IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA **CASE NO: FOC 4564/06-07/GP (3)**

In the matter between:

JACOBUS JOHANNES GROVE Complainant

and

NATIONAL INSURANCE CO- ORDINATORS CC Respondent

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

A. THE PARTIES

[1] Complainant is Jacobus Johannes Grove, a male of adult age, an events manager, who resides at 7 Vlei Street, Glenmarais, Kempton Park, Gauteng Province.

[2] Respondent is National Insurance Co- ordinators CC, a close corporation duly incorporated and registered in terms of the laws of South Africa, with its principal place of business situated at, 122 Monument Road, Aston

Manor, Kempton Park, Gauteng Province. Respondent is an Authorised Financial Services Provider in terms of the FAIS Act with license number 14115. The responses to the complaint were all prepared by compliance officer Johann Boschoff.

B. THE COMPLAINT

[3] Complainant is claiming an amount of R18 000,00 the amount by which he would have been indemnified by his insurer, plus R855,00 being the amount he paid for towing his vehicle to the panel beaters and R527,00 for towing from the panel beaters to his place of residence. Complainant's basis for the claim appears in the paragraphs hereunder.

C. BACKGROUND

The following are the facts which are common cause between the parties:

[4] Complainant is the registered owner of a motor vehicle, a VW Golf 1800 with registration letters and numbers MDB 930 GP, (hereinafter referred to as complainant's vehicle'). Complainant's vehicle was insured through respondent's intermediation with Santam. Cover under the Santam policy incepted from 2002. It endured until 31st May 2005. As a result of what respondent terms 'a forced move', complainant's insurance arrangement,

together with a number of other policyholders was moved over to Hollard Insurance Company Limited (Hollard). Cover under Hollard incepted on 1st June 2005. In a letter dated 1st May 2005, respondent advised complainant of the move. The most important part of the letter reads:

> '*a decision had been reached to change your underwriter to Hollard Insurance, with effect from 1 June 2005. The good news is that your monthly premium, excess structure and cover will not be affected. We have also negotiated Roadside Assistance as part of your insurance policy through Hollard and at no additional cost to you. This service* ***includes*** *assistance with mechanical and electrical breakdowns that require emergency roadside assistance.., 24 hours a day, 7 days a week, 365 days a year. As your financial service provider, we hereby inform you that your debit order will be transferred to Hollard Insurance from 1 June 2005.'* (own emphasis)

[5] On 26 September 2003 complainant had faxed a letter to respondent advising it that he was nominating his son Cornell Grove, (Cornell), then 17 years of age, as a driver of his motor '**vehicles'**. At the time Cornell was in possession of a learner driver's licence. On 5 May 2004 Cornell obtained his driver's license. On 6 September 2005 complainant faxed a letter to respondent's offices advising it that Cornell had obtained his driver's license. In that letter, complainant once again informed respondent that Cornell is nominated to drive all his vehicles.

[6] On 18 May 2006 Cornell was involved in an accident whilst driving complainant's vehicle. A claim was lodged with Hollard. Hollard rejected the claim and informed complainant of its decision on 30 May 2006. The reason cited in the letter was complainant's failure comply with policy conditions. The policy condition Hollard relied on is stated in the policy document as follows:

> '**POLICY HOLDER 30 YEARS AND YOUNGER**
>
> Driver younger than 26 years (not specified as the regular driver)
>
> NO COVER IN TERMS OF THIS POLICY'

[7] On 6 June 2006, complainant wrote to respondent stating that he was unaware of the condition until Hollard declined his claim. He could not understand why Hollard could use a term that he was unaware of to deny his claim.

[8] On 8 June Hollard wrote to complainant, re-iterating its decision to reject his claim and further stating, ' According to the information in our possession, a policy schedule detailing all the conditions and endorsements applicable to your policy was forwarded for your perusal and safe keeping.' In the same letter he was advised to lodge a complaint with the Ombudsman for Short Term Insurance in the event that he disagreed with Hollard's decision.

[9] At complainant's request, respondent mailed a copy of the Hollard policy schedule to him on 9th June 2006. Indeed, the policy schedule contained a clause excluding cover for drivers under the age of 26 not specified as regular driver.

[10] Complainant lodged a complaint to the Ombudsman for Short Term Insurance, (OSTI) on 15 June 2006. In his complaint to OSTI, complainant:-

10.1 denies ever receiving the policy schedule from Hollard prior to the abovementioned accident. He claimed, the first time he heard that his son was not covered under the policy was when Hollard notified him of the rejection of his claim;

10.2 stated that he has in his possession policy schedules from Santam dating back to 2nd May 1998, until 7 February 2005 and had at all times acquainted himself and complied with all his responsibilities as a policy holder;

10.3 stated that the practice was that in the 1st quarter of every year, respondent would forward him the policy schedule for the particular year;

10.4 Mentioned that the policy document which Hollard used to reject his claim was only received by him on 9th June 2006, which was after he submitted the claim.

[11] On 20 November 2006 OSTI informed complainant that the underwriting criteria of the insurer was fully within the knowledge of respondent, therefore, the insurer's decision to reject the claim was in order. OSTI informed complainant that should he be of the view that the respondent failed him in its duties, he should lodge a claim with this Office.

D. INVESTIGATION BY THIS OFFICE

[12] The complaint was referred to respondent on 17th April 2007 in terms of Rule 6 (b) of the Rules on Proceedings of this Office for resolution with complainant. On 30th April 2007 respondent replied, denying any wrongdoing on its part. The gist of respondent's defence is:-

12.1 Complainant's son was not yet 26 years at the time of the accident and product suppliers regard the fact that a driver is under 26 as a material risk factor. For this reason, additional excess is levied on drivers under 26 years.

12.2 As far as respondent is aware complainant ‘only nominated’ his son. It was only during the processing of the claim that respondent got to know that complainant’s son was a regular driver of the vehicle. Had the product provider been aware of it, the premium would have been loaded. Thus, so claims respondent, complainant benefited from the non-disclosure.

12.3 That the roadside assistance complainant sought to claim was not applicable, as it is only available in instances of mechanical breakdown and not in accident cases.

12.4 Respondent concluded that complainant was not candid with it. In its view, the rejection was in line with the policy conditions.

[13] The complaint was not resolved by the respondent. A letter in terms of section 27 (4) of the FAIS Act was sent to it on 6 August 2007 requesting it to file its full response to the complaint. Respondent was also requested to furnish copies of its client advice record and any other material information to support its case, including a full statement from the person who dealt with the complainant when the service was rendered.

[14] Respondent replied to this letter with a full (undated) response attaching various annexures to support its case. Respondent frankly admitted it did

not have a client advice record. No reasons were furnished for failing to maintain this record. Instead, it referred this office to two documents, namely, the covering letter dated 1st May 2005 mentioned in paragraph 4 of this determination and the original application form dated 12 August 2002. Most of what is contained in respondent's response is contained in its first letter. However, in addition, respondent made the following points:-

14.1 The move from Santam to Hollard came about as a result of a disagreement between Dexdata (the portfolio managers) and Santam which led to the latter cancelling the underwriting of all the former's policies. According to respondent, there was no need to seek each client's consent as the arrangement made with Hollard was to take over the risk on the same terms and conditions as those of Santam. As proof that the policy was underwritten on the same terms, respondent referred this Office to a letter dated 10 February 2005 annexed to its response, marked "A" and a Santam policy schedule dated 10 February 2005.

14.2 Respondent also referred to a note marked B2 in its reply, being a form, completed in 2002. The document is in Afrikaans. The relevant part of this document respondent is relying on states, when translated:

‘ Will any person under the age of 25 drive any of the insured vehicles? The answer is, ‘ NO’.

‘There shall be no cover for any driver under the age of 25 if ***he is not a nominated driver in the policy’****.* (my emphasis)

14.3 Respondent noted that when Cornell obtained his driver’s license, complainant on his own volition nominated him as an ‘occasional’ driver of the vehicles. This, according to respondent, means complainant was aware of his obligations. Respondent also argued that complainant’s son however, was not nominated as a regular driver of any of the vehicles. It transpired after the accident that the son was actually the regular, ‘or possibly the only driver of the vehicle involved in the accident.’

Respondent refers to a transcript of a voice recording marked Annexure “G”. The transcript, in Afrikaans, relates to a taped conversation between complainant (K= Klient) and one Sylvia, (‘S’) of the respondent. The important extracts of the transcript when translated read:

‘S: Hi, Mr Grove, this is Sylvia from Nic Brokers.

K: Hi, Sylvia! Well and you?.....

S: Oh, Ok, so tell me, this CH Grove?

K: He is my son.

S: He is your son. And how often does he drive the vehicle?

K: Well, it was his car, which we gave him.

S: So, it was actually your son's vehicle?

K: Yes

S: So he is a regular driver?

K: Yes.....'

14.4 Respondent concludes by stating that the onus was on complainant to disclose any changes in the circumstances that would adversely affect the policy. In essence, respondent states that it is aware that as a provider, it owes a duty of care to complainant and that in its view the service it delivered was in line with that duty.

E. DETERMINATION AND REASONS

[15] The issues to be determined are:-

15.1 Did the respondent comply with the provisions of the FAIS Act whilst rendering the financial service?

15.2 If it is found that respondent failed to comply with the provisions of the FAIS Act, can it be said that its conduct occasioned complainant's loss?

15.3 The quantum of complainant's loss.

A. DID THE RESPONDENT COMPLY WITH THE PROVISIONS OF THE FAIS ACT?

(a) The duty to provide information to a client timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction, Part II, clause 3 (iv) of the General Code of Conduct, as amended (the Code)

[16] I first want to point out that there does not appear to be diversion as such between complainant's version and that of respondent. My reasons for making this statement appear below.

[17] Complainant's sole claim is and has always been that nobody disclosed to him that his son would not be covered under either of the policies, namely, the Santam or the Hollard policy. Complainant states that he was advised by respondent that because his son was younger than age 26 he would be liable for additional excess of R1000. Complainant's version in this regard is supported by respondent's letter of 30th April 2007 (See paragraph 12 of this determination). This version is also supported by a document, which complainant refers to as a policy schedule dated 7 February 2005. The document is a quotation from Santam, which was issued by

Respondent during the rendering of the financial service to complainant. The quotation states clearly that for drivers under the age of 26 not registered as regular driver, there shall be an added excess of R1000.

[18] There appears to have been a material change in the term contained in the Hollard policy schedule when compared with the Santam quotation of 7th February 2005. Complainant was unaware of this change until rejection of his claim by Hollard. He believed that the new term came with the move to Hollard. In fact, the new term was part of the Santam contract dated 10 February 2005, which was issued three days after the quotation. A copy of the Santam policy schedule was furnished to this Office by respondent when it responded to the section 27 (4) letter issued by this Office.

[19] The policy schedule came with a covering letter addressed to complainant, marked annexure “A” and dated 10 February 2005. It is clear from the policy schedule that there is no cover for drivers under the age of 26 where they are not noted as regular drivers. When respondent sent a copy of the policy schedule to this Office, it made no claim and furnished no proof that it ever disclosed to complainant the material change from what was communicated to complainant in the quotation and what is said in the policy schedule.

[20] It is this contract which respondent relies on together with the covering letter. The covering letter, as stated earlier, is addressed to complainant and contains his postal address. It reads:

> *'10 February 2005*
>
> *Dear Mr Grove,*
>
> *Santam Dex Personal Lines Policy*
>
> *Policy number: 12/33937*
>
> *Attached please find your amended policy. The policy certificate reflects the Insured amount for each item and the premium applicable. Kindly check all the details to ensure that your request was correctly administered.*
>
> *VERY IMPORTANT: Please refer to the conditions on which this risk was accepted. It can lead to denial of any liability and cancellation of your cover should you not comply with the above conditions.*
>
> *Please contact us should you have any further queries.*
>
> *Thank you for your support and be assured of our best service at all times.* (own emphasis)
>
> *Kind regards*
>
> *UNDERWRITING DEPARTMENT*
>
> *FSB License Number:'*

[21] No attempt is made in the letter to pertinently draw complainant's attention to the inclusion of an important new clause which was not in the quotation. Respondent furnished no proof that the original of the letter had been sent to complainant. In any event, the FAIS Act requires that 'representations made and information provided to a client by a provider must be provided timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction.'

(b) The duty to render financial services honestly, fairly, with due skill, care and diligence and in the interests of the clients and the integrity of the financial services industry.

[22] By the time complainant would have received the letter, he would have already made a decision on the basis of the terms set out in the quotation. Fairness, care and diligence demand that once the provider could no longer finalise the contract on the basis of the terms set out in the quotation, it should have gone back to complainant to disclose the term. This would have given complainant the chance to consider whether the new term or condition would suit his circumstances and make a decision accordingly. Since respondent has furnished no proof that it counselled complainant about the sudden inclusion of a term excluding his son from cover if he is not registered as a regular driver, I would have expected it to have resolved the complaint with complainant without dragging the

process this far. Instead respondent supported the insurer in its rejection of the claim when the problem is actually one of non-disclosure on its part.

[23] Respondent, in its letter of 30 April 2007, makes the point that as far as it was aware, complainant only "**nominated"** his son as a driver. It was not aware that the son was a "**regular**" driver of complainant's vehicle. In its follow up letter responding to the notice in terms of section 27 (4), respondent notes that complainant had only nominated his son as **'*an occasional driver*'**. This, according to respondent, supports its argument that the complainant was aware of his obligations in terms of the policy. The onus, respondent argues, was on complainant to disclose whatever circumstances might adversely affect the cover in terms of the policy. In an effort to bolster its argument, respondent referred this Office to annexure B2 of its papers. Annexure B2 is a form that was completed in 2002 by complainant. The specific question raised in B2, when translated from Afrikaans to English reads:

> ' *Will any person under the age of 25 drive any of the insured vehicles? The answer is, ' NO'.*
>
> The question is followed by this warning:
>
> '*There shall be no cover for any driver under the age of 25 if he is not a nominated driver in the policy' (my emphasis).*

[24] It is correct that complainant nominated his son as a driver of his vehicles, but not as an occasional driver. In the two letters dated 23 September 2003 and 5 September 2005, complainant advised respondent that his son Cornell is nominated to drive all his vehicles. There is no reference in either of the letters to an 'occasional driver'. The nomination of Cornell in my view is in line with annexure B2 and the quotation dated 7 February 2005. The claim by respondent that the nomination of Cornel by complainant is indication that he was aware of the condition excluding his son from cover is, to say the least, absurd.

NOMINATED vs REGULAR DRIVER

[25] Respondent emphasises complainant's 'nomination' of his son as opposed to specifically registering his son as a 'regular' driver as is required by the policy. There are fundamental flaws in this argument. To start with, there is no indication that respondent had disclosed the existence of the term excluding cover for drivers under the age of 26 where they have not been specified as regular drivers. In addition, Respondent does not give any indication that it had ever properly advised complainant of what a **nominated driver** is as opposed to a **regular driver**.

[26] Judging by respondent's decision in its later response to this Office to characterise the nomination of complainant's son as 'occasional' driver, it

would appear that respondent links the term 'nominated driver' to a less than frequent user of a vehicle as opposed to a regular driver. This is an incorrect approach. In this regard, I refer to an article appearing in the latest issue of "Ombudsman's Briefcase, the Official Newsletter of the Ombudsman for Short Term Insurance".

I quote from the article as follows:

> '*Motor vehicle policies are commonly underwritten on the basis of a "regular driver" or "nominated driver", however in insurance, a regular driver is not the same as a nominated driver . . . . These concepts are used in order to assess the risk associated with the insurance of a particular motor vehicle and the premium to be charged. The identity and profile of the driver of a motor vehicle is obviously an important factor in risk, which the Insurer is being asked to assume as well as the premium to be charged.*
>
> *Certain policies of insurance define a regular driver as 'the person who uses the motor vehicle the most frequently and more than any other', but this definition is not without its difficulties. Where a policy is underwritten on a 'regular driver basis', other persons may drive the motor vehicle in addition to the regular driver, provided that they are in possession of a driver's licence and that they are only the secondary driver.*
>
> *A "nominated driver" policy on the other hand only gives cover to persons who are actually nominated and recorded as a nominated driver on the*

policy of insurance. Any person who is not nominated and recorded as a nominated driver on the policy schedule will not be covered.'

[27] When the respondent rendered the financial service to complainant during or about 7 February 2005, it ought to have complied with the provisions of the Code by properly advising its client. This was respondent's first opportunity to discuss the implications of a nominated driver as opposed to a regular driver. In May 2005, when the move to Hollard was being arranged, respondent would have known or ought to have known that a new contract of insurance was going to come into existence. A financial service therefore ought to have been rendered. This was yet another opportunity for respondent to properly advise its client about the concepts of nominated and regular drivers. When complainant sent the letter of 5 September 2005, informing respondent that his son had obtained his driver's license and that he is nominated to drive all his vehicles, respondent ought to have been aware that up to that stage, it had not properly advised its client of the meaning of the concepts. It should have seized that opportunity to advise it's client. It failed. I cannot therefore see how complainant can be expected to have known or complied with the term on which Hollard based its decision to reject the claim. Respondent's conduct fell short of the general duty of providers.

(c) The duty to maintain records of verbal and written communications relating to a financial service rendered to a client as contemplated in the Act.

[28] Respondent should have maintained a record of all verbal and written communications in relation to the service it rendered to complainant during 7 February 2005. (Part II, section 3 (2) (a) (i) – (iii) of the Code.) This means a copy of the quotation furnished to complainant should have been provided to this Office together with the policy document dated 10 February 2005. Not only did respondent fail to furnish the quotation to this Office but it also made no attempt to obtain it from complainant in order to reach an early resolution of the complaint.

[29] Instead of acknowledging its own shortcomings whilst rendering the financial service, respondent sought to paint complainant as an untruthful person who failed to disclose the true circumstances and benefited from a cheaper premium. On the contrary, complainant's conduct can hardly be construed as that of a person who was looking for insidious ways to save on premiums. Complainant, as with other users of financial services who make use of authorised financial services providers such as respondent, do so to get the benefit of a professional service. In so doing, complainant had a legitimate expectation that respondent would act in a professional manner and in the interest of its client.

[30] I understand that respondent had a huge task whilst handling business relating to the three thousand clients brought to it by the union, IMATU. However, that is no excuse to have left complainant with a quotation stating one thing and then to seek to bind complainant with an undisclosed material term in a resultant contract. I have been furnished with no written records of advice showing what steps it had taken to inform the complainant about the exclusion of drivers under 26 years where they have not been registered as regular drivers under the policy.

THE MOVE FROM SANTAM TO HOLLARD

[31] In its second response to this Office, respondent alludes to a 'forced move' by the cancellation of the underwriting of all Dexdata policies. It goes on to state that 'it was not necessary to obtain the prior consent of all clients'. The reason provided is that it, the respondent, had no say in the matter as Santam had given 60 days notice to Dexdata. Therefore, an underwriting facility had to be sought for the three thousand policy holders. There was, it alleged, also no change to the underwriting conditions that would have adversely affected the complainant.

[32] It is not unusual for this Office to receive complaints relating to movements of clients' insurance arrangement from one insurer to another, often without the knowledge of the insured. The phrases often used are 'the

book was taken over,' or 'the book was sold to', or 'the book was transferred to'. Whilst appreciating the urgency of the situation in this case and the necessity to take steps to ensure that complainant and the rest of the clients affected had cover, this practice, as is evidenced in complainant's case, fails in one important respect. Providers do not often recognise that a new contract of insurance comes into existence the moment a new insurer underwrites the risk and therefore, a financial service ought to be rendered. The practice may also undermine the client's right to decide whether he or she wants to be insured with an insurer of the respondent's choice. A client may have valid reasons for not wanting to deal with a particular insurer. Whilst I make no ruling on the aspect of moving complainant from Santam to Hollard without complainant's knowledge, providers need to approach such cases with caution and observe proper compliance with the provisions of the FAIS Act.

B. DID RESPONDENT'S CONDUCT CAUSE COMPLAINANT'S LOSS

[33] Respondent in its reply to the notice in terms of section 27 (4) submitted that there is no nexus between the change of product supplier and the loss suffered by complainant, therefore it should not be held accountable for the loss. That is indeed so when viewed in isolation. However, as I have said earlier, Respondent failed to pertinently inform complainant of the

term introduced in the Santam quotation which formed the basis for the policy eventually issued by Hollard. It is therefore the respondent's conduct that caused complainant's loss.

C. QUANTUM OF COMPLAINANT'S CLAIM

THE CLAIM FOR TOWING EXPENSES

[34] In response to complainant's claim for towing expenses, respondent made the following statement:-

> '*The letter informing the client of the move to a new product supplier is clear that the assistance will be given in the instances of a mechanical breakdown or electric failure. It clearly does not cover the current case where the vehicle was involved in an accident. It therefore is submitted that the complainant cannot claim the towing costs from the respondent as he could not have claimed it from the product supplier.*

[35] The relevant extract of the letter is set out in paragraph 4 of this determination. The letter states that the roadside assistance '**includes** assistance with mechanical and electrical breakdowns that require emergency roadside assistance . . .' In my view, a reasonable

interpretation of the phrase is that emergency roadside assistance was part of or amongst other types of assistance that would be rendered when the vehicle was rendered inoperable. In the context of this phrase it would also include the case where the vehicle was rendered inoperable due to an accident.

[36] It would be illogical to construe it as limiting assistance to **only** cases of mechanical and electrical breakdowns. If that was the intention, the drafter of the letter would have said so. I see no reason in principle why the provider should not be held liable where it failed to explain exactly what was covered under the rubric of 'Roadside Assistance' to the complainant. In the absence of a clear indication to the contrary, the expectation of such assistance on the part of the complainant is not far-fetched. The claim by complainant of the towing expenses is therefore justified.

[37] Complainant's claim for the damage to his motor vehicle and the towing expenses is upheld.

[38] Complainant's claim in respect of the motor vehicle is R19 000, 00. Hollard has assisted this Office on how they would have computed the claim.

Retail value at time of accident:	R18 600, 00
Less 10 % excess or minimum of	R 2 000, 00
	R 16 600, 00
Less additional excess	
(driver under 26 years of age)	R 1 000, 00
Payable to complainant	R15 600, 00

The towing expenses from the scene of the accident to the panel beaters and from the panel beaters to complainant's residence are R855, 00 and R527, 00 respectively. Complainant has submitted proof of these amounts. The total payable to complainant then is R15 600, 00 + R855, 00 + R527, 00 = R17 082, 00

ORDER

[39] I make the following order:

1. Respondent is ordered to pay complainant R 17 082, 00 within 14 days from date of this order.

2. Respondent is to pay interest on the aforesaid sum at the rate of 15.5 per cent per annum from 30th May 2006 being the date of repudiation of complainant's claim by the insurer.

3. Respondent is to pay the case fee of R1000 within 30 days of date of this order.

DATED AT PRETORIA ON THIS THE 3rd DAY OF DECEMBER 2008

NOLUNTU N BAM

DEPUTY OMBUD FOR FINANCIAL SERVICES PROVIDERS