IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FOC 2246/07-08/WC 1

In the matter between:-

DOLPHINS CREEK GOLF ESTATE **Complainant**

and

BURGER WILELMUS GERICKE

Trading as

BUKS GERICKE MAKELAARS **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 Dolphins Creek Golf Estate, a close corporation duly incorporated in terms of South African laws with its principal place of business at Morrison Way, Grootbrakrivier, George in the Western Cape Complainant is represented by Daniel Theron Murray (Murray), vice chairman and authorised representative of the complainant.

[2] Respondent is Burger Wilhelmus Gericke (Gericke), an adult male, licensed financial services provider in terms of the FAIS Act, with license number 18308. Gericke trades under the name Buks Gericke Makelaars/Brokers whose address is 17 St John Street, George in the Western Cape.

B. THE BACKGROUND

[3] Dolphins Creek Golf Estate was established in 2000. The estate consists of a golf course and several homes overlooking the golf course. During or about 8 June 2000, the Body Corporate of the Estate represented by Murray, approached the respondent to insure the golf estate, which at the time consisted of a thatch-roof clubhouse and a storage building (shed) where a tractor, three lawnmowers and other green keeping equipment were stored.

[4] Respondent initially placed the cover with Hollard. The original value allocated to the machinery and equipment stored in the shed was R36 000. In October 2001 this figure was adjusted to R72 000 and in August 2003 to R86 400. In June 2005, Respondent moved the policy over to a new insurer, Thatch Risk, with a value of R100 000 placed on machinery and equipment. [1]

[5] The requirements for the cover were sent to the Insurer in writing.[2]

[6] The new insurer, Thatch Risk, issued the policy and the policy schedule and wording was forwarded to Respondent.

[1] Complainant's complaint dated 16 August 2007.
[2] Letter from Respondent to Thatch Risk dated 8 June 2005.

[7] During the night of 20th December 2006, a fire broke out in the shed where the complainant's equipment was kept. It appears that the cause of the fire was a short circuit in the battery system of a tractor parked in the shed. The building did not have a ceiling and it appears that flames in and around the battery area ignited the rafters supporting the roof, causing the fire to burn through the rafters, resulting in the collapse of the roof. The majority of the damage related to the collapsed roof and the resulting fire which affected the lawnmowers and other equipment in the store. [3]

[8] With the assistance of the respondent, the complainant lodged a claim with Thatch Risk for the damage to the building and the contents thereof. Thatch Risk sent an assessor to assess the damage. Murray provided the assessor with a list of the damaged equipment (which included two lawnmowers and a Massey Ferguson tractor, which was in the shed at the time) and the estimated cost of repairs. Complainant estimated the cost at R93 883.38[4]. The assessor estimated the loss at R96 569.69.

[9] The building claim was honoured. However, the tractor claim was rejected. According to the insurer, the Massey Ferguson tractor was not insured in terms of the cover provided. This was due to the fact that it was a self-propelled vehicle and had to be insured under the vehicle section of the policy. Since this was not done, the tractor was never on risk and was therefore excluded from the claim, reducing the claim to R80 569.69.

[10] The condition of average was subsequently applied to the claim for the damaged equipment. The condition of average applies where immediately

[3] Assessors Report of 9 January 2007.
[4] List provided by Complainant to Insurer: "Implimente Beskadig gedurende Brand"

prior to its loss or damage the market value of property insured is greater than the sum for which such property is insured. If a loss occurs in these circumstances, the insured is entitled to compensation only for a proportion of the loss suffered. This proportion is calculated by dividing the sum insured by the true value of the object of the insurance. [5] This usually happens when used or second-hand goods are insured; their resale value may be low, but to replace as-new ("old for new") would require a high payout against the policy. In such a case, if the policy is subject to average, the claim will be reduced by the value of the underinsurance.

[11] In this instance, the insurer found that the equipment was under- insured by approximately 75% and placed the replacement value of the damaged equipment to be a minimum of R475 000, whereas the sum insured was R100 000.00. Applying the condition of average to the adjusted claim value of R80 569.69, the insurer limited its liability to R16, 962.04.[6]

Sum insured R100 000.00 x *R80 569.69* = *R16 962.04*

inclusive of VAT

Value at Risk R475 000.00

[12] Respondent then approached Thatch Risk to reconsider the settlement offer arguing that it was always his intention to insure the items as second hand, as most of the equipment had been purchased second hand. Further correspondence was exchanged between the respondent and the insurer in

[5] Reinecke et al LAWSA Volume 12 at 298

[6] Letter from assessor to insurer – undated

which the respondent disputed the basis for the rejection of the tractor claim and the average applied to the equipment claim. [7]

[13] However, the insurer maintained that at the time the policy was incepted, it had received the following paperwork from the respondent:[8]

[13.1] an inventory list of machinery and equipment (dated May 2005),

[13.2] Cover letter from broker to insured confirming insurance breakdown (dated 12/10/2001 – Hollard policy);

[13.3] Copy of page 5 of Insured's policy schedule (Hollard schedule – effective date/s 01/08/2002 and 01/08/2003 respectively)

[13.4] Copy closing instructions from broker to T.R.A (dated 08/06/2005 = policy effective date to be 01/07/2006)

[14] According to the insurer they could not find any form of communication on record stating that the items to be insured were second hand and that the basis of the property valuation was on an agreed value basis. The insurer pointed out that it "was never disclosed to [insurer] in the proposal form nor in any email communications nor was it discussed with [their] underwriting department that lawnmower/machinery/equipment was to be on an agreed valued basis." Further, the insurer referred to the proposal form[9] completed by the respondent, under the section, "SUMS INSURED", where the contents section states that the "*Sum insured must represent the full replacement value of the contents of the residence including VAT*.

[7] Letter from respondent to insurer dated 8 March 2007.
[8] Email from Insurer to Respondent dated 11 June 2007
[9] Proposal for Domestic Thatch Insurance.

[15] In respect of the tractor claim, the insurer stated that, it was not disclosed that a tractor was to form part of the contents insured. In the circumstances, the insurer refused to reconsider the claim.

[16] Regarding the tractor, Murray states that it had been on the policy “for years” and no one complained about it while the monthly premiums were being paid. It was only after the claim had been lodged that the complainant discovered that the tractor was never insured.

[17] Regarding the under insurance, Murray submits that it was his understanding that the R100 000 accurately reflected the cost of the insured items, as they would not consider buying new equipment.

[18] He further adds that at no point was the complainant made aware that the policy had an, “old for new” clause. The complainant believed that if the equipment were to be lost, the cover put in place by the respondent would get the golf course back in the position prior to the loss.

[19] The matter could not be resolved between the parties.

C. COMPLAINT

[20] The complainant’s complaint may be summarised as follows:

[20.1] Murray requested the respondent to provide him with comprehensive cover and was under the impression that the golf estate was comprehensively covered as per his instructions. He subsequently discovered that the equipment was grossly under-insured and the

tractor incorrectly insured. Murray states the respondent had failed to properly insure the complainant's property; alternatively did not act with due skill when rendering the financial service to the complainant.

[20.2] Complainant also claims that it was not made aware that the policy had an "old for new" clause. It believed that if the equipment were to be lost, the cover put in place by the respondent would get the golf course back in the position prior to the loss. Complainant accuses respondent of failing to inform the insurer that the clause should not apply in the complainant's circumstances.

[20.3] Based on the respondent's failure to discharge his duties properly and in line with the General Code of conduct for Authorised Financial Services Providers, (the Code) the complainant wants respondent to pay the balance of the claim – viz the loss it suffered as result of the underinsurance of the equipment and the incorrect cover of the tractor.

D. RESPONDENT'S VERSION

[21] The complaint was referred to the Respondent on 28 January 2008, requesting him to resolve the complaint with the complainant, alternatively, to revert with a comprehensive response thereto within 6 weeks.

[22] Despite several requests the Respondent failed to resolve the matter with the complainant or revert with his response.

[23] On 7 April 2008, a Notice in terms of Section 27 of the FAIS Act was issued, this time requesting from the respondent his version of events and supporting documentation. By early November 2008 there was still no response from the respondent despite several letters from this Office requesting same.[10]

[24] On 7 November 2008, the respondent filed his response. His version is summarised:-

24.1 This was a Pre-FAIS Policy written in 2000 by Hollard. According to him no replacement advisory record is needed when a policy is moved from one short term insurer to another. However, he had proof of cancellation and correspondence proving that he changed the policy;

24.2 He had never made any mention of any equipment that might have been new or bought as new. As the complainant was a mini-golf course, the equipment value had started at R32 000.00 and as complainant purchased more second hand equipment, he adjusted the values accordingly. He states that no mini golf course of this size will ever buy new Jacobson lawnmowers and Tractors.

24.3 He avers that the policy wording should have been amended to state that all equipment is second hand and the "Old for New" clause removed according to the original list of second hand equipment forwarded to the Company.

24.4 The respondent was further of the view that the insurer had applied "double standards" in respect of the tractor claim. He states that while the insurer saw the tractor as a self-propelled vehicle which

[10] Emails dated 7 April 2008, 19 June 2008, 10 July 2008, 30 October 2008 and 6 November 2008.

should have been insured separately, it saw fit to include the two second-hand lawnmowers which are also self-propelled. The values of the lawnmowers were then incorporated into the total value of the claim before the condition of average was applied.

[25] The respondent attached several documentation to his response. The following are worth mentioning:-

25.1 Letter to Thatch Risk dated 17 January 2007 (after the fire) wherein the respondent states that “it was the understanding from the start when we put the equipment on risk that seeing the tractor will only be used on the golf course and never go outside the premises. It was been used for towing trailers and cutting and cutting machinery on the golf course as such. In the light here of the tractor was seen as a normal machine such as the lawnmowers and other equipment stored in the store.” [sic]

25.2 Letter to Thatch Risk dated 8 March 2007 where respondent states:

“U sou merk dat hierdie nie ‘n volwaardige Golfbaan is nie. Die eienaars het sedert die begin tweedehandse masjienerie en toerusting aangekoop en opgebou. Nerens was daar te enige tyd sprake van nuwe masjienerie nie. Ons het die toerusting van die begin af teen tweedehandse waarde verseker. U kan self verstaan dat ‘n klein golfbaantjie soos Dolphins Creek nooit nuwe Jacobson Grassnyers sou aankoop nie. “

25.3 Letter to Complainant dated 3 May 2007 wherein the respondent assures the complainant that he believed that the contents were insured for second hand value from the beginning. [11]

[26] Further correspondence was sent to the respondent pointing apparent contraventions and requesting documentation which demonstrated his compliance with the FAIS Act and the Code at the time the cover was placed with Thatch Risk. No submissions were received in relation to respondent's compliance with the Code. Instead respondent maintained that the fault lay with the insurer.

[27] The complainant referred the complaint against the insurer to the Ombud for Short Term Insurance (OSTI). However, it appears that OSTI found that no fault could be attributed to the Insurer.

[28] In light of OSTI's ruling, the complainant accepted the insurer's offer of R16962.04 and indicated his intention to continue pursuing his complaint against respondent.

[29] The respondent was once again requested to provide a response to the issues and supporting documentation. Despite several requests, the respondent failed to cooperate with this Office.

E. ISSUES

[11] Respondent states: "*Ons is egter van mening dat die waarde van die inhoud van die begin af teen die werklike tweedehandse waarde verseker was*."

[30] The issues are:-

30.1 Whether there was a violation of the Code) on the part of the respondent when rendering the financial services to complainant. Specifically, were any of respondent's duties as a provider rendering the financial services to complainant breached?

30.2 Did such breach cause complainant's damage?

30.3 Quantum

F. COMPLIANCE WITH THE GENERAL CODE

[31] According to the complainant, his claim was not honoured in full by the insurer due to the fact that the equipment was under-insured. The equipment had been procured second-hand and on respondent's advice was insured for the value of R100 000. During the assessment of the claim, the assessor placed the real value of replacing the equipment at approximately R475 000. As a result of being under-insured, the insurer applied the condition of average and offered R16962.04 to settle claim.

[32] In the complaint, Murray states that he was not aware that an "old for new" clause applied to the policy. It was in fact his understanding that the Golf estate was correctly insured.

[33] When contents are insured as "Old for new" or for "replacement value" this refers to what it would cost the client to replace the contents at current prices. Respondent specifically denied to complainant that an "old for new" clause existed in the policy and had continuously maintained that the complainant was properly and adequately insured throughout.

[34] Respondent states that no mention was made that the equipment was bought as new, therefore the policy wording should have been amended to state that all equipment is second hand. He submits that the "old for New" clause should have been removed according to the original list of second hand equipment forwarded to the insurer. The respondent appears to be oblivious to his responsibilities towards its client. It was his responsibility to make sure that proper instructions were communicated to the insurer. However, the respondent has not provided this Office with any evidence relating to how he insured the equipment. In other words, there is nothing that supports that it was his request to either insure the equipment as second-hand or on an agreed value basis. An examination of the proposal form and the accompanying instruction to place cover reveals that he merely left it to the insurer to decide how the goods should be insured.

[35] The Insurer confirms that at no point did the respondent inform them that the equipment was to be insured as second-hand or on an agreed value basis.

[36] This is borne out by the documentation and the respondent's own version. In Respondent's letter to complainant dated 3 May 2007, Respondent states:

> *"Ons is egter van mening dat die waarde van die inhoud van die begin af teen die werklike tweedehandse waarde verseker was."*

[37] Further, in respondent's response to our Office, he states that:-

> *"never ever in this event we made any mention of any equipment that might have been new or bought as new equipment… the policy wording should have been amended to state that all equipment are*

second hand and that the "old for New" clause should have been removed according to the original list of second hand equipment forwarded to the [insurer]."

[38] Respondent's reference to an "egter van mening" with the insurer and that "the policy wording should have been amended" is not supported by any specific instruction furnished to the insurer.

[39] The evidence against the respondent is overwhelming in that:-

39.1 The respondent assisted complainant to complete the proposal form;

39.2 He subsequently submitted same to the insurer;

39.3 Under the sums insured section, it is specifically stated under **Contents** that the "sum insured must represent the *full replacement value* of the contents." [my emphasis] and respondent handwrote the followings words next to this instruction: "R1**00 000"** and underneath "machinery & lawnmowers."

[40] It was on the basis of the value of R100 000 supplied by the respondent that the insurer accepted the risk, calculated the premium and issued the policy. The R100 000 did not represent the full replacement value of the contents. On his own version, Respondent failed to properly insure the equipment. This is a violation of the provision relating to the general duty set out in section 2 of the General Code. The fact that incorrect information was submitted to the insurer cannot be blamed on Thatch Risk. Neither can this be blamed on the complainant.

[41] It is difficult to understand how the respondent could not have known what was required under this section of the policy. As an expert, he should have known and furthermore communicated to the complainant what was required. Murray in fact states that respondent assured him that they were insured for the right amount and that the “old for new clause” was not applicable in this case.

[42] The only conclusion one can draw is that the respondent did not understand how the Thatch Risk policy worked. This is inexcusable. The sale of commercial insurance requires highly specialised and skilled individuals. By holding out to the general public that he offers financial services in Commercial insurance, the Respondent implied that he possessed those specialised skills.

[43] The “new for old clause” remained in the policy and was therefore applicable at all material times. There is also no evidence that respondent informed the complainant that such a clause existed and what the consequences of this were.

[44] Regarding the tractor, as stated earlier the insurer was of the view that the tractor, as a self-propelled vehicle should have been covered under the motor section – notwithstanding its use. It appears instead that the respondent had included the tractor in the list of items to be insured.[12] Here again the respondent failed to correctly insure the tractor. This is yet another indication that respondent was completely out of his depth. As a result, at the time of loss, the tractor was not insured.

[12] Insurer correspondence to OSTI dated 21 April 2009.

[45] 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."**

[46] As a financial services provider, respondent had a duty to render the financial services with due skill and diligence. This means that it was the respondent's duty to fully understand the product he was selling. It is for this reason that respondent is allowed to charge a fee/commission for his services. Respondent should have known how short term insurance works in general and particularly how this particular insurer, Thatch Risk policy works. The insurance of goods at their full replacement value is a fairly common practice in the insurance industry and it would have been crucial for the respondent to have a thorough understanding of this clause in order to properly render financial services to the complainant.

[47] It is clear that the complainant's loss was as a result of the respondent's conduct. Firstly in respect of the incorrect sums insured for the equipment and the failure to properly insure the tractor.

[48] 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.

[49] Respondent has raised an additional issue regarding the replacement policy advice record viz. that none is needed when a policy is moved from one Short Term Insurer to another. This is not true.

[50] Clause 8(1)(d) of the General Code is unequivocal in its requirements:

> *"A provider other than a direct marketer, must, prior to providing a client with advice –*
>
> *(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 replacement...."*

[51] There is no distinction between long term and short term insurance products under this clause. It must be assumed, in the absence of any express contrary provision that it applies to replacements of any financial product with any other financial product.

G. FINDINGS

[52] Respondent failed to properly insure the machinery and equipment and failed to disclose this to complainant.

[53] Respondent failed to correctly insure the tractor, being a "self-propelled" vehicle in that he included the tractor in a wrong section of the policy when, according to the insurer, the tractor, being a self-propelled vehicle should have been included in the vehicle section.;

[54] 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.

[55] On the facts before this Office, one concludes that, had respondent rendered the financial service properly, complainant would have enjoyed indemnity under the Thatch Risk policy. Accordingly, respondent's unlawful and negligent conduct was the sole cause of the insurer's rejection of complainant's tractor claim and the insurer's application of the condition of average on the machinery and equipment claim. Respondent is liable to compensate complainant.

H. QUANTUM

[56] According to the complainant, its claim was not honoured in full by the insurer due to the fact that the damaged equipment was under-insured. The equipment had been procured second-hand, and was insured for its second-hand value of R100 000. The insurer confirmed to this office that the quantum of the claim would have differed had the contents and tractor been properly insured. According to the insurer, the estimated value at risk as calculated by the loss adjuster was R 475 000 and the quantum of the claim before average was applied was R 96 569.69.

[57] The insurer would therefore have settled as follows:

Add Contents:	80,569.69
Less excess:	1, 000.00

Add Tractor:	16,000.00
Less excess @ 10% of claim:	1,600.00
TOTAL CLAIM	**R93, 969.69**

[58] The office is however mindful of the fact that had the complainant been properly insured, this would have necessitated an adjustment in premium. Such difference in premium should be taken into consideration when the final quantum in calculated. The policy with the current insurer was incepted in June 2005 and the insured event occurred in December 2006. The complainant had therefore been paying premiums on the incorrect cover for a period of 18 months. The payable premiums during this period were R 150.00 per annum.

[59] Both parties have stated that the intention was to insure the contents on an agreed value basis i.e for R100 000 and not the full replacement value.

[60] In correspondence with this office the insurer confirmed that had the complainant been properly insured on the agreed value basis, the premiums levied on the cover for the contents would have been R750.00 per annum and premiums for the tractor would have been R750.00 per annum.

[61] The difference in premiums payable over the 18 months period would therefore have been as follows:

Contents:	(R750.00 x 1.5 years)	R1,125.00
Tractor:	(R750.00 x 1.5 years)	R1,125.00

Less premiums:	(R150.00 x 1.5 years)	R225.00
TOTAL DIFFERENCE		**R 2,025.00**

[62] The total claim payable is therefore

Total claim:	R93,969.69
Less difference in premium:	R2,025.00
TOTAL CLAIM PAYABLE	**R91,944.69**

[63] The complainant had already accepted a settlement from the insurer in the amount of R 16 962.04. The respondent's liability is therefore R91,944.69 less R16, 962.04 =R74,982.65

THE ORDER

In the premises, the following order is made:

1. The complaint is upheld;
2. Respondent is hereby ordered to pay to complainant the amount of R79 607,65;
3. Interest at the rate of 15.5 % , to be paid from a date seven (7) days from date of this order to date of final payment;
4. Respondent is 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 14th OF MAY 2012.

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NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS