IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 07987/11-12/GP3

In the matter between:-

FLIPTRANS C C **Complainant**

and

S & P INSURANCE ADVISORS (PTY) LTD

T/A McCRYSTAL AND PARTNERS **1st Respondent**

E SOLMES **2nd 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] This is a complaint arising out of a claim that was rejected by the complainant's insurers, New National. At the heart of the complaint is the allegation made by the complainant that the respondents as authorised financial services providers failed complainant, in not disclosing that the insurers required the insured motorcycle to be fitted with a tracking device.

B. THE PARTIES

[2] The complainant is Fliptrans CC, a close corporation duly incorporated in terms of South African laws, with its principal place of business situated at 53 Hatfield Road, Albermarle, Germiston, Gauteng. Complainant is represented in this complaint by Phillip Johannes Meyer (Meyer), its member.

[3] First respondent is S & P Insurance Advisors (Pty) Ltd, t/a McCrystal and Partners, (registration number 2000/026220/07), a company duly incorporated in terms of South African laws, with its principal place of business situated at, 38 Dover Street, Ferndale, Pinegowrie, Gauteng. First respondent is an authorised financial services provider in terms of the FAIS Act, with licence number 13998.

[4] The second respondent is Elton Solms, an adult male, director and authorised representative of 1st respondent whose address is the same as that of 1st respondent. Second respondent is cited in his capacity as key individual of 1st respondent. For the purposes of convenience, and where appropriate, I refer to 1st and 2ndrespondents collectively as respondents.

C. BACKGROUND

[5] The insured motorcycle was stolen on the 9thJuly 2010, with the theft being reported to respondents on the 12thof July 2010.The claim in respect thereof, was subsequently rejected by the insurers on the basis that all motorcycles with a value in excess of R80 000.00 were required to be fitted with a tracking device.

[6] It is this requirement that is at the heart of the complaint, in that the complainant alleges that he was never alerted to such a requirement at the time of purchasing the policy.

D. COMPLAINT

[7] Thus the essence of complainant's complaint can be summarised as follows:

7.1 Respondents' failure to inform complainant that a tracking device was required resulted in complainant unknowingly failing to meet a term of the policy, namely to fit such a device. This failure was the very basis upon which complainant's insurance claim was rejected.

7.2. In consequence, complainant has suffered a financial loss for which he holds respondents accountable in the amount of R79, 500.00, being the market value of the motorcycle.

E. RESPONDENT'S RESPONSE

[8] In terms of the Rules on Proceedings of the Office, the complaint was referred to the respondents on 19 March 2012 to resolve it directly with their client.

[9] Having failed to resolve the complaint a notice in terms of Section 27 (4) of the FAIS Act, was directed to respondents, advising that the matter had been accepted for investigation and requesting that they submit their response along with any documentation which might support their case.

[10] Respondents' version is contained in their letters of 23 March, 7 May and 30 August 2012.

[11] In their first letter of 23 March, respondents denied having rendered financial services to the complainant; and instead attempted to divert attention to the auto dealer, S4 whom they alleged was an authorised financial services provider. In fact S4 were never so authorised.

[12] In their letter of 7 May 2012, respondents claim that complainant knew about the security requirement. The basis of their argument being that complainant signed the very proposal form which contained this security requirement. However in this response they make no mention of having brought this requirement to complainant's attention.

[13] Complainant does not deny signing the proposal form, but points out that there were a lot of documents he signed on the day. At no stage did anyone inform him that a tracking device was required.

[14] Turning to the letter of 30 August 2012; without explanation and in contrast to the 23rd March 2012 letter, respondents made a sudden about turn and accepted that they were indeed respondents. The salient features of the letter are set out below. For convenience, I comment as I go along:

(a) Complainant approached the respondents via an auto dealer with an insurance application form for motorcycle cover. This is in fact incorrect. Complainant went to purchase a motorcycle and was

offered insurance by the salesman at S4 who duly furnished him with a proposal form to complete. After the proposal form was completed, it was sent to the respondent.

(b) The fitment of the tracking device to the motorcycle is a requirement of the insurance cover. As such, it was incumbent upon complainant to ensure that a tracking device was fitted to the motorcycle. The onus, so they argue, could thus never have shifted from complainant to respondents.

(c) Respondents pointed out that the requirement of the tracking device was contained in the application form, which was duly completed by complainant on 18 September 2009; which requirement was reaffirmed when the document titled 'Confirmation of Cover' was forwarded to complainant. They re-iterated that the requirement was confirmed in the policy schedule.

(d) Respondents further added that it was not complainant's complaint that he did not receive the policy; hence had he not been satisfied, there was nothing preventing him from cancelling the policy.

(e) With regard to what constitutes the record of advice between respondents and complainant, respondent pointed to the application form, the confirmation of cover letter and the policy schedule as fulfilling this requirement in terms of the Code.

(f) Respondents further charge that complainant wrote to them requesting a change to the regular driver. Thus they contend that if the complainant saw the regular driver clause, he ought also to have seen the security requirements.

(g) Respondents' view is that the Code does not govern the provision of short term insurance. Given this fundamentally flawed misunderstanding of their obligations, it is little wonder that respondents have been called to account for their conduct as a financial services provider.

F. DETERMINATION AND REASONS

[15] There are three main issues to be decided in this matter:

a) Whether there was a breach of any provisions of the Code;

b) Whether such breach occasioned the financial damage suffered by the complainant.

c) Quantum of the damage.

(a) The question of whether there was a breach of the provisions of the Code.

[16] Section 16 (1) of the FAIS Act provides that; 'A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions....'

[17] Hence we have provisions such as section 7(1) (c) (vii) of the Code which requires full and appropriate disclosure of:

> *'any special terms or conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which the benefit will not be provided'*

[18] Respondents' version is that they did not render advice, as contemplated in the FAIS Act, to the complainant. Their version is that the complainant was assisted by S4 in making his decisions. Their second letter of 7 May 2012 merely insisted that complainant knew about the provision because he signed the proposal form in which the security requirement is disclosed. The same assertion appears in the letter of 30 August 2012. Thus far, the provisions of the Code have clearly been breached because complainant's version that no one advised him of the security requirements has remained uncontested. Indeed, it is abundantly clear from respondents' letters to this office that the respondents had made no contact with complainant on the day the proposal form was signed.

[19] As touched on previously, further reading of the response evidences a bizarre claim on the part of respondents that they are not bound by the provisions of the FAIS Act because they deal in short term insurance. This is expressed in their letter of 30 August 2012 where they state:

'The reality is that short term motor vehicle insurance cover is sold to hundreds, if not thousands of members of the public in this manner on a daily basis. Services providers selling short term motor vehicle insurance cover do not rush out a representative to each and every auto dealer every time a policy is sold for short term cover. If this was a requirement under the Code, which we submit it is not, it would be virtually impossible for the short term insurance industry to conduct business from an administrative point of view'.

[20] There is nowhere in the FAIS Act where providers of short term insurance are excluded. The Act refers to financial services providers which includes the respondents. How respondents have managed to remain holders of a licence to provide financial services whilst having such a poor understanding of their duties in terms of the Code beggars belief.

[21] Then there is the lack of integrity which is clear from the reluctance to accept accountability for the rendering of advice; the integrity of a financial services provider is a requirement of section 2 of the Code. At first, respondents disowned their client. Then in their letter of 30 August 2012 came the startling remark, which simply states:

'Our client accepts that it is the respondent in this matter and not the auto dealer, S4.'

[22] The question that arises is, given that respondents had the temerity to mislead a statutory office, should they be servicing clients who may have little or no means to obtain information when they need to exercise their rights.

[23] This is perhaps amply illustrated by the insurance certificate. In this regard, the certificate, which I believe must have been produced in early 2000, contains contact details of the registrar, and the short term insurance ombudsman, and not a single detail about the existence of the FAIS Ombud. By law, respondents must convey the details of the FAIS Ombud to their clients. The Code makes provision for this. Clearly, respondents do not comply in anyway with Part XI of the Code.

[24] Respondents saw themselves as merely brokers on a policy with a group scheme of motorcycles with Enbridge. They did not take into account that behind the scheme, there is a client with individual needs and circumstances who needs to be advised individually.

[25] In complete disregard of the Code, respondents also submitted that they had posted to complainant a confirmation of cover letter and a policy document. On that basis, they contend that the complainant must have known about the security requirement. Posting a policy to a client long after they have signed the proposal form can hardly be considered as constituting advice to a client; enabling them to make an informed decision.

[26] In this regard I refer to the previously mentioned section 7(1) (c) (vii) of the Code; which is really encompassed in section 7(1) (a) which compels a provider to-

> 'provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a

client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision;'

[27] That it was thought necessary to re-emphasise this provision, speaks to its significance in so far as ensuring that the interests of clients are protected.

[28] On 13 July 2010, about one year after complainant signed the proposal form, a document titled; 'Certificate of Insurance' was dispatched to complainant. A perusal of the insurance certificate shows on page two, at the bottom, a provision for the name of the regular driver. Based on the fact that complainant wrote to respondents asking them to change the regular driver, they claim, he must have been aware of the security requirement. They do not even know how it came about that complainant knew about the regular driver clause. Here too, respondents failed to advise the complainant about the meaning and consequences of such a clause. Complainant denies that he was aware of the security requirement and insists that respondents never disclosed this aspect of the contract to him. As to how he came to request the change of the name of the driver, complainant states he was looking at the premium breakdown when his eye caught the name PJ Meyer. He then requested it to be changed. I am satisfied that the deduction made by respondents in this regard is unreasonable. There is no basis to conclude that complainant would have been aware of the security requirement simply because he requested this change.

[29] A perusal of page 3 of the certificate shows a litany of material terms including restrictions. These relate to excess. There are excess clauses relating to :-

(a) Age;

(b) whether the motorcycle is comprehensively covered;

(c) claims within the first 120 days of cover;

(d) the ability to trace third parties;

(e) the motorcycle being destroyed in totality.

[30] All of these are matters which any client needs to know before they conclude the insurance contract. If the respondents' argument is anything to go by, their clients must find their way through the policy documents and make sense of these material terms without explanation.

[31] There is something fundamentally wrong when a financial services provider fails to advise a client about a material term of a contract and then places reliance on the signature of the client, when on their own version, they had not advised the client about the existence and significance of the term. It is simply unconscionable.

[32] What comes across from respondents' version is that they had no dealing with the complainant. They neither spoke on the phone nor met in order for the respondents to discharge their duties in terms of the Code. In fact, if one goes by the respondents' first letter, the respondents merely received commission for accepting a form that complainant had completed with no assistance whatsoever from respondents. They cannot tell what happened on the day

complainant bought this policy. So their claim that they complied with the Code must fail.

[33] Section 9.(1) of the Code requires that:

> *'A provider must, subject to and in addition to the duties imposed by section 18 of the Act and section (3) (2) of this Code, maintain a record of advice furnished to a client as contemplated in section 8, which record must reflect the basis on which the advice was given..'*

[34] On their own version respondents failed to maintain proper records. Their letter of 23 March 2012 says it all:

> *'We acted as the Brokers on the policy and had a group scheme for motorcycles with Enbridge Financial Services which is underwritten by New National.*
>
> *From our records it seems that the insured was assisted in making a decision on insurance by the dealership where he bought the bike, S4 Auto Boksburg – 011 826 2626*
>
> *Hence we do not have any voice recordings on this matter.'*

b) Causation

[35] Complainant was advised orally by respondents that owing to his failure to comply with the security requirement, his claim would not be paid by the insurers. Respondents have not disputed this statement. Indeed the letter from the insurers confirms this. Complainant would not have known of this

requirement because respondents failed to render the financial services in compliance with the Code.

c) Quantum

[36] Complainant had insured the motorcycle for R84, 800.00. This office obtained assistance from Enbrige as to how much they would have paid to the complainant had the claim been honoured. Their computation of the claim was as follows:

VALUE:	R 84,800.00
BASIC EXCESS:	R 8,480.00
TOTAL	R 76, 320.00

ADDITIONAL EXCESS

IF TOTAL LOSS:	R 8,480.00
TOTAL:	R 67, 840.00

[37] The additional excess of R8, 480.00 is applicable in instances where there is a total loss of the insured object.

[38] The respondent is on record stating that they do not make mandatory disclosures to a client before the latter concludes the contract of insurance. In simple terms, they argue that it would be a nightmare to sell short term insurance if they were to comply with the provisions of the Code. This is confirmed by the complainant's version that on the day he purchased the

motorcycle, he signed the proposal form at the auto dealer with no help whatsoever from respondents.

[39] The significance of this is that the excess as a whole was not disclosed to complainant. If the ultimate amount payable by respondents to complainant were to include the second excess, it would simply be tantamount to promoting respondent's conduct of undermining the Code. I am prepared to accept the first excess even though it also was not disclosed to complainant. Based on enquiries made by this office with several insurers, there is evidence that the complainant would have, at the very least had to pay a standard 10% excess on the claim.

G. FINDINGS

[40] Respondents, on their own version failed to advise complainant of the security requirement to fit a tracking device to the motorcycle.

[41] Accordingly, respondents failed to advise complainant of the security requirement to fit a tracking device to the motorcycle.

[42] On their own version, respondents had no contact with complainant on the day of purchasing the policy.

[43] Respondents' conduct undermined the Code, in particular the duty to treat clients fairly.

[44] Respondents failed to put complainant in a position where he could make an informed decision.

[45] Quite simply respondents' omission, occasioned the financial damage complained of.

H. ORDER

1. The complaint is upheld.

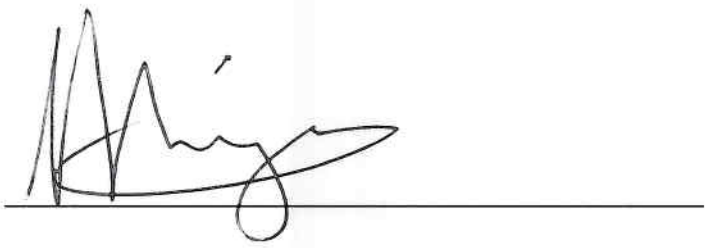
2. The respondents are jointly and severally liable for the loss sustained by the complainant, the one paying the other to be absolved.

3. Respondents are hereby ordered to pay complainant the amount of R76,320.00

4. Interest at the rate of 15 % SEVEN (7) days from date of this order to date of final payment;

.

DATED AT PRETORIA ON THIS THE 9th DAY OF MAY 2013.



SYDWELL SHANGISA

DEPUTY OMBUD FOR FINANCIAL SERVICES PROVIDERS