to the conclusion I arrive at.
- [14] Complainant alleges the respondent wrote up the policies. This is denied by respondent, who says he merely caused changes to be effected on request of the complainant to policies which were initially written up by one Anton Williams of M&F at the request of a C J Krause from Old Mutual. The respondent's version is confirmed by two documents he furnished. A 'Kommersiele Kwotasie en Aansoek vir Versekering' signed by the complainant and dated 29 January 2005 on which the broker is stated to be C J Krause. The other is an Old Mutual fax, dated 11 February 2005, from 'Pirrie Krause' (presumably the same C J Krause) addressed to Anton Williams at M&F requesting that a BMW motor vehicle be added to the Anang Construction policy, i.e. the business policy.
- [15] Respondent says it was only during October, 2005 that Anton Williams (M&F) introduced the respondent to the complainant, who wanted insurance cover for a truck he intended to hire. The respondent duly arranged cover, the premium was paid and, when the hire period ended, the cover was cancelled.
- [16] Respondent thereafter asked complainant if he could handle complainant's existing business and personal insurance portfolio. After a number of discussions the complainant agreed but pertinently told him that the business policy was structured between him and Anton Williams of M&F and no alterations or amendments were to be effected to the policy without his consent. The complainant's view was that brokers were thieves as he was at the time involved in litigation against a broker and an insurance company.
- [17] The complainant lived in Cape Town at the time while the respondent was based in Bethlehem. The respondent told him that all discussions would have

to take place telephonically in view of the long distance between them. The complainant agreed but repeated that he (complainant) would decide how the policy was structured due to his previous experience with brokers.

[18] Respondent was duly appointed as complainant's broker in terms of a broker's appointment note dated 23 November 2005 and he began servicing complainant's insurance needs as they changed from time to time, particularly in respect of his construction business policy. Complainant would request respondent to add or delete various items under the all risks section of the policy as and when his needs changed.

[19] Complainant alleges that respondent promised to visit him in Pietermaritzburg and make an inventory of his business and personal goods. Respondent denies it. In view of the conclusion I arrive at it is not necessary for me to determine this factual dispute.

The Issues

[20] The issues for determination are:

20.1 Whether the respondent was negligent in rendering a financial service in respect of the business policy and if so, whether he is liable for the difference between what complainant received from the insurer and his actual loss.

20.2 Whether the respondent was negligent in rendering a financial service in respect of the personal policy and if so, whether he is liable to refund the premiums paid to the insurer for the period during which it was covered under the personal policy instead of the business policy.

Determination and Reasons Therefore

Whether the respondent was negligent in rendering a financial service in respect of the business policy and if so, whether he is liable for the difference between what complainant received from the insurer and his actual loss.

[21] It is quite clear from the facts before me that the complainant exercised active control over the structure and content of the policy. He does not dispute this. He would ask the respondent to add or remove items under the 'All Risks' section as his needs changed. He knew what equipment he had at any given time – something which the respondent could not know of his own accord.

[22] In any event, his complaint is not in relation to that section of the policy but rather that the theft cover was inadequate as a result of the respondent's negligent failure to inform him that the cover limit of R5 000.00 was not per item but the maximum. Complainant fails to appreciate that even if the theft cover had included all the items stolen it would not have availed him as there was no forced or violent entry to the premises. I therefore need not consider this aspect of the complaint any further.

Whether the respondent was negligent in rendering a financial service in respect of the personal policy and if so, whether he is liable to refund the premiums paid by the insurer for the period during which the BMW motor vehicle was covered under the personal policy instead of the business policy.

[23] Complainant submits that had a claim arisen in respect of the vehicle, he would not have been compensated for his loss because it was covered for personal use when in fact it was used for business purposes.

[24] When respondent became complainant's broker, he found several motor vehicles were covered under complainant's business policy while the BMW car was insured under respondent's personal policy.

[25] In a letter to the complainant and his wife dated 9 December 2005 the respondent pertinently refers to complainant's 'personal policy' (persoonlike polis) and suggests that the amount of cover for the BMW be changed to reflect the correct value. Respondent also tells them if they wish to add, reduce or change anything they should inform him and he will do attend to it. The letter ends with 'Laat weet net dat dit korrek is en ek sal die verandering laat aanbring.'

[26] Respondent had not been instrumental in effecting cover for the car under the personal policy. Given the extent of control complainant exercised over his insurance portfolio it would be reasonably expected of him that he would inform the respondent that the car was placed in the wrong policy. He did not do so. It was, in my view, not unreasonable for the respondent to assume that that was the way the complainant wanted it to be.

[27] This complaint falls to be dismissed for a further reason. I do not know what the insurer's attitude would have been in the event of a claim and to that extent is mere speculation and, to my mind, the complaint in this regard is premature and an order for refund of the premiums paid cannot be entertained.

Order

[1] Both complaints are dismissed.

Dated at PRETORIA this 22 day of August 2007.



CHARLES PILLAI

OMBUD FOR FINANCIAL SERVICES PROVIDERS