

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

Case Number: FOC 01078/09-10/ NW 3

In the matter between:

Alta Clarence

Complainant

And

Bestsure Financial Services (PTY) Ltd

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 Alta Clarence, an adult female, residing at No.10 Exner Street, Brits, Gauteng.
- [2] The respondent is Bestsure Financial Services (PTY) Ltd ('Bestsure'), a company duly incorporated, having its place of business at, 2nd Floor, Flora Centre Office Block, Cnr Ontdekkers Road & Conrad Street, Florida Hills, Gauteng. Bestsure 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. 13633.

The Background and Undisputed Facts:

- [3] On or about 30th June 2008, the complainant purchased short term insurance cover in respect of two motor vehicles. The transaction was concluded over the telephone with Bestsure, who were represented by Leandra Liebenberg.
- [4] The policy itself was with Constantia Insurance Company Ltd ('Constantia') in order to comprehensively insure both of the Complainants motor vehicles, namely a 2008 Hafie Lobo 1.1, 16V Lux, and a 2008 Hafie Lobo 1.1, 16V Comfort registration HCK080NW. Bestsure, at all material times acted as an agent, providing financial services to the Complainant.
- [5] On 8th November 2008, while the contract of insurance was in place, the 2008 Hafie Lobo 1.1, 16V registration HCK080NW, (hereinafter referred to as complainant's vehicle) was involved in an accident whilst the vehicle was being driven by the complainant's 19 year old daughter. The complainant immediately instituted a claim via Bestsure for the damage to the vehicle.
- [6] On 12th November 2008 Constantia rejected the claim. This was conveyed to the complainant in a letter headed: "Confirmation of No Cover In Terms Of Policy". The letter referred to General Exception 9 of the policy where no cover will be provided where the insured motor vehicle is damaged whilst under the control of a person under the age of 23.
- [7] Complainant approached the Ombudsman for Short Term Insurance ('OSTI'), who investigated the matter and found that no fault lies with the Insurer as the insurer had no direct dealing with the complainant. OSTI referred the matter to this Office.

The relief sought by Complainant:

[8] The complainant wants to be compensated her for loss of indemnity in respect of the damage to her motor vehicle in the amount of R77000 as well as for towing costs of R511.

The Complaint:

[9] The complainant contends that respondent failed to disclose this material term. It is further the complainant's version that if the exception had been drawn to her attention she would not have purchased the policy. The complainant states that her attention was drawn to the exception for the first time after the claim had been rejected by the insurer.

[10] Complainant further contends that she was only aware that an additional excess will apply for claims that arise where the driver was under the age of 26.

Bestsure's Response:

[11] In response to a letter from the FAIS Ombud in terms of Section 27 (4)(a) of the FAIS Act, Bestsure relied on a letter written by IDA Insurance Brokers which was addressed to the complainant dated 14th July 2008. According to this letter the complainant would have received a copy of the schedule to the policy and a copy of the terms and conditions of the policy. The letter respondent is referring to advised the complainant to read through the documentation in order to become familiar with the terms and conditions of the cover. This according to Bestsure amounted to disclosure of the exception in terms of which the claim was rejected

[12] Bestsure further relied on the proposal which was obtained from the complainant. According to Bestsure during the completion of the proposal complainant was requested to

state the names of the regular drivers of the insured vehicles. According to the proposal complainant's response was that she and her husband Mr. Clarence would be 'the regular drivers' of the insured vehicles. It is Bestsure's case that at this point the complainant ought to have disclosed that there were other drivers. Bestsure therefore states that it was appropriate under the circumstance that their agent said nothing about the exception. It is Bestsure's submission that it did not contravene the Code of Conduct in that they provided their client with concise and express details as contemplated in the FAIS Act.

Determination:

[13] The matter was officially accepted for investigation in terms of Section 27, and Bestsure were advised to reconsider their stance with a view to resolving the complaint, based on the above mentioned alleged non disclosure.

[14] In response thereto, Bestsure, once again refused to accept liability sticking to its version that its representative had asked the relevant questions. Bestsure makes the assertion that the complainant never disclosed that her children would have cause to drive the vehicles and had that been disclosed, the exclusion would have been disclosed. Respondent's view is that it can only advise on relevant terms and conditions etc based on the information provided by the insured. In addition it states that the policy wording sent to the complainant provided concise details of all information required, and that in its view it had complied with Section 7(1) (c) (vii) of the General Code of Conduct and was not liable for the loss suffered by the complainant.

- [15] Section 7(1) (c) (vii) of the Code provides that at the earliest reasonable opportunity a provider must provide, where applicable, concise details of any special terms or conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided.
- [16] It must be accepted that Bestsure, at all material times was aware its duty to disclose to consumers the exception which might render the consumer at risk of being without any cover.
- [17] For this determination the issues are as follows:
- i) Was this condition specifically drawn to complainant's attention?
 - ii) If such disclosure was not made then did such non-disclosure cause the complainant damage?
- [18] In addition Section 15(3) (j) of the Code provides that a direct marketer must when rendering a financial service to a client, at the earliest reasonable opportunity furnish the client with concise details of any special terms or conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided.
- [19] It is not in dispute that during the telephonic proposal for insurance, complainant was assisted by one Leandra Liebenberg, who is described by Bestsure as a 'marketer'. Bestsure supplied this Office with no information regarding the skills of Liebenberg to enable her to market such products.

[20] Upon listening to the recorded transaction it became clear that all Liebenberg did was ask the 'Name of Regular Driver/s'. To this question complainant answered Mr. and Mrs Clarence. This answer is recorded in the proposal. Liebenberg then moved on to the next question. Specifically, Liebenberg did not ask for the names of people who would drive the insured vehicles. Nor did Liebenberg say anything about exceptions and excess payments which relate to the age of the drivers of the vehicles.

[21] The exception relied on by the Insurer is a material term of the contract of insurance. The nature of this exception is such that it could easily place the insured at risk. There was at all material times a duty on Bestsure to draw its client's attention to such an exception. A lay person is not expected to assume that there may be exceptions. According to the FAIS Act there exists a positive duty on a service provider to draw client's attention to such exceptions.

[22] On Bestsure's own version, the following is clear:

- i) On the 30th June 2008 Leandra did not draw complainant's attention to any exceptions in the policy she was selling.
- ii) The telephone proposal form does not provide that exceptions based on driver's age be disclosed to client.
- iii) Complainant was merely requested to read the 'wording of the policy' in a letter dated the 14th July 2008.

[23] The letter dated 14th July 2008 states that 'the policy schedule and policy wording' is attached. Complainant disputes that the terms and conditions of the policy was attached to that letter. According to complainant only the schedule to the policy was attached. This

Office obtained the terms and conditions of the policy from Bestsure. However for purposes of this determination it is not necessary to resolve this dispute. Even if Bestsure had sent a copy of the policy they were still required to have drawn the complainant's attention to the exception to the policy to enable the complainant to make an informed decision prior to entering into the transaction. Simply enclosing a policy schedule with terms and conditions after conclusion of the transaction is not compliant with Section 7 (1) (c) (vii) of the Code.

[24] On Bestsure's own version they did not draw their client's attention to the exception in question. Bestsure's version is that they did enough so that complainant was adequately informed about the policy. According to Bestsure they did not deal with the exception because the complainant did not tell them that there would be other drivers. Against this proposition is the fact that Bestsure's proposal does not ask any questions about other drivers but only 'regular drivers'. One can only reasonably expect a lay person to give the term 'regular drivers' its ordinary meaning. This is exactly what the complainant did. This Office has had occasion to deal with the question of regular drivers in the case of *Jacobus J Grove v National Insurance Co-Ordinators CC*. In that determination, it was clearly stated that regular driver does not mean the only driver. It would appear that respondents failed to make this distinction.

[25] On the undisputed facts of this matter the conclusion is inescapable that.

- i) There was a duty on Bestsure to disclose the material term to complainant. It failed to do so.

[26] According to complainant had Bestsure disclosed the exception to her she would not have purchased the policy. On the aforementioned facts, respondent's failure to disclose the exception caused damage to the complainant.

Quantum of Damage:

[27] The damage to the vehicle was quantified by complainant as R77000. Bestsure elected not to dispute this amount.

[28] The insurer was asked to provide a detailed breakdown of how it would have adjusted the claim and the eventual payout had the claim not been rejected:

- i) Basic excess – R1500
- ii) Additional excess for driver under the age of 26 – R1000

[29] Complainant claims for towing costs of R511.

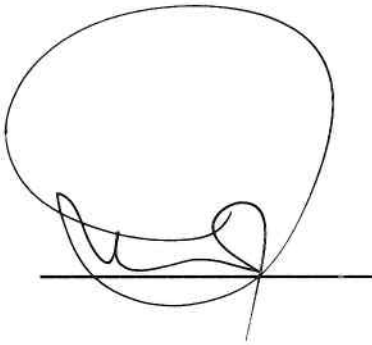
Order:

The following order is made: -

1. The complaint is upheld;
2. The respondent is hereby ordered to compensate the complainant in the sum of R75 011.00;
3. Interest on the aforementioned amount shall accrue at a rate of 15.5% to be calculated from a date SEVEN (7) days from date of this order to date of final payment

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

DATED AT PRETORIA ON THIS THE 10th DAY OF SEPTEMBER 2010

A handwritten signature in black ink, consisting of a large, rounded loop at the top and several smaller, connected loops below it, all resting on a horizontal line.

NOLUNTU BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS