IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NO: FOC 979/05

In the matter between:

HELENA ANTOINETTE DENNIS	**Complainant**
And	
NEDBANK GROUP INSURANCE BROKERS	**1st Respondent**
NEDBANK LIMITED	**2nd Respondent**

NOTICE OF AMENDEMENT OF ORDER DATED 21 JULY 2005

KINDLY TAKE NOTICE THAT the order of the Office dated 21 July 2005 is hereby amended by the deletion of the word '1st' in paragraph 3 of the order and the substitution thereof of the word '2nd'.

DATED AT PRETORIA ON THIS THE 22 JULY 2005

Charles Pillai

Ombud for Financial Services Providers

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NO: FOC 979/05

In the matter between:

HELENA ANTOINETTE DENNIS **Complainant**

And

NEDBANK GROUP INSURANCE BROKERS **1st Respondent**

NEDBANK LIMITED **2nd Respondent**

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

The Parties

[1] The Complainant is Helena Antoinette Dennis, married out of community of property and the owner of certain immovable property described as 'Erf 79132 Diep River' ('property') and situated at 11 Annadale Road, Diep River, Cape Town.

[2] First Respondent is Nedbank Group Insurance Brokers, an authorized financial services provider with its principal place of business and head office at Level 3, Forum 1, Braampark, 33 Hoofd Street, Braamfontein.

[3] Second Respondent is Nedbank Limited, a bank and an authorized financial services provider with its principal place of business at 135 Rivonia Road, Sandton, Johannesburg.

The Issue

[4] The issue in this dispute revolves crisply around whether the 1st Respondent has the right, in the light of the Financial Advisory and Intermediary Services Act 37 of 2002 ('FAIS Act'), to deny free choice to the Complainant by imposing its own short term insurance cover, known in the market place as homeowners cover (and referred to as such in this determination) over property mortgaged to the 2nd Respondent in terms of a loan agreement dated 9 March 2005 between the Complainant and the 2nd Respondent ('loan agreement').

[5] The 1st Respondent maintains that it is entitled to deny the Complainant freedom of choice by imposing its own homeowners cover and bases its entitlement to do so on the provisions of Section 43 (5) (a) of the Short Term Insurance Act 53 of 1998 ('STI Act') as well as on the provisions of the loan agreement.

The Context

[6] The issue arises in the following factual context.

[7] Complainant applied for and was granted a loan by the 2nd Respondent on the security of a first mortgage bond over her property for the sum of R400 000.00 (Four Hundred Thousand Rand). The terms of the loan were reduced to writing and are contained in the loan agreement concluded between the Complainant and 2nd Respondent.

[8] At the time of concluding the agreement Complainant enjoyed homeowners cover over the property with Santam Insurance Limited ('Santam policy') for the sum of R874 504.00 under policy number 63108913233. The Santam policy has been in existence since 1 August 2000.

[9] Complainant offered to cede this Santam policy to the 2nd Respondent as homeowners cover on the property and thereby to record the 2nd Respondent's interest over the property. This offer was rejected by the 2nd Respondent, who insisted that it was not prepared to accept the cession on the Complainant's existing Santam policy for the reasons stated in paragraph 5 above. The Complainant was not satisfied with the Respondents' reasoning. It would appear she was advised by the 2nd Respondent that the matter could be assessed by the Ombudsman for Banking Services. Why this was done is not clear, especially in the light of the fact that it is this Office that would adjudicate upon a complaint which relates to the rendering of a financial service in terms of the FAIS Act.

[10] The matter was indeed assessed by the Ombudsman for Banking Services who upheld the view expressed by the 2nd Respondent and dismissed the complaint. In response to this assessment by the Ombudsman for Banking Services, Complainant advised that she was still not satisfied and informed both the Ombudsman for Banking Services and the 2nd Respondent that she was not accepting the 'finding' and would be referring the complaint to this Office.

[11] The further response from the Ombudsman for Banking Services to the Complainant was that he did not consider that the matter fell within the jurisdiction of this Office and that she should rather address her complaint to the Ombudsman for Short Term Insurance whose details were then provided to the Complainant. Complainant nevertheless persisted and referred the matter to this Office

[12] Upon receipt of the complaint, the Office addressed a letter dated 27 June 2005 to 1st Respondent. It was pointed out to 1st Respondent that another matter mediated by this Office with Respondents, where the facts were similar to the complaint at hand, was resolved by the Respondents by granting the complainant in that case free choice. The letter to the 1st Respondent was accompanied by a Recommendation by the Ombud in terms of Section 27 (4) (c) of the FAIS Act.

The parties to the dispute were required to confirm by close of business on 29 June 2005 whether they accept or reject the Recommendation.

[13] The Complainant accepted the Recommendation by way of a letter to the Office dated 28 June 2005.

[14] The 1st Respondent has not accepted the Recommendation. Instead they have posed various questions to the Office. In essence they sought advice from the Office as to the respects in which they may not be complying with the FAIS Act. The Office informed the Respondents that in terms of the Rules of Proceedings of the Office, it was precluded from providing advice and that its functions were confined to the investigation and resolution of complaints. In this regard the Office placed reliance on the provisions of Rule 2 (c) of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers, 2002 as promulgated in Board Notice 81 of 2003 and published in Government Gazette 25299 dated 8 August 2003. The Office further informed the Respondents that it was proceeding to refer the matter for determination by the FAIS Ombud.

[15] As the Recommendation was not accepted by the 1st Respondent, I proceed to determine the matter in terms of Section 28 (1) of the FAIS Act.

Is this a complaint in terms of the FAIS Act?

[16] In order to qualify for adjudication before this Office, a complaint would have to qualify as such in terms of the FAIS Act. In terms of the FAIS Act, a complaint is defined as:-

'.....a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative –

(a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;

(b) has willfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or

(c) has treated the complainant unfairly;'

The complaint must relate to a financial service that was rendered on or after the 30 September 2004.

[17] The Complainant alleges that a financial service was rendered by the 1st Respondent in terms of which a financial product, namely homeowners cover was sold to her without considering her needs or interests and without any consultation or negotiation with her. Complainant alleges further that notwithstanding the fact that she had suitable existing homeowners cover over the property, the 1st Respondent nevertheless proceeded to effect homeowners cover with an insurer of its choice. Homeowners cover was apparently effected by the 1st Respondent with an insurer, Nedinsurance Company Limited. Complainant knew this because she was required to pay a premium of R261, 00 on the 1 April 2005. The sum insured in terms of the Nedinsurance policy is R563 500, 00. Policy and disclosure documents were given to her when she requested the same on or about 12 July 2005.

[18] There are further allegations of non-compliance with the provisions of the FAIS Act, the details whereof will emerge later on in this determination.

[19] The Complainant also alleges that the existing homeowners cover provides reasonable protection both to her and to the 2nd Respondent and it also emerges

from investigation that the excess that the Complainant will be required to pay in the event of a claim against her existing homeowners cover will be less than that which the 1st Respondent has effected.

[20] In the circumstances, it is quite clear that the Complaint is one that qualifies as a complaint in terms of the FAIS Act, in that a financial service was rendered which may have violated the provisions of the FAIS Act and which has or potentially will cause financial prejudice to the Complainant. Alternatively, it might appear that the client was treated unfairly, in which event this would also qualify as a complaint.

The determination

[21] I propose, in this determination to deal:-

(a) firstly with whether Section 43 (5) (a) of the STI Act grants the Respondents the right to effect their own homeowners cover in the circumstances in which they have done in this case;

(b) secondly if the 1st Respondent's contention is that it has such a right, whether this is inconsistent and irreconcilable with the provisions of the FAIS Act; and

(c) thirdly whether by placing reliance on the relevant provisions of the loan agreement, the 1st Respondent is entitled to unilaterally effect homeowners cover in the light of the FAIS Act.

[22] Section 43 (1) of the STI Act grants the consumer free choice in certain circumstances. It is not necessary for the purposes of this determination to set out in full the various provisions of that section. In essence it gives the right of freedom of choice to the consumer of credit in the circumstances set out therein as to which short term insurer the consumer wishes to contract with; and through

which intermediary as well as to the appropriate value which needs to be ceded to the creditor [provided it shall exceed the value of the interest of the creditor]. Section 43(2), (3) & (4) also set out various other safeguards, essentially intended to protect the consumer of credit against unscrupulous practices.

[23] Section 43 (5) (a) of the STI Act, on which the Respondents rely in denying free choice provides that the rights given to the consumer under Sections 43 (1) shall not apply in the case of a short-term policy which is required to be made available in relation to a contract in terms of which money is loaned upon the security of the mortgage of immovable property. It is this Sub-section (5) (a) of Section 43 which needs to be interpreted to establish whether the 1st Respondent can simply rely on it to put in place its own insurance without any recourse to the Complainant. In my view, the legislature could never have intended such a consequence. What was intended, in my view, is that the creditor and the debtor in a case where money is loaned upon the security of a mortgage of immovable property would have to ensure that the security that is provided in terms of the policy or policy benefits is appropriate to protect the interests of the creditor. To interpret the section literally as the 1st Respondent does will lead to absurd consequences. One such absurd consequence is the insistence by the creditor on its own insurer and intermediary when the short term policy which is required to be made available already more than adequately protects the interests of the creditor, in this case the 2nd Respondent. Another absurd consequence is that the mortgagee, in this case the Complainant, would be made party to an agreement with an insurer with whom she may not want to contract on terms that are unacceptable and through an intermediary that she may not want to deal with. This flies in the face of the cardinal rule of contract that the contract is formed by the parties themselves, who must reach consensus on all the essential terms thereof.

[24] My view is that, the legislature in taking away the entitlements that are given to the consumer in Sections 43 (1) of the STI Act does not grant any corresponding

rights to the lender in Section 43 (5) (a). It certainly does not mean that any right to deny free choice is granted to the 1st Respondent, neither does it entitle the 1st Respondent the right to place short term insurance with an insurer of its choice through its own intermediation. My view is supported by the various respects in which the conduct of the 1st Respondent in placing, as it does, reliance on Section 43 (5) (a) of the STI Act would be both inconsistent and irreconcilable with the provisions of the FAIS Act.

[25] The long title to the FAIS Act provides that it is intended to 'regulate the rendering of certain financial advisory and intermediary services to clients;….' The FAIS Act seeks to achieve this through a system of licensing and supervision of financial services providers and also creates the Office of the Ombud for Financial Services Providers to ensure that clients will have recourse where they have been given inappropriate advice or where there has been non compliance with the provisions of the FAIS Act or where they have been treated unfairly. Of importance for the purposes of regulating the rendering of financial services is the publication of various codes of conduct to which financial services providers and their representatives have to adhere when rendering a financial service. In short, the FAIS Act is intended to ensure professionalism in the rendering of financial services which upholds the integrity of the financial services industry and ensures the protection of the consumer of such services.

[26] Of importance, is Section 1 (6) of the FAIS Act, which provides:

'This Act must be construed as being in addition to any other law *not inconsistent* with its provisions and not as replacing any such law.'(My italics)

[27] The General Code of Conduct for Authorised Financial Services Providers and their Representatives published under Section 15 of the FAIS Act and promulgated in Board Notice 80 of 2003 under Government Gazette 25299 dated 8 August 2003 provides in Section 1 (2) (a) that the Code must be construed-

(i) in conjunction with the provisions of the Act and in a manner conducive to the promotion and achievement of the objectives of codes of conduct as stated in section 16 of the Act; and

(ii) as being in addition to any other law *not inconsistent* with its provisions and not as replacing any such law.'(My italics)

[28] Section 1 (2) (b) (ii) of the Code further provides that in the case of any inconsistency or conflict between-

'a provision of this Code and a provision of any other law specifically regulating market conduct in the rendering of financial services in respect of one or more specific financial products, the last mentioned provision, *unless inconsistent or in conflict with the Act*, shall prevail.'(My italics)

[29] The issue then is whether Section 43 (5) (a) of the STI Act is inconsistent or in conflict with the FAIS Act. If this is indeed the case then clearly the provisions of the FAIS Act shall prevail. See in this regard the remarks of Kotze A,A.J.A. at 397 in *New Modderfontein Gold Mining Co. v Transvaal Provincial Administration* 1919 AD 367 at 397:

'Generally speaking, no doubt when a repeal of former legislation is intended, specific words to that effect are employed, but this, however desirable is not always done, nor is it absolutely necessary. There are many illustrations in the books of the repeal by implication of earlier statutes by later ones, for subsequent legislation repeals previous inconsistent legislation, whether it expressly declares such repeal or not. Such an implied repeal will arise wherever the contents and operation of a later Act are repugnant to or cannot be harmonized with those of an earlier one.'

The learned judge quoted with approval the following from an interesting American decision by Marshall J., in *Gorham v Luckett*:-

'And if the last Act professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former acts, so far as it differs from them in its prescriptions. The great object, then, is to ascertain the true interpretation of the last Act. That being ascertained, the necessary consequence is, that the legislative intention thus deduced from it must prevail over any prior inconsistent intention to be deduced from a previous Act.'

[30] I turn now to examine whether Section 43 (5) (a) of the STI Act is inconsistent or in conflict with the FAIS Act and whether it can be harmonized with the latter or not. I will focus on certain of the provision of the FAIS Act to illustrate this.

Areas of conflict between some of the provisions of the FAIS Act and Sec 43)(5) (a) of the STI Act

[31] The key objective of the FAIS Act, as spelled out in its long title is to regulate the rendering of certain financial advisory and intermediary services to clients. In order to achieve this objective, the FAIS Act has in place a process whereby financial services providers and their representatives are authorized to render financial services (Section 7). This process of authorization envisages qualifications and competency requirements described as 'fit and proper' requirements (Section 8). As a means to achieve the key objective set out in the FAIS Act, a General Code of Conduct for Authorised Financial Services Providers and Representatives was published in terms of Section 15 of the FAIS Act ('General Code'). The General Code must comply with the Principles of the code of conduct as set out in Section 16 of the FAIS Act. The General Code was published in Board Notice 80 of 2003 in Government Gazette 25299 of 8 August 2003 and came into effect on 30 September 2004.

[32] I propose now to deal with specific aspects of the FAIS Act and the General Code to indicate the areas of conflict between Section 43 (5) (a) of the STI Act and the FAIS Act.

[33] Section 16 (1) of the FAIS Act is premised on the principle that a client being rendered financial services must be able to make informed decisions. Implicit in the concept of an informed decision is the right to choose. In other words in order to make an informed decision on a particular product or service, the client must be able to select from a range of products and services, offered at competitive prices with an assurance of satisfactory quality. Section 43 (5) (a) of the STA denies one the right to choose. It is therefore inconsistent and irreconcilable with the concept of an informed choice.

[34] Section 16 (1) of the FAIS Act gives rise to various provisions under the General Code which the 1st Respondent would have been obliged to comply with in order not to fall foul of the FAIS Act.

[35] Section 2 of the General Code requires the 1st Respondent to have rendered the services honestly, fairly, with due skill, care and diligence, and in the interests of the client and the integrity of the financial services industry. Now, in simply effecting homeowners cover over the property, without consultation with the Complainant, it is impossible to test the 1st Respondent's conduct against any of the duties set out in this section. The Complainant has not participated in the transaction to which she is now bound. Clearly then, Section 43 (5) (a) of the STI Act on which the 1st Respondent relies is not in harmony with the FAIS Act and as such is inconsistent with and irreconcilable with its provisions.

[36] Section 3 (1) of the General Code sets out in fair detail the disclosures and information that the 1st Respondent would have been obliged to furnish to the Complainant at the time that the financial service was rendered. This duty can be summarized as follows:

1. That any representations and information must be factually correct; provided in plain language, avoid uncertainty or confusion and not be misleading (Sub-section (i) and (ii));

2. That such representations and information must be 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 (Sub-section (iii));

3. That such representations and information must be provided timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction (Sub-section iv);

4. Client's monetary obligations must be disclosed or be easily ascertainable (Sub-section vii);

Complainant was only furnished with a policy document after requesting same from the 1st Respondent. This was done on or about the 12 July 2005, notwithstanding that the policy was in force since 1 April 2005.

Measuring these obligations against what the 1st Respondent has done based on its asserted right to effect homeowners cover without recourse to the Complainant it becomes obvious that, once again, Section 43 (5) (a) of the STI Act is inconsistent and irreconcilable with the above provisions of the FAIS Act.

[37] Section 3 (b) of the General Code requires the 1st Respondent to have disclosed to the Complainant the existence of any personal interest in the financial service being provided or any circumstances which gives rise to an actual or potential conflict of interest in relation thereto and must take all reasonable steps to ensure fair treatment of the Complainant. None of these disclosures were made and the

1st Respondent relying on the provisions of Section 43 (5) (a) believes it is not obliged to do this. If there was no contact with the Complainant when the financial service was rendered obviously none of these disclosures would have been made. The 1st and 2nd Respondents are part of one group, namely Nedbank Limited. This is disclosed by the 1st Respondent in a disclosure document provided after the rendering of the financial service. The insurance is placed with NEDInsurance Company Limited. If the 1st Respondent can place homeowners cover with an insurer of its choice, there is nothing whatsoever to prevent it from placing such cover with an insurer in which it has a shareholding, thereby creating an actual conflict of interest. Clearly the legislature envisaged that where there is conflict of interest clear disclosure must be made before the client can exercise a choice.

[38] Similarly Section 3 (c) of the General Code, which relates to the disclosure of payment of non-cash incentives and/or other indirect considerations, also cannot be tested as no disclosures whatsoever were made at the time that the financial service was rendered.

[39] Section 3 (d) of the FAIS Act cannot be harmonized and exist alongside Section 43 (5) (a) of the STI Act for it is inconsistent and irreconcilable with the latter section. In particular the 1st Respondent, if it relies on Section 43 (5) (a) (a) of the STI Act in denying free choice to the Complainant would have no regard 'to the interests of the client' which according to the section 'must be accorded appropriate priority over any interests of the provider.'

[40] That the 1st Respondent can simply deny free choice to the Complainant by placing reliance on the provisions of Section 43 (5) (a) of the STI Act, could also flout the provisions of Section 3 (e), which provides that transactions must be accurately accounted for. Once again, Section 43 (5) (a) of the STI Act is inconsistent and cannot be reconciled with the FAIS Act.

[41] Section 2 of the General Code obliges the 1st Respondent to have procedures and systems in place to record certain information relating to the financial service rendered. This section was intended to ensure that there was compliance with the FAIS Act, the General Code and any other Code drafted in terms of the FAIS Act. In particular the 1st Respondent would be obliged to record verbal and written communication relating to the financial service to ensure such compliance. By simply relying on the fact that it is entitled, in terms of Section 43 (5) (a) of the STI Act to effect homeowners cover, the 1st Respondent would escape compliance with this section of the FAIS Act. It would never have been the intention of the legislature that 1st Respondent should escape compliance in this fashion. Clearly, once again, Section 43 (5) (a) of the STI Act is inconsistent, irreconcilable and cannot be harmonized with the FAIS Act.

[42] To the extent that it is necessary to provide advice to a client, Part VII, Sections 8 & 9 of the FAIS Act envisages that a financial services provider seeks appropriate and available information from a client to provide such advice. Now there would be no need for the 1st Respondent to carry out any of the steps required in Section 8 pertaining to the Complainant's particular circumstances, if it simply put in place homeowners cover, based on its entitlement to do so in terms of Section 43 (5) (a) of the STI Act. This could never have been intended. Any client before putting in place cover such as homeowners cover would want to consult a professional financial services provider, such as a broker of short term insurance products in order to get what is best to suit her/his particular needs. Considerations of premiums payable, excesses applicable, extent of cover, exclusions, restrictions and limitations would have to be discussed and explained by the provider, prior to the client making a choice, informed by the discussion. It could clearly not have been intended that the person in the position of 1st Respondent simply place cover based on its own choice. Again Section 43 (5) (a) of the STI Act, is in clear conflict and inconsistent with the FAIS Act and cannot be harmonized therewith.

[43] The various instances of disharmony between Section 43 (5) (a) of the STI Act and the FAIS Act clearly indicate that they cannot exist harmoniously alongside each other. Therefore in accordance with the principles that I have set out above the provisions of the FAIS Act prevail and the 1st Respondent would have had to comply therewith.

[44] I have also considered a further aspect and that is a constitutional one. I am of the view that there is yet another reason for Section 43 (5) (a) not to be of application any longer.

[45] The validity of Section 43 (5) (a) of the STI Act may be open to constitutional attack. I say so on the basis that no similar provision exists in Part VII of the Long Term Insurance Act 52 of 1998 ('LTI Act'). Section 44 of the LTI Act deals with free choice in certain circumstances. The provisions of Section 44 of the LTI Act are similar to the provisions contained in Section 43 of the STI Act, except for the existence of Section 43 (5) (a) in the STI Act which denies such free choice where money is loaned upon the security of the mortgage of immovable property. In this sense, it would appear that Section 43 (5) (a) of the STI Act offends the equality provisions of Constitution of the Republic of South Africa (Act 108 of 1996) ('Constitution). I refer, in particular to Section 9 (1) of the Constitution which guarantees the right to equality before the law and equal protection and benefit of the law. However, I make no finding in this regard.

[46] I turn now to consider the terms of the loan agreement on which the 1st Respondent also relies in denying free choice to the Complainant. Clause 6.1 of the loan agreement obliges the mortgagor (the Complainant in this case) to insure all improvements, for so long as the mortgagor is indebted to the bank, against risk of loss or damage from fire, storm and any other risk which the 2nd Respondent at any time directs in writing, plus SASRIA (SASRIA Limited) extension, and shall cede the relative policy or policies to the bank as collateral security for the indebtedness of the Complainant to the 2nd Respondent.

[47] Clause 6.2 of the loan agreement provides that insurance on the mortgaged property shall be arranged by the 2nd Respondent. The 2nd Respondent may, however agree otherwise in writing.

[48] Clause 6.4 governs the situation where the 2nd Respondent agrees that the Complainant could effect her own insurance. It provides, *inter alia* that the Complainant, shall, if so required by the 2nd Respondent lodge the policy or policies with it, together with documentary evidence to its satisfaction that all premiums including renewals thereof have been paid and that the insurer concerned has noted the cession of such policy or policies to the 2nd Respondent as collateral security for the indebtedness of the Complainant to it.

[49] The loan agreement also records that the replacement value of the improvements on the property for insurance purposes shall not be less than R563 500.00 (Five Hundred and Sixty Three Thousand Five Hundred Rands).

[50] Clause 6.2 of the loan agreement, in so far as it relates to the arranging of insurance by the 2nd Respondent would have to be interpreted in the light of the FAIS Act. For the 2nd Respondent to arrange insurance means that it would have to do so with due regard to all the provisions of the FAIS Act. To view it otherwise would amount to a waiver of the rights that are available to the Complainant in terms of the FAIS Act. This is clearly not intended and is indeed expressly prohibited in the FAIS Act. In this regard I set out in full the provisions of Part X111 of the General Code:

'WAIVER OF RIGHTS

21 No provider may request or induce in any manner a client to waive any right or benefit conferred on the client by or in terms of any provision of

this Code, or recognize, accept or act on any such waiver by the client, any such waiver is null and void.'

If one reads Clause 6.2 in the light of the provisions of the FAIS Act and the prohibition contained in Section 21 of the General Code, it becomes clear that clause 6.2 can only be interpreted in a manner that is consonant with the provisions of the FAIS Act.

[51] If clause 6.2 is open to an interpretation that defeats the provisions of the FAIS Act, the question then arises as to what can be done, in view of the fact that the Complainant is a party to the agreement of which clause 6.2 is a part. In this regard, it is appropriate that one seeks guidance from the jurisprudence that exists on this question. Our common law does not recognize agreements that are contrary to public policy. See in this regard the authority provided by *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891 (G). In the case of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 AD the court addressed the question of what is meant by public policy and when it can be said that an agreement is contrary to public policy. The court in the *Sasfin* case recognized the principle expounded by Innes CJ in *Law Union and Rock Insurance Co Ltd vs Carmichael's Executor*1917 AD 593 at 598 that:-

'(P)ublic policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject-matters.'

The court in *Sasfin* held that :-

'Agreements which are clearly inimical to the interest of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced. (at 8 C-D).

The court in *Sasfin* was mindful of the 'fundamental and governing principle' with regard to severability. If those provisions of the agreement can be severed from the remaining provisions without destroying 'the probable intention of the

parties as it appears in, or can be inferred from, the terms of the contract as a whole'(per Botha J in *Vogel NO v Volkersz* 1977 (1) SA 537 T at 548F) then the offending provision can be so excised from the rest of the agreement.

[52] A further relevant, and not unimportant, consideration is that 'public policy should properly take into account the doing of simple justice between man and man' – *per* Stratford CJ in *Jajbhay v Cassim* 1939 AD 537 at 544 quoted with approval in *Sasfin* supra at 9 G.

[53] Applying the foregoing principles to the present case clearly paragraph 6.2 of the loan agreement can be severed from the rest of the agreement on the grounds of its illegality leaving the rest of the agreement intact.

[54] The Respondents may also seek to rely on the fact that the Complainant signed a cession in the offices of the attorneys at the time that she signed the bond documents. The Respondents contention is that in signing the cession, the Complainant accepted the homeowners cover effected by the 1st Respondent. There is no basis for this argument. For a cession to be valid there would have had to be a policy in place. Complainant signed all documents, including the cession on 9 March 2005. The policy effected by the 1st Respondent was only put in place, after the cession was signed, thereby rendering the cession a nullity. In any event, the Respondents conduct in rendering the financial service is what is under consideration in this determination. The rendering of the financial service would have to be considered in the light of the provisions of the FAIS Act. The financial service was rendered in contravention of the FAIS Act. It necessarily follows that the cession cannot stand.

[55] In the result, the 1st Respondent can and should accept Complainant's existing Santam policy subject to the conditions agreed to in paragraph 6.4 of the loan agreement.

[56] In conclusion, I am satisfied that the Complainant has a valid complaint. It is clear that the 1st Respondent has rendered a financial service, namely the putting into effect of homeowners cover over the mortgaged property. It is also clear that the financial service was rendered without compliance with the provisions of the FAIS Act. As a result the Complainant has suffered and will potentially suffer financial prejudice. It is clear that Complainant has been treated unfairly by the Respondents. The unfairness is evident in their conduct in unilaterally effecting their own homeowners cover and rejecting the cession of the Complainant's Santam policy.

[57] In making an order I am guided by what would be an equitable remedy in all the circumstances. In this regard, it is quite clear that the Complainant has enjoyed homeowners cover in terms of the Santam policy, which according to the Complainant has been in existence since the year 2000. The Santam policy provides cover over the mortgaged property in the sum of R874 504, 00. This is far in excess of the sum of the loan over the mortgaged property or for that matter the current balance on the loan account, which according to the records is the sum of R175 338, 84. She further enjoys cover for a higher sum assured in respect of the Santam policy and would be subject to a lower excess in the event of a claim on the policy. For all the above reasons, it would be equitable if the Complainant were to continue with that policy.

[58] Before I make an order in this matter, there is another related but not unimportant issue. This Office has received a number of complaints of a nature similar to this case against the Respondents. I have noted with concern certain trends and practices which indicate that the Respondents particularly may be engaging in prohibited practices and/or anti-competitive conduct regulated by the Competition Act 89 of 1998, as amended. Whilst matters involving the Competition Act do not fall within the remit of this Office, I believe that such conduct may warrant investigation by the Competition Commissioner. To this end, I will be forwarding a copy of this determination to the Competition Commissioner for investigation.

Accordingly, the order that I makes is:

1. That the 1st Respondent is ordered to cancel the homeowners cover that it has effected over the property and refund all premiums paid in respect thereof to the Complainant;

2. That the 1st Respondent is ordered to pay interest at the rate prescribed in the Prescribed Rate of Interest Act 55 of 1975 on each premium from the date it was paid by in by the Complainant to the date of final payment thereof;

3. That the 1st Respondent accept cession of Complainant's Santam policy as homeowners cover over the property;

4. That the 1st Respondent pay the case fees of this Office of R1 000,00 plus 14% value added tax thereon.

DATED AT PRETORIA ON THIS THE 21st DAY OF JULY 2005

Charles Pillai
Ombud for Financial Services Providers