

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

Case Number: FOC 00023/09-10/ GP 3

In the matter between:

Mrs Beverley Blainey

Complainant

And

Aquarius Insurance Consultants CC

Respondent

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

The Parties:

[1] The complainant is Mrs Beverley Blainey, a 51 year old adult female, residing at No.59 Victoria Avenue, Sandringham, Gauteng Province.

[2] The respondent is Aquarius Insurance Consultants CC (CK2001/038750/23), a close corporation duly registered in terms of South African law, having its place of business at, No. 4 Melteser Road, Northriding, Gauteng Province. Aquarius Insurance Consultants CC is a registered financial services provider as contemplated in the Financial Advisory and Intermediary Services Act No.

37 of 2002 ('FAIS Act'), with licence no. 14578. The key individual is Mr. Maurizio Scolari.

The Background:

- [3] On 26th November 2007 the complainant purchased a 2000 Ford Fiesta 1.4 registration KWT486GP from Ford Eagle Corner in Johannesburg. She paid R41 900.00 for the vehicle. During the purchase transaction complainant also completed an application form for insurance on the vehicle with Hamford (PTY) Ltd, ('Hamford'). The insurance was underwritten by a member of Lloyds of London. Cover commenced on 26th November 2007.
- [4] During February 2008 complainant received a text message on her mobile phone from Hamford stating that her insurance policy had been cancelled effective from the end of February 2008. No reasons were given for the cancellation of cover. Complainant urgently concluded alternative vehicle insurance with Hollard Insurance.
- [5] Sometime later, complainant noticed that there was an unauthorised debit order on her account which had been running for about nine months. Her investigations with the bank led her to the conclusion that the debit order was in favour of Niche Administrators ('Niche') for insurance on her vehicle. Respondent apparently had contracted Niche to insure complainant's vehicle. Complainant had no knowledge of the policy with Niche. At that point she realised that she had dual insurance on the same vehicle for a period of 9 months.

The relief sought by Complainant:

- [6] Complainant wants all of the unauthorised deductions to be refunded to her by the respondent in the amount of R5400 being the total premium. The basis for complainant's case appears in the paragraphs below.

The Complaint:

- [7] At all times material hereto complainant had no knowledge of Niche and had not entered into any contract with them. It is also complainant's version that at no time did she give the respondent or anyone a mandate to cancel her existing insurance with Hamford nor purchase insurance cover from any other insurer.
- [8] According to complainant she contacted respondent and requested cancellation of the debit order with payment of the premiums deducted but respondent demanded proof of insurance with Hollard. She indeed faxed proof of deductions from her bank account but was then told that Niche would not be able to repay her as its accounts were frozen and the entity was under investigation. Complainant further states that respondent contracted with yet another insurer, insuring complainant's vehicle. This time, complainant was on alert and immediately reversed the premiums. Complainant states that the respondent is liable to repay her the amount of R5400.

Respondents Response:

- [9] Respondent denies any wrongdoing, and states that at all material times, complainant knew that she was dealing with Aquarius Insurance Consultants CC as they had received a written mandate from her. Copies of documentation relevant to the case were forwarded to this Office to support respondent's version and an analysis of the documentation is carried out in the paragraphs that follow.
- [10] According to respondent, complainant was informed in writing of the change in insurers and a replacement policy schedule was attached to that letter.
- [11] Respondent admits that it made a decision in January 2008 to move all its clients' policies from Hamford to Saxum Insurance ('Saxum') effective as from the 1st March 2008. The respondent states that this was done in the interest of its clients as it was not satisfied with the service clients were receiving from Hamford. According to respondent Niche was the administrator. It is not in dispute that not long after the respondent shifted the policies Niche had its licence revoked and subsequently placed under administration.
- [12] According to the respondent it acted according to a written mandate from complainant, and at all times acted in the complainant's interests.

Determination:

- [13] The following are issues to be determined:

- i) Did the respondent, whilst rendering financial services to complainant comply with the General Code of Conduct for Authorised Financial Services Providers and Representatives ('Code'), more specifically Section 8 of the Code?
- ii) If it is found that respondent failed to comply with the Code, did such failure to comply result in any damage to complainant?

Findings:

[14] The Code provides in Section 8:

(8)(1) A provider other than a direct marketer, must, prior to providing a client with advice-

- a)...
- b)...
- c)...

d) where the financial product ("the replacement product") is to replace an existing financial product wholly or partially ("the terminated product") held by the client, fully disclose to the client the actual and potential financial implications, costs and consequences of such a replacement, including, where applicable, full details of-

- i) fees and charges in respect of the replacement product;*
- ii) special terms and conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided, which may be applicable to the replacement product;*
- iii)*

(8)(2) The provider must take reasonable steps to ensure that the client understands the advice and that the client is in a position to make an informed decision.

It is not in dispute that the respondent, a financial service provider as contemplated in the FAIS Act is therefore bound by the code.

A chronological sequence of the events, and comment about the conduct of the parties in this complaint are set out below.

[15] On the 26th November 2007 complainant went to Eagle Corner, a Ford dealer in Johannesburg to purchase a 2000 Ford Fiesta 1.4 registration KWT486GP. She paid R41900 for the vehicle. While at the Ford dealership an employee of the dealership who attended to her assisted her with the purchase of insurance for her vehicle. According to complainant she requested insurance cover and was informed by a Ford dealership employee that they could arrange cover for her. The complainant was then required to sign a set of forms.

Upon perusal of these forms the following is noted:

- a) All of these forms were faxed to the Ford dealership on 26th November 2007 under a letter dated 26th November 2007. The letter is from Lorrain Chandler (Chandler) acting on behalf of the respondent.

- b) The letter mentioned above in paragraph 15 a) begins with the words 'Dear Valued Client'. The letter welcomes the client and thanks client for choosing the respondent. The letter contains various details about addresses, banking, anti-theft devices and contact numbers. The letter is signed by Chandler on behalf of the respondent. It is not in dispute that at no time was Chandler present at the Ford dealership and that all documentation was pre-signed by her at some other location and faxed to the dealership. Complainant was asked to sign at the bottom of this letter. This letter is undated.
- c) There is a motor vehicle insurance quotation from Hamford, whereby complainant was merely asked to sign as applicant and the documents were date stamped 26 November 2007.
- d) The next document is a motor vehicle insurance application form from Hamford which complainant was merely asked to sign.
- e) Thereafter follows an unusual document titled 'The Client Advice Record'. This document notes complainant's name and the date of interaction is given as 26 November 2007. The document then deals with needs identification. It follows a standard form and deals with all types of short term insurance including motor vehicle insurance. The document seeks to provide product comparison to enable a client to make a choice. The premium for a product from Lion of Africa is given as R852pm and is compared to a Hamford premium of R391.30. The document then notes the provider's recommendation as, '*Recommended Lloyds of London*'.

f) Absurd as the above recommendation is, respondent still insists that it complied with the provisions of the Code. Surely, a recommendation is meant to guide a client and not to obfuscate matters. There is no mention as to which insurer within the Llyods syndicate and no mention as to what it is that makes the recommendation appropriate for complainant's circumstances. Then there is space to note the client's reason for selecting the product. The reason set out is, 'Good premium'. The latter is also questionable, considering that respondent had no conversation and no clue what complainant would consider a good premium.

[16] There is no question that the act of comparing insurance cover only on the basis of a premium is misleading and unfair to clients as the premium is a tool for managing risk. It may be reduced by, amongst other things, exclusions and excesses. Providers are required to advise their clients not to mislead them. On the second page of the Client Advice Record a declaration is signed by complainant confirming that the various provisions of the FAIS Act and Code were complied with. This page is signed by the complainant and it bears the signature of Chandler. What is not in dispute is that Chandler had pre-signed this document before it was signed by complainant. It is equally not in dispute that Chandler was not present in her capacity as provider at the dealership. Complainant did not speak to Chandler. Only the sales person for the dealership was present. It is not clear whether the person acted as an advisor for and on behalf of respondent. Certainly the Ford dealership's representative did not sign any of the documentation regarding the insurance

policy. Equally there is no information as to whether or not the Ford dealership's employee was qualified to give advice in respect of insurance. The respondent was invited to deal with this aspect but failed to address it.

a. The next document is the 'Client Mandate and Letter of Engagement'. This document, on the face of it, appears to be a written mandate from complainant to respondent. Complainant was merely asked to sign this document. Complainant's signature is dated 26 November 2007. The document is signed on behalf of respondent by Chandler who is described as an 'advisor'. It is not in dispute that Chandler was not present when this mandate was signed by complainant. Chandler's signature is dated May of 2007. This was obviously a pre-dated and pre-signed document that complainant was merely asked to sign. This is not in keeping with the Code.

g) The last document is a 'Letter of Introduction'. This letter is dated 26 November 2007 and Chandler signed as the 'licensed FSP'. Chandler was not present and the signature was already attached to the faxed document. This is clearly not what was contemplated in the FAIS Act and Code.

[17] The sum total of these observations brings one to the conclusion that the respondent's conduct is in conflict with the provisions of the FAIS Act whilst rendering financial services to complainant. This is precisely the conduct

which the FAIS Act was aimed at stamping out. The FAIS Act requires actual compliance from FSP's and not lip service.

[18] The complaint is not directed at the initial sale of the policy. This is not surprising as a lay person such as the complainant is not expected to know that the respondent's conduct was irregular right from the start.

[19] On the respondent's version it decided in January of 2008 to cancel all policies with Hamford effective 1st March 2008. A letter from the respondent to Hamford confirms this. The respondent however can provide no proof that it consulted with complainant about the cancellation of her policy with Hamford and the subsequent decision to insure through Niche administrators. Complainant was not party to the decision to insure through Niche brokers and what terms were offered by the new insurer as no disclosures were made.

[20] According to the respondent the complainant was informed of the change in insurers by letter. As proof, respondent sent a copy of a letter dated 28th January 2008. This letter is of no assistance to the respondent. To begin with, the letter is addressed to 'Dear Valued Client'. The letter does not have complainant's name nor does it have an address. There's no proof that this letter was posted to complainant. Complainant denies having received such a letter, and there is no reason to disbelieve her.

[21] Against this complaint respondent relies heavily on two documents namely 'The Client Mandate' and the letter dated 28 January 2008.

The client mandate

- i) The client mandate was merely a standard form which was pre-signed and dated long before 26th November 2007 when it was signed by the complainant. It is not in dispute that this mandate was not given by complainant to the provider in the latter's presence. Neither was there any discussion between complainant and respondent to understand the precise nature of complainant's requirement. This is not a proper mandate. Respondent nevertheless relies on the mandate for having cancelled the Hamford policy without first informing client. Respondent relies on the following provision in the mandate:

'Monitoring We undertake to review your plan should your circumstances change or that of the insurance carrier'

This according to the respondent gave them the right to cancel the Hamford policies without complainant's consent. This particular provision is stated in vague terms and certainly cannot amount to a mandate to the respondent to cancel policies without obtaining the consent of its client. As it happened in this case the policy with the new insurer, namely, Niche came at a substantially higher premium.

This client mandate did not give the respondent powers to change policies at will resulting in the client having to pay substantially more. Surely, for this to happen, any FSP will require the express permission of client. On respondent's own version they had no such permission. It is noted that the premiums went from R391.30 with Hamford, to R600.00 per month with Niche Administrators. Surely the complainant needed to know what the offering was against the R600.00.

The letter dated 28 January 2008

- ii) As already pointed out, this letter is not addressed to complainant. Also, no proof has been provided that that this document was ever sent to the complainant. This letter shows that respondent simply ignored the provisions of the FAIS Code. The third paragraph of the letter reads as follows 'We have decided to move all our clients to Saxum Insurance effective 1 March 2008 and we have attached your new policy schedule.' Clearly on the respondent's own version they unilaterally made a decision to move complainant's policy and the letter served merely to inform that they have done so. This letter confirms that complainant was not consulted nor was any advice given regarding the move of the policy. According to this letter the new policy schedule is attached. Complainant denies that she received such a schedule. In addition respondent can give no

proof that the policy itself was at any stage delivered to the complainant. Nor did the respondent, at any stage, send a copy of the policy to this Office.

This letter also states that the premium is now more reasonable whilst it states that the premium is now increased. Nowhere in this letter does it state the terms on which the complainant is being insured, nor does it state what the new premium will be. This is precisely the information the respondent was obliged to disclose to complainant.

Both documents therefore are of no assistance to respondent. On the respondent's own version it did not seek a mandate nor did it inform complainant of the decision to move the policy. Complainant only found out about this on receipt of a text message from Hamford. In the interim, respondent handed to Niche complainant's banking details and an authorisation to execute a debit order. Again on the respondent's own version this was done without the express permission of the complainant.

- iii) On the facts before me complainant was not informed by the respondent that her policy had been moved. It is reasonable to conclude that if complainant was consulted she would have been placed in a position where she would have had a choice as

to whether or not her policy should be moved. If she agreed to move her policy then the respondent would have been obliged to provide her with all the necessary information to make an informed choice. It is equally reasonable to conclude that had complainant been properly informed by the respondent she would not have ended up paying for two policies.

- iv) It is ironic that respondent claims to have acted in the interests of the complainant when the evidence points to the contrary.

- v) In the premises, the rational conclusion to be drawn is that respondent's conduct was in contravention of the FAIS Act and was the sole cause of complainant's financial loss. The respondent is therefore liable to compensate the complainant in full.

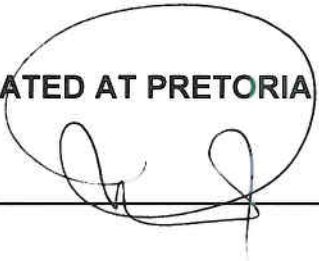
Order:

The following order is made: -

1. The complaint is upheld;
2. Respondent is hereby ordered to compensate the complainant in the sum of R5400;
3. Interest on the aforementioned amount shall accrue at a rate of 15.5% to be calculated from 15th October 2009 (Date of Section 27(5) Letter) to date of final payment;

4. Respondent is ordered to pay the case fee of R1000, 00.

DATED AT PRETORIA ON THIS THE 7th SEPTEMBER 2010



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, is written over a solid horizontal line. The signature is enclosed within a hand-drawn oval.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS