

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 01129/13-14/ GP 3

In the matter between:-

JACQUES DU TOIT

Complainant

and

BARRINGTON INSURANCE BROKERS (PTY) Ltd

First Respondent

JOHN FRAYNE

Second Respondent

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

A. INTRODUCTION

[1] Complainant insured his motor vehicle against theft and hijacking. The insurance policy was obtained through the first respondent who acted as complainant's broker. The vehicle was stolen and complainant filed a claim against the policy. The insurer repudiated the claim on the basis that complainant had not complied

with a material condition in the policy, viz that complainant had failed to fit his vehicle with a tracking device as specified in the policy.

[2] Complainant stated that he was not aware of this requirement and claims that the respondents were negligent in failing to inform him of the requirement of the tracking device.

[3] Complainant filed a complaint with the Ombud for Short Term Insurance. After considering the facts, the latter declined to deal with the matter on the basis that it was appropriate for this Office to deal with complainant's complaint. The complainant then filed a complaint in this Office. The matter was then investigated and what follows is the determination; the parties having failed to reach any settlement.

B. THE PARTIES

[4] Complainant is Jacques Du Toit a medical doctor who resides at 3 Oak Tree Villas, 16 Albatros Street, Helderkruijn.

[5] First respondent is Barrington Insurance Brokers (Pty) Ltd a company duly registered (registration no 1989/01817/07) with its principal place of business at Unit 12 Waterford Office Park, Waterford Drive, Fourways. The first respondent is a registered financial services provider and carried on business as, *inter alia*, an insurance broker for short term insurance.

[6] As at the time of writing this determination, first respondent no longer conducts business as insurance brokers. On the 19th March 2014 first respondent, represented by second respondent, sold its Book of Business to Galileo Risk (Pty) Ltd. First respondent thereafter stopped conducting the business of short term insurance brokerage. The transaction in issue in this determination took place before the sale of business to Galileo.

[7] This Office wrote to Galileo requesting them to deal with the issue as to why they should not be held liable for any consequence of the transaction involved in this complaint. A comprehensive response was received from Galileo's attorneys explaining why their client cannot be held liable. For purposes of this determination it is not necessary to deal with this in any detail. I merely state that this Office accepts the explanation given by Galileo and there is no legal or factual basis to hold the latter liable.

[8] Second respondent informed this Office, on the 12th November 2014, as follows:

- 8.1 First respondent was deregistered with the Financial Services Board (FSB) in June 2014;
- 8.2 First respondent was being deregistered from the companies registry (CIPC) and was a shell company with no business and no assets;
- 8.3 That this Office should deal with this complaint by communicating directly with second respondent.

[9] Second respondent is John Frayne, a businessman, who at all material times was the managing director of first respondent. In the light of the current non-existent status of first respondent, second respondent has taken responsibility for the acts and omissions of the first respondent in so far as it relates to the transaction in this complaint. The second respondent is nevertheless responsible by operation of law.

[10] I must point out that this Office was not under the impression that the first respondent was deregistered to avoid any possible consequence of this complaint. This Office accepts that deregistration was carried out by second respondent in the ordinary course of business.

[11] Complainant also filed a complaint against the insurer Execuline, on the basis that the latter failed to fulfil their duties in terms of the FAIS Act. I can find no basis in fact or law to hold the insurer liable for complainant's loss and accordingly will not consider any complaint against the insurer. The Ombud for Short Term Insurance also investigated the role of the insurer and found that the latter did no wrong.

C. FACTUAL BACKGROUND

[12] Complainant had obtained short term cover in respect of his house and motor vehicle through first respondent. The policy was initially obtained from Compass Insurance Company Ltd ("Compass"). A requirement of the Compass policy was for the insured vehicle to be fitted with a tracking device. Complainant complied with this requirement and fitted an approved tracking device to his vehicle, a Toyota Hilux 3.0 D4D registration YKL 651 GP.

- [13] During December 2009 Compass informed the first respondent that it would no longer provide cover for vehicles valued at over R300 000. This resulted in first respondent having to find cover with another insurer. According to first respondent they considered various options and found that the best cover, for complainant's vehicle, was with Execuline Motor Underwriting Managers (Pty) Ltd ("Execuline"). Accordingly and as from 1st December 2009, complainant's policy was transferred to Execuline.
- [14] Complainant submits that he was never informed of the transfer of cover to Execuline, nor did he give first respondent permission to transfer the policy. Nevertheless, it is not in dispute that the Execuline policy was in place and complainant paid the monthly premiums.
- [15] On the 14th September 2012, after the policy was renewed twice, complainant's vehicle was stolen from the car park at Chris Hani Baragwanath Hospital. The tracking company was notified but failed to recover the car. The tracking device was later found discarded by the thieves.
- [16] Complainant submitted a claim to the first respondent, his broker, against his policy. On the 3rd October 2012 complainant was informed in a letter from first respondent that the claim had been repudiated. The reason for the repudiation was that the tracking device fitted to the vehicle did not comply with the requirements of the insurer as stated in the policy document.

[17] It is not in dispute that complainant's vehicle was fitted with a device. However it is also not disputed that the device was inadequate in terms of the Execuline policy. This policy stipulated that the requirement was for the installation of a dual tracking unit. This was not fitted to complainant's vehicle.

[18] Complainant's case is that he was never informed of this special requirement in the Execuline policy and points out that it was the duty of his broker to draw his attention to this.

[19] The respondents disagreed with complainant and pointed out that complainant was aware of the tracking requirement and the latter neglected to comply. Respondents deny any responsibility for complainant's loss.

[20] Both parties made comprehensive written submissions to this Office and also provided all the relevant documentation, including all correspondence between the parties. This Office was well placed to make a determination.

D. THE COMPLAINT

[21] Complainant summarised his complaint against the respondents as follows:

"The basis of my dispute is as follows:

- 1. I was never informed of the reason for the transfer of my policy from Compass to Execuline in December 2009.*

2. *Barrington never requested my consent to transfer the policy to Execuline, which had materially different requirements and policy terms. One of which led to the rejection of my claim.*
3. *Barrington claims to have communicated the tracking device requirements to me via e-mail on 19 April 2010 (which is in any event five months after the transfer of the policy to Execuline). I never received any such communication from them.*
4. *Despite the fact that Barrington did not receive a response to the alleged e-mail communication in 3 above, Barrington failed to follow up with me, either telephonically or via post, regarding the non-compliance with the requirements of the Execuline policy for a period of almost 3 years. During this three year period I was under the impression that my vehicle was comprehensively covered.*
5. *Despite the non-compliance with the tracking requirements my policy was renewed twice by Barrington (during 2010 and 2011), without Barrington ever attempting to inform me of the non-compliance with the tracking device requirements which eventually led to the rejection of my claim.”*

I will deal with the complaint in more detail below.

[22] Respondents, and in particular second respondent, filed a comprehensive response to the complaint; which can be summarised as follows:

22.1 Compass was no longer providing cover and announced this decision during the festive period when people were away on holiday. They had to

ensure that clients were not left without cover. They acted in the interests of clients in arranging cover through Execuline;

- 22.2 Policy documents were delivered to complainant with instructions for him to read and consider the terms and conditions of the policy;
- 22.3 Policy documents as well as correspondence pointed to the requirement of tracking devices and complainant had to comply;
- 22.4 Complainant either did not read the documents or neglected to comply with the required installation of dual tracking devices;
- 22.5 Complainant was aware that there was a different insurer as the policy document was delivered to him and the debit order on his account for the premiums was changed; and
- 22.6 Respondents complied with the FAIS Act and Code and were not negligent in providing complainant with financial services.

I will deal with this response in more detail below.

E. THE ISSUE

[23] The issues here can be stated as follows:

- 23.1 Whether the respondents rendered the financial service herein negligently and/or in a manner which is not compliant with the Act and Code; and
- 23.2 If it is found that respondents did render the financial service negligently and/or failed to comply with the Act and Code, whether it was such conduct that caused the complainant loss.

[24] To put it plainly, the issue is whether the respondents took reasonable and diligent steps to alert complainant to the tracking device requirements in the Execuline policy.

F. ANALYSIS OF THE EVIDENCE

[25] I commence by referring to the following facts which are undisputed:

25.1 Respondents, at all material times, acted as complainants broker for the purpose of advising and obtaining short term insurance cover for the latter's house and motor vehicle;

25.2 Until the 1st December 2009, complainant enjoyed cover from Compass. The Compass policy required complainant to install a tracking device in the insured vehicle. Complainant complied and provided a certificate of fitment. Respondents noted such compliance in their file;

25.3 When the policy was transferred to Execuline, the parties were aware that the insured vehicle was already fitted with a Tracker. This much is noted by respondents in the proposal form forwarded to Execuline;

25.4 Execuline accepted the proposal and issued comprehensive cover in respect of the vehicle and delivered the policy document to the respondents;

25.5 The policy did refer to specific conditions regarding the installation of a tracking device;

25.6 The policy documents were delivered to complainant with a note that he should read same;

25.7 The Execuline policy came into effect on the 1st December 2009 and was renewed in 2010 and renewed again in 2011. The renewals were handled

by respondents and from the inception of the policy in 2009 complainant paid the monthly premiums through a debit order;

25.8 At the time of the theft, complainant had paid all his premiums;

25.9 From December 2009 to the date of the theft on 14th September 2012, there is no correspondence from respondents to complainant in which they specifically draw complainants attention to the fact that Execuline's requirements for a tracking device is different from the requirement in the Compass policy;

25.10 From December 2009 to September 2012, through two renewals of the policy, there is no correspondence from respondents to complainant pointing out the following:

- That the Execuline policy requires the fitting of a Dual tracking unit,
- Exactly what is meant by a dual tracking unit and why it is different from the requirement in the Compass policy, and
- That complainant since December 2009 had not yet provided proof of compliance with the Execuline policy and what the consequences will be for such failure;

25.11 Complainant did not fit a dual tracking unit and was under the impression that the unit already fitted to the vehicle was adequate;

25.12 Complainant did not, at any stage after December 2009, correspond with respondent regarding the fitting of an Execuline compliant tracking unit;

25.13 On the 14th September 2014 the insured vehicle was stolen and never recovered;

25.14 On the 3rd October 2012 Execuline repudiated the claim on the policy due to complainants breach in failing to install a dual tracking unit.

[26] As I have pointed out, respondents can provide no evidence that they specifically drew complainant's attention to the tracking requirements in the Execuline policy, nor did they attempt to explain why this was different to the Compass policy. The respondents merely rely on the policy document, having expected the complainant to have read the policy and understood it. The details of the special condition is in the policy schedule.

[27] Even if I accept that complainant read and understood the tracking requirements, it cannot be disputed, on respondents own version, that the latter must have known that complainant did not provide proof of compliance (as he had done for the Compass policy). It is undisputed that complainant did not forward proof of compliance. The undisputed facts tell us that respondents were aware that complainant did not comply with the Execuline requirements and simply failed to follow up.

[28] Respondents state that on the 19th April 2010 they communicated the tracking requirements to complainant in an e-mail and there was no response from complainant. The latter denies having received such an e-mail. This is a dispute of fact which, for reasons below, this Office need not resolve.

[29] Respondents do not explain why the first communication about the tracking device happened five months after the policy was issued. Nor is there any explanation as to why there was no follow-up over a period of two years when no proof of compliance was received and even after the policy was renewed twice.

G. THE POLICY DOCUMENT

[30] At this stage it will be appropriate to refer to the policy document. Respondents rely on this to submit that the complainant was adequately informed of the Execuline tracking device requirements. The Motor Vehicle section of the Schedule of Insurance, dated 28/10/2010, contains the following:

“Comments: *REQUIRED SECURITY*

C-TRACK INSURE WITH STEALTH GUARD

OR

CAR TRACK DOUBLE PROTECTION

OR

EXECULINE APPROVED TRACKING DEVICE TOGETHER WITH

TOYOTA ELECTRONIC CONTROL UNIT

FAILURE TO FIT EITHER OF THE ABOVE WILL RESULT IN THE EXCLUSION OF THEFT/HIJACK COVER OR ANY ATTEMPT THEREAT.”

The above wording is not clear. Even if complainant read it, it does not tell him that these requirements are different to the Compass policy. It certainly does not explain that what was required was a form of dual tracking unit. It is not unreasonable for complainant to think that he already had a tracking device in the vehicle. There was a duty on the broker to explain this special condition to the

client and to see to it there was compliance. It is not disputed that respondents knew what the wording of the schedule meant and they also knew that non-compliance will render their client without cover for theft and hijacking.

[31] To make matters more confusing the schedule was accompanied by a "*Tracking Systems Guide*" a document which sets out the required tracking devices to be fitted in insured vehicles.

Under "*Toyota Hi Lux*" the following appears:

"Cartrack Double Protection

Cartrack Executive Plus

Cartrack Quick Alert

Or

Two separate tracking devices"

Note that this is merely a guide and one must question the legal standing of this document. The recommended devices differ from that stated in the insurance schedule. It is also noteworthy that the insurance schedule does not mention "*Two separate tracking devices*".

There is no evidence that respondents even attempted to explain this to complainant in plain language.

[32] After the policy was renewed the new policy was sent to complainant. The Schedule of Insurance, dated 19/10/2011, in the Motor Vehicle Section provides as follows:

"Endorsements / Proviso

Required Tracking Device

Car Track Executive Plus

OR

Car Track Double Protection

OR

Car Track Quick Alert”

Again, this differs from the previous schedule. The wording does not convey that what is required is a dual tracking unit or that the vehicle has to be fitted with two separate tracking devices. It is reasonable to accept that when the complainant read this it merely sets out various preferred options for tracking devices and that he did have such a device fitted into his vehicle.

There was a duty on the respondents to explain to complainant, in plain language, that what the wording meant was the installation of a dual tracking unit or two separate tracking units and that this was different to what was already installed in the insured vehicle.

[33] Respondents point out that complainant was referred to the schedule of insurance and that the latter failed to read it. I find that even if he read it, it would not have told him that he needed a dual tracking unit or two separate tracking units. It was perfectly reasonable for him to accept that his vehicle already had an insurance approved tracking device. On the probabilities, if complainant was told what the Execuline requirement was, he would have complied immediately or would have requested respondents to consider another insurer.

H. THE CORRESPONDENCE/DOCUMENTATION

[34] The correspondence and the documents provided by the parties is helpful in dealing with this dispute.

[35] On the 27th November 2009 respondents sent complainant an e-mail informing him of “*Change of Motor Insurer*” and enclosing the policy wording. The policy itself was not yet in place and this was the opportune time to draw complainant’s attention to the proviso in the schedule of insurance dealing with the tracking devices. This was not done.

[36] There was a duty on respondents to first familiarise themselves with the terms and conditions of the new policy and then to fully inform their client of any special terms and provisos. Certainly respondents had to deal with any term or condition that might result in a possible repudiation of a claim or a failure to provide cover.

[37] On the 12th April 2010 Execuline wrote a letter to first respondent confirming that complainant’s policy was issued on the 1st December 2009. The letter then reminds respondents that certain documents remain outstanding and one of these documents is the “*Tracking Certificate*”. The letter concludes as follows:

“Please let us have the outstanding documents”.

Respondents were reminded that since the 1st December 2009 (five months ago), the tracking certificate was outstanding. This should have resulted in urgent action to get their client to comply. This did not happen.

[38] On the 19th April 2010 respondents sent an e-mail to complainant, referring to his policy with Execuline and stated as follows:

“Please supply me with the following documentation urgently:

Copy of Registration Document

Proof of the Tracking System installed”

This is the letter respondents rely on and which complainant denies having received.

However even if he read it, the letter is unhelpful. Remember at that stage complainant had already sent proof of fitment of a tracking device in respect of the Compass policy. The letter does not tell him that the Execuline policy is different and what was required is a dual tracking unit or two separate tracking units.

In any event, on respondents own version complainant did not respond and they did not follow up notwithstanding a reminder from the insurer.

[39] On the 1st November 2010 respondents wrote a letter to complainant informing him that his policy was renewed. The letter stated that the value of the vehicle and the monthly premiums were adjusted. Again there was absolutely no reference to the dual tracker requirement. At this stage respondents knew that complainant had not yet complied and still they failed to rectify the situation.

[40] A year later on the 11th November 2011 respondents wrote to complainant, informing him that his policy will be renewed with effect from 1st December 2011. The letter again deals with the adjustments to the value of the vehicle and the premiums. There was still no mention of the tracking device requirement

notwithstanding that there was no proof of compliance by the complainant since December 2009. Still the respondents failed to follow up.

[41] After the theft occurred the insurer wrote an interesting letter to the Short Term Ombud detailing the history of the matter regarding the specific tracker requirements. The letter is dated 22nd April 2013 and reads as follows:

“Please note that our records indicate as follows:

- 1. 13/10/2009 – our quotation summary indicates the requirement. – last attachment.*
- 2. 12/04/2010 Michelle Venter sends an e-mail to the broker and a reminder letter that a Double Tracking unit is required in the vehicle.*
- 3. 06/10/2011 – A schedule is generated that indicates that a double tracking unit is required and that should the unit not be installed theft and hijack cover or any attempt thereat will be excluded.*
- 4. 18/10/2011- We received an e-mail back from the broker with our schedule attached which indicates the requirement. In this mail he requests us to amend the value of the vehicle.*
- 5. 19/10/2011 – Anita from our offices sends the renewal schedule which again shows the requirement. Included in the attachments were the guidelines to our tracking requirements.*

This is the extent of what our records indicate, however, I believe that the broker was advised of the requirement on several occasions in terms of the schedule and the renewal 01/12/2011”

[42] It is plain that the insurer repeatedly reminded respondents about the tracker requirement. On respondents own version they did not see proof of compliance from complainant over a period of nearly three years. There was no follow-up with client. This is negligent conduct. Respondents must have known that complainant was unaware of the specific requirement of a dual tracker unit. Yet there was no follow-up, not even a telephone call.

I. FINDINGS

[43] For reasons stated above; I make the following findings:

- 43.1 Respondents failed to communicate material changes to the policy requirements to complainant;
- 43.2 Complainant continued to pay premiums in the understanding that his vehicle was insured against theft;
- 43.3 Respondents failed to communicate, and made no attempt to do so, that complainant had failed to comply with material policy requirements which could result in him having no cover for theft;
- 43.4 Respondents conduct was negligent and amounted to a breach of the FAIS Act and Code; and
- 43.5 Such conduct resulted in the repudiation of complainants claim and subsequent loss occasioned by the theft of the insured vehicle.

[44] On the facts before me, respondents were in breach of the General Code of Conduct for Authorised Financial Services Providers and Representatives as follows:

44.1 Section 3(1) (a) for not providing the complainant with accurate information in plain language and in a manner that does not confuse or mislead.

44.2 Respondents conduct as stated above amounts to a breach of section 7 (1) (a), (b) and (c).

44.3 Section 2 describes the general duty of a provider as follows:

“A 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.”

For reasons stated above, respondents were in breach of this provision.

[45] As a direct consequence of such breach, complainant’s claim was repudiated and complainant suffered loss. Respondents are liable to compensate complainant for such loss.

J. THE QUANTUM

[46] The vehicle was insured for R372 900 – 00, subject to 5% excess. The policy provides that the maximum amount payable will be the Reasonable Retail Value or the Vehicle sum insured as stated in the schedule whichever is the lesser, after deduction of the excesses. Retail value means the retail value as described in the “Auto Dealers Digest by Mead and McGrouther”, and adjusted according to the kilometre and condition chart contained in the Guide.

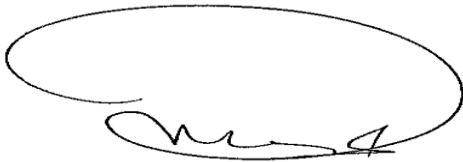
[47] Accordingly, this office sought the services of a loss adjuster to assist in quantifying the damage. According to the loss adjuster’s report, the retail value of the vehicle is R249 700.

K. THE ORDER

[48] In the premises the following order is made:

1. The complaint is upheld;
2. First and second respondents are ordered to pay the complainant, jointly and severally the one paying the other to be absolved, the amount of R249 700. 00;
3. Interest on the said amount at the rate of 9% per annum from the 14th September 2012 to date of payment.

DATED AT PRETORIA THIS THE 4th DAY OF MARCH 2016.

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a cursive name, all enclosed within a large, hand-drawn oval.

NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS