

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

Case Number: FOC 2825/09-10/GP/(3)

In the matter between:-

Serafim Antonio Mendonca Dos Santos

Complainant

And

PF Business Services cc T/a EA Brokers

First Respondent

Paulo Fernandes

Second 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 Serafim Antonio Mendonca Dos Santos ("Dos Santos"), an adult male, who resides at 49 Kilini Street, Earphone & Foxtrot Turn, Radiokop, 2040.
- [2] First Respondent is PF Business Services cc T/a EA Brokers ("EA Brokers"), a close corporation duly registered in accordance with the laws of South Africa. First respondent is also a registered Financial Services Provider (FSP nr: 15412) with its registered office, alternatively, principal place of business at 32 Pieter Ackroyd Street, Bassonia, 1448.

- [3] Second Respondent is Mr Paulo Fernandes (“Fernandes”), of 32 Pieter Ackroyd Street, Bassonia, 1448, member and authorised representative of the first respondent.

B. BACKGROUND AND UNDISPUTED FACTS

- [4] Dos Santos had a short-term insurance policy through EA Brokers with Fernandes as his representative since February 2008. In August 2008 Dos Santos bought a new Mercedes Benz and requested Fernandes to add this vehicle to the existing policy at the time with Renasa Insurance Company (‘Renasa’).
- [5] The motor vehicle was duly added and a copy of the policy schedule and terms forwarded to Do Santos via e-mail on the 20th August 2008. In this e-mail and of particular relevance to the complaint that arises, Fernandes states that Dos Santos ‘needs to get a tracking device on the new car...I will arrange that for him’ (my emphasis)
- [6] The valuation of the motor vehicle was such that the policy terms required that a tracking device be installed within seven days of inception of the policy. However no tracking device was installed.
- [7] Unfortunately the vehicle was hi-jacked at Dos Santos’ home on the 13th of October 2008, and Dos Santos immediately informed both the South African Police Service and Fernandes.
- [8] Dos Santos completed the required claim form and faxed same to Fernandes at the office of EA Brokers on the 21st of October 2008. In a letter dated 12 December 2008

Renasa informed Dos Santos that his claim had been repudiated due to misrepresentation. The relevant section of this letter reads as follows”

‘This policy or any particular section shall be voidable if there is evidence of any misrepresentation or non-disclosure in any material particular relative to the Policy or any section thereof.

It is noted on the Schedule that the minimum Security requirement to Motor vehicles exceeding the value of R250 000 to have a Vesa approved tracking and recovery device fitted and activated, which was established during the investigation was not the case.”

- [9] The allegation of misrepresentation related to the fact that the policy schedule reflected the motor vehicle as having an active tracking device, whilst as mentioned no device had been installed. With Fernandes having made the arrangements to insure the vehicle it was initially assumed that he had conveyed erroneous information to Renasa’s administrator, KVB Consulting. Subsequent investigations point to an administrator at KVB Consulting having entered the incorrect information. In any event I do not believe that this would have changed the outcome but merely the reasons for repudiation.
- [10] The crux of the complaint is the allegation that whilst Fernandes had undertaken to arrange the tracking device, he had negligently failed to do so resulting in the repudiation of the claim, and financial prejudiced Dos Santos.
- [11] Dos Santos also raised two further issues, the first being that he was aware of instances in which an insurance company accepted a letter from Mercedes Benz stating that no aftermarket tracking systems had been approved for fitment, thereby bypassing the requirement that a tracking device be installed.

[12] The second related to the continued deduction of premiums post Renasa's repudiation of the claim.

C. THE RELIEF SOUGHT

[13] Dos Santos seeks an order against the respondents compelling them to pay the insured value of the vehicle. According to the policy schedule provided by Dos Santos the vehicle was insured for R 359 000 (three hundred and fifty nine thousand Rands). Dos Santos further seeks repayment of the premiums paid in respect of the vehicle after the claim was repudiated.

D. INVESTIGATION BY THIS OFFICE

- [14] Upon receipt of this complaint it was forwarded to both Fernandes and EA Brokers. Fernandes replied on behalf of both respondents.
- [15] He stated that Dos Santos contacted him on short notice and requested that the vehicle be insured. A quotation was done on the system on the 'active policy' and the premium discussed telephonically with Dos Santos who accepted same and requested that he send proof of insurance to the dealership. Consequently on the 16th August 2008 a document headed 'CONFIRMATION OF INSURANCE COVER' was forwarded to the dealership by EA Brokers.
- [16] Dos Santos was then sent the e-mail of the 20th of August 2008, which both informed him that a tracking device was required and attached the policy schedule. Fernandes alleged that he brought the security requirements to Dos Santos' attention and as a courtesy offer went beyond the call of duty and informed a tracking company to contact Dos Santos.

- [17] It was Fernandes's contention that it was not his duty as a financial services provider to seek out and ensure that Mr Dos Santos had the tracking device fitted to his motor vehicle.
- [18] Fernandes contended that Dos Santos was by the very nature of his employment aware of the importance of reading and complying with contractual provisions. Additionally Fernandes contended that various correspondence forwarded to Dos Santos had highlighted the need for a tracking device. Accordingly Dos Santos should have taken steps to ensure that he would enjoy the cover for which he was paying a premium.
- [19] Further Fernandes stated that '*Dos Santos ought to have known that the tracking device had not been installed as he had never taken his car to Cartrack or any other tracking fitment centre to have the device installed nor did Mr. dos Santos pay a monthly fee therefor*'.
- [20] In so far as the premiums were concerned Fernandes attached a document which supports his allegation that Dos Santos was credited for the premiums which he paid subsequent to his claim being repudiated by the insurer.

E. DETERMINATION AND REASONS

- [21] The issues for determination are whether the First and Second Respondents' actions amounted to a contravention of the FAIS Act and the General Code of Conduct and if so whether such contravention resulted in the loss suffered by Dos Santos.
- [22] Prior to dealing with the main issue it is necessary to deal with the two secondary issues raised by Dos Santos. In so far as the premiums are concerned Fernandes has provided documentary evidence to the effect that this issue was resolved.

- [23] In respect of Dos Santos's claim that an insurance company had accepted risk on a Mercedes- Benz motor vehicle without requiring that a tracking device be installed, it is not necessary that I determine whether or not this has occurred. This Office has dealt with many instances of tracking devices being installed on a Mercedes Benz and by all accounts this is a common insurance requirement.
- [24] That the motor vehicle required a tracking device is not the issue at hand. Dos Santos neither disputes that he received the e-mail of the 20 August 2008¹ nor does he contend that he was unaware of the requirement that his vehicle have a tracking device installed.
- [25] Furthermore additional correspondence from EA Brokers to Dos Santos served to emphasise the security requirements. In particular a letter dated 10th September 2008² has a highlighted section titled 'Motor-MINIMUM SECURITY REQUIREMENTS' which details the tracking device requirement for vehicles over R250 000³. Additionally upon the commencement of the relationship between EA Brokers and Dos Santos a letter dated 7th March 2008 was forwarded to Dos Santos. Whilst the security requirements were not specifically pointed out the policy documentation itself did contain the relevant terms.
- [26] The point that Dos Santos makes in his complaint is that Fernandes in his e-mail of 20th August 2008 stated that he would arrange for the tracking device. Accordingly in doing so he voluntarily imposed an obligation on himself to ensure that the security conditions of the policy were met.

¹ E-mail containing policy documentation and requirement that a tracking device be installed

² Dos Santos denies that this letter was ever received by him.

³ Applicable in the present instance due to the value of the vehicle

- [27] In failing to meet this obligation he directly contributed to the loss when the insurance company repudiated the claim.
- [28] Fernandes in turn would have us believe that his e-mail of the 20th August 2008 was merely a courtesy offer which was in fact met when he sent an e-mail to the tracking company. In any event he further contends that Dos Santos would have known that no tracking device was installed and hence should have followed up and taken steps to ensure that the vehicle was properly covered.
- [29] I have frequently quoted Clause 2 of the General Code of Conduct for Authorised Financial Services Providers and representatives ('the General Code'), which requires that an authorised financial services provider must "*at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.*" [Own emphasis].
- [30] Allied thereto and pertinent to the matter at hand is the requirement in section 7. (1)(c) (vii) of the General Code that a provider provide 'concise details of any special terms or conditions, exclusions of liability, waiting periods....restrictions or circumstances in which benefits will not be provided.'
- [31] With these provisions in mind I am perturbed by the casual nature of the e-mail sent by Fernandes on the 20th August 2008. In terms of the policy conditions there was a seven day grace period within which Dos Santos was required to install the tracking device failing which theft cover would lapse. Fernandes in his e-mail makes no mention of this clause and in fact the very nature of his correspondence conveys a distinct lack of urgency. Whilst he does state that Dos Santos needs to get a tracking device, Fernandes

goes on to state that he will arrange this but yet offers no indication whatsoever as to when this will be done .

[32] When queried on whether he had in fact made such arrangements Fernandes provided the Office with a copy of an e-mail allegedly sent to the tracking company on the 21st August 2008. This mail simply requests that someone contact Mr Dos Santos's assistant. It also provides a name and contact number. Once again there is no indication of any urgency.

[33] Furthermore and in the course of the investigation the Office contacted the tracking company in order to verify whether such a request had actually been received. In turn we were informed that the IT department of this company was tasked to find whether such an e-mail was sent, however none could be found.

[34] When asked to explain, Fernandes replied as follows: 'In response to your reference to the investigations you carried out on the authenticity of my assistant's email to Cartrack, dated 21 August 2008, our business practice is such that once my assistant has sent an email, she prints off the sent email and then deletes it from her sent items so as not to clog up her sent items folder. This is why we were only able to fax you a copy of that email.'

[35] However even assuming that the e-mail had actually been sent there can be no way to excuse the haphazard nature of its contents which evidence a distinct lack of professionalism. Furthermore Fernandes did not bother to follow up with the tracking company, instead his version was that he assumed that the tracking company had contacted Dos Santos.

- [36]** Whether this was an courtesy offer or contractually binding obligation in no way changes the fact that Fernandes had a clear duty to alert Dos Santos to the seven day grace period and draw Dos Santo's attention and notice to the fact that theft cover would fall away in the event that the requirement was not complied with. Section 8 (2) of the General Code requires that a provider take reasonable steps to ensure that the client understands the advice.
- [37]** Whilst the grace period is contained in the policy documentation, and one must expect that clients read their documentation, this does not excuse a service provider from complying with the FAIS Act and drawing a client's attention to the material provisions at the time that the financial service is rendered.
- [38]** This is particularly relevant in the present instance given that Dos Santos did not have to complete any documentation and there was no written communication between Dos Santos and Fernandes prior to the motor vehicle being insured. Fernandes himself confirmed that clients do not have to complete an application form for the addition of a vehicle to an existing policy. All that is required with a "New vehicle" is a copy of the Tax Invoice and this is what occurred in the present instance.
- [39]** The process of adding additional items to an existing policy is normal within the industry but this must be done with appropriate record keeping. There is not a single record of any communication such as the verbal communication between Dos Santos and Fernandes leading up to the motor vehicle being insured. When the Office queried this and requested copies of voice recordings, Fernandes informed the Office that he had no such facilities, hence none could be provided. Section 3.(2) (a) (i) of the General Code distinctly requires that a provider have appropriate systems in place to record written

and verbal communications relating to the financial services rendered. This lack thereof in the present instance evidences both non compliance and a distinct lack of professionalism.

- [40] Additional evidence of the lack of professionalism on Fernandes's part was that the policy schedule incorrectly reflects the vehicle as having an active tracking device. As I have already mentioned it was initially assumed that Fernandes had conveyed the incorrect information to Renasa's administrator but investigations later pointed to this having been erroneously inputted by the administrator. Nonetheless one would have expected Fernandes to check the schedule prior to forwarding it to Dos Santos.
- [41] In the present instance there is no dispute that whilst perhaps unaware of the seven day grace period, Dos Santos was clearly aware of the need to install a tracking device. The motor vehicle was hijacked some seven weeks after policy inception and in this instance the grace period was no longer applicable and hence of no relevance to this determination.
- [42] What is relevant however is the seven week period between the inception of the policy and the loss. Dos Santos had been alerted to the fact that a tracking device needed to be installed, and whilst no time frame had been specified I have no doubt that he was cognisant of the potentially negative impact on his cover as well as the need to ensure that this was installed within an appropriate time frame.
- [43] I have no hesitation in finding that the seven week period was well in excess of what any reasonable person would have taken to be a reasonable time frame.
- [44] However during this period Dos Santos did not make so much as a single phone call to enquire from Fernandes as to when he would arrange for the tracking device. In terms of installing the device it was Dos Santos who would have had to arrange for his vehicle to

be available and of course arrangements would have to be made to debit the monthly premium from his account.

[45] I have already criticised Fernandes for the sloppy manner of his e-mail. No date was arranged or any indication as to how the tracking device would be installed. However this in itself leads me to question whether Dos Santos is entitled to hold Fernandes accountable in the instance for the ensuing loss. The offer was casual in nature and devoid of any specifics. In simple terms there was no meeting of the minds as to exactly how this would be arranged. In the instance had Dos Santos validly believed that Fernandes would make the necessary arrangements I would have expected Dos Santos to have at least followed up in order to enquire as to times and dates or even the name of the tracking company required. Particularly as already mentioned he was in possession of the vehicle which had to be fitted.

[46] Dos Santos is not someone insuring a vehicle for the first time. Additionally he is employed as a workshop manager, a position which no doubt requires an awareness of contractual provisions.

[47] As such Dos Santos appears to be unwilling to take responsibility for his own tardiness. Had the loss occurred within a shorter time frame my findings may have differed but in the present instance the long period of inactivity on Dos Santos's part is difficult to overcome.

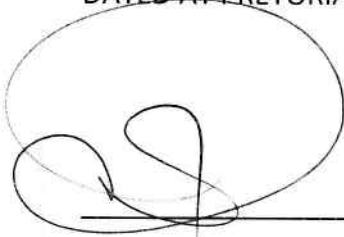
[48] Whilst I am extremely critical of the way in which Fernandes has conducted himself I do not believe that his actions were the proximate cause of the loss. Instead these are outweighed in the present instance by the responsibility of insured to comply with policy conditions. That responsibility cannot easily be abdicated to a third party.

[49] In dismissing this complaint I must however caution that I am less than pleased with the manner in which Fernandes has conducted himself and it is only by a very narrow margin that he has escaped liability.

Order

In the premises the complaint is dismissed.

DATED AT PRETORIA ON THIS THE 11th DAY OF JULY 2011.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS