IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA **Case No. FOC 2012/05/GP/3**

In the matter between:

BUSANI LEONARD MATHEBULA **Complainant**

and

INSURANCE FOR YOU BROKERS CC **First Respondent**

CHRISTOPHER MORTIMER **Second Respondent**

DETERMINATION IN TERMS OF SECTION 28 (1) (b) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 of 2002

A. INTRODUCTION

[1] This complaint was initially lodged with the Ombudsman for Short Term Insurance who investigated it and concluded that no fault could be attributed to the insurer, Santam Limited. He concluded that the broker had conveyed incorrect information to Santam about whether Vesa approved security devices were fitted in the insured vehicle. (A Vesa certificate is proof that the anti-theft device complies with certain minimum quality standards). The matter was

therefore referred to this Office for investigation of possible negligence on the part of the broker concerned.

[2] On 19 October 2007, this Office issued a recommendation in terms of section 27(5) (c) of the Financial Advisory and Intermediary Services Act 37 of 2002 ('FAIS Act'). The recommendation was however not accepted by the respondents. For the reasons which follow, this complaint is upheld.

B. PARTIES

[3] The complaint was brought by Mr. Busani Leonard Mathebula ('Mathebula') against the first respondent, Insurance for You Brokers CC. At the time the complaint was lodged in November 2005, the first respondent carried on business as an authorised financial services provider under Licence No. 10818 issued in terms of the FAIS Act. The second respondent, Mr. Christopher Mortimer was the key individual of the first respondent at all material times.

C. COMPLAINT

[4] The complaint related to the rejection of a claim by Mathebula's insurer, Santam Limited of a motor vehicle theft claim under his policy. The rejection was based on the grounds that:

[4.1] Safety conditions in respect of the immobiliser and gear-lock of the insured motor vehicle had not been met; and

[4.2] No Vesa certificate could be provided by the insured.

[5] Mathebula complained to this Office that he had not been informed by the first respondent who had sold the policy to him, about the requirement of a Vesa certificate or that one would be required at claims stage. The complaint was forwarded to the first respondent on 8 November 2005. Mortimer, on behalf of the first respondent then informed this Office that the sale of the policy had been concluded telephonically and that the security requirements had therefore been conveyed in that manner. Mortimer however, was unable to provide this Office with the record or tape of the voice logging. The explanation given at the time was that the system had allegedly experienced technical problems which had resulted in the voice recordings being damaged. The first respondent, in other words, was unable to prove that the requirement for a Vesa certificate had been conveyed to the complainant.

[6] It was therefore recommended that the first respondent resolve the complaint by compensating the complainant for his loss by paying him the sum of R45 000, 00.

[7] The first respondent failed to inform this Office whether it had accepted or rejected the recommendation. Nor did it furnish any reasons, if it had rejected it, as the FAIS Act requires. I shall revert to this aspect later on in this determination.

Facts subsequent to the recommendation

[8] The recommendation was duly sent to the second respondent, Mortimer [1] by fax on 19 October 2007. On the same day, this Office telephonically confirmed with Mortimer that he had received the recommendation. During this telephone conversation, Mortimer informed this Office that according to him, this matter had been resolved some time ago in that the claim had been rejected. He said further that he had since sold the business assets (of the first respondent) to Goldex Risk Insurers which had bought the business's *'book'*. He further stated that since he was no longer involved in the business, there was no point in sending the recommendation to him as there was *'nothing [he could] do about it'*. According to Mortimer he was *'now into cell phones'*.

[9] Mortimer informed this Office on 7 November, 2007 that although he had received the recommendation, he was not prepared to settle the matter and that it was *'no longer [his] problem'.*

[10] This Office then contacted Goldex Risk Insurers and was informed by Mr. D J De Lange (key individual) that it had purchased the *'book'* [2] from Mortimer in October 2006. According to De Lange, their financiers had insisted on an express exclusion regarding the liabilities in respect of the book. De Lange provided this Office with a copy of the Purchase agreement, which indeed verified his version. In the agreement, the first respondent is represented by Mr.

[1] Contact details for Mr. Mortimer were provided by Mr. J Hurter, former compliance officer of the second respondent.

[2] The transferred 'business assets' included *inter alia* the (1) entire short-term insurance portfolio of the seller including any and all rights in and to any and all policies of any and all existing clients with Santam, Auto and General, SA Underwriters, Unity Insurance, Insignia and any other short term insurer, (2) goodwill of the seller in respect of its entire insurance portfolio and the seller's exposure in the market as insurance broker.

Christopher Augustine Mortimer and Mr. Warren Brett Fletcher. In clause 5.2.2. of the agreement, the following is provided:

> *'The Seller hereby warrants to the Purchaser that the Business Assets, as defined, is* [*sic*] *not the subject of any litigation or subject to any attachment.'*

[11] According to the Financial Services Board's register, the first respondent's licence lapsed on 24 October 2006. A search on the database of the Companies and Intellectual Property Registration Office (CIPRO) reveals that the first respondent is still a registered entity but was trading under a different name, Remitrom Cellular Coms *(*Enterprise number: 2003/000462/23).

D. ISSUES TO BE DETERMINED

[12] In light of the above, I must now decide:

[12.1] whether my initial recommendation still stands;

[12.2] whether the first and second respondents should be held jointly and severally liable, the one paying the other to be absolved;

[12.3] the amount of the loss.

Whether my initial recommendation still stands

[13] Section 27(5)(c) of the Act provides *inter alia* that where a recommendation has been made, a respondent is required to confirm whether or not it accepts the recommendation and, where the recommendation is not accepted by it, the respondent is required to give reasons for not accepting it.

[14] To date the first respondent has not submitted any response to the recommendation, apart from the verbal response given by Mortimer to this Office in November 2007.

[15] In terms of Section 28(1) of the Act,

> 'the Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5) (c) has not been accepted by all parties concerned make a final determination which may include – (a) the dismissal of the complaint; (b) the upholding of the complaint, wholly or partially'.

[16] Despite Mortimer's failure to respond to the recommendation in writing, it is clear that he has not accepted same. I am however, not convinced by the reasons for non-acceptance offered verbally to this Office, viz. that he had sold the business and that it was *'no longer [his] problem'.*

[17] I mentioned earlier that the complainant, Mathebula alleges that he was not informed of the requirement of a Vesa certificate or that one would be required at claims stage.

[18] First respondent's compliance officer furnished this Office with the originals of the file of papers kept by the first respondent regarding Mathebula. In a document headed 'Voicelog Policy Sheet' it is stated that Mathebula has not previously had any insurance (for a motor vehicle). In other words, this was the first time he was putting in place insurance for a motor vehicle.

[19] At the time Mathebula secured the insurance cover, his vehicle already had a gear lock and an immobiliser. He says he only found out that the devices had to be Vesa approved when he filed a claim and was asked to provide proof by way of a certificate to that effect. He says:

> *'[T]he broker didn't tell me anything about a vesa certificate. He only asked if the car has a gearlock and immobiliser. He also asked about the accessories that were in the car e.g. the type of radio tape that was in the car. He didn't tell me that certificate will be needed when it comes to a claim.*
>
> *. . .*
>
> *[A]fter submitting a claim they [Santam] started asking me about a vesa certificate . . . . I told them that the broker didn't tell me anything about a vesa approved certificate. I [then] spoke to the broker and he told me that our conversation was recorded when I joined the ensurance and he said he will email the conversation tape to me. The next day he told me that the conversation tape is damaged and it has a technical problem and he did email the conversation tape to me of which I can't here anything.'*
>
> (Quoted as is, from the complaint form)

[20] Mortimer alleges that the security requirements had been conveyed telephonically to Mathebula at the time the product was sold.

[21] What arises therefore is a dispute of fact and I must determine whether the probabilities favour any one of the parties.

[22] Mathebula denies being specifically asked whether the security devices were Vesa approved.

[23] It was the first respondent, through its representative, who informed the insurer that Mathebula's vehicle was fitted with a Vesa approved immobilizer. Mortimer is relying on voice recordings which he is unable to provide to this Office as he alleges that these do exist but are damaged. Mortimer is unable to provide any other corroborating evidence which would persuade me to believe his version over Mathebula's.

[24] Where a financial product is sold through direct marketing, as is the case here, section 15(5) of the General Code provides:

> 'A direct marketer shall be obliged to record all telephone conversations with clients in the course of direct marketing and must have appropriate procedures and systems in place to store and retrieve such recordings. Records of advice furnished to a client telephonically need not be reduced to writing but a copy of the relevant voicelogged records must be provided, on request, to the client or Registrar within a reasonable time'.

[25] In terms of section 11 a provider is required to:

'. . . at all times have and effectively employ the resources, procedures and appropriate technological systems that can reasonably be expected to eliminate as far as reasonably possible, the risk that clients, product suppliers and other providers or representatives will suffer financial loss through theft, fraud, other dishonest acts, poor administration, negligence, professional misconduct or culpable omissions'.

[26] First respondent's compliance officer, Mr Jack Hurter, informed this Office in a letter dated 28 November 2005, that during January 2005, first respondent experienced technical problems with its voice logging system which affected eight of its:

'*initial or first contact incidents with clients. The date, time and duration of the calls were registered but no voice recording was registered'.*

The complainant was one of the affected clients, he says.

[27] After the problem was discovered it was apparently fixed and:

'they started to call the involved clients to re-record the lost information. During this time, someone stole Mr Mathebula's car . . . .'

[28] This information is rather vague. No details are provided about when the problem was discovered, nor the date the calls were allegedly made, or when the problem was rectified.

[29] Hurter then submits that as compliance officer he has found evidence that the first respondent usually explicitly asks its clients whether they have a Vesa approved immobiliser and/or gear lock and suggests that it was therefore more likely that it would have put the same question to the complainant. However, it could equally well be questioned why it is this client (and, admittedly the other seven) whose voice recording was 'damaged'. In any event, respondents were unable to provide any other corroborating evidence in this regard and are extremely vague as far as the details are concerned.

[30] The policy incepted on 28 January, 2005 and the theft occurred on 23 February, 2005 – just over three weeks later. According to Santam, the complainant lodged his claim on 23 February, 2005. In May 2005 Mathebula was informed by the insurer that his claim was rejected.

[31] It was only when Mathebula submitted a claim that he was asked to provide proof that the security devices were Vesa approved. He contacted Mortimer who alleged that he had a voice recording to prove that he had told Mathebula about the Vesa requirement. The next day he informed Mathebula that the tape was damaged. If Hurter's explanation is to be accepted, then the question arises why Mortimer did not immediately tell complainant when the latter called him, that the tape was damaged, the problem had thereafter been rectified, and that they were re-collecting information from the affected clients including complainant. He appears to have discovered that the tape was faulty only when retrieving it in an attempt to prove to Mathebula that he had been told of the Vesa requirement.

[32] Mortimer's version of the facts as well as that of Hurter, which is at best hearsay as he must have obtained it from respondents, falls to be rejected as being highly improbable.

[33] Hurter also submits that complainant was sent a copy of the policy schedule in which is stated in the vehicle section under the heading *'Information provided to us:*

> *Is the vehicle equipped with a Vesa approved immobiliser? Yes*
> *Is the vehicle equipped with a Vesa approved gear-lever lock? Yes*
> *. . .'*

He argues that if that information was captured incorrectly then complainant should have brought it to the attention of the first respondent.

[34] While it is true that Mathebula's policy documents (which do set out the Vesa requirements) were sent to him on 29 January 2005, the accident occurred less than a month later. Given that it was the first time he was insuring a motor vehicle and his allegation that the Vesa requirement was not explained to him, it would be reasonable to assume that Mathebula did not fully appreciate the meaning thereof. In any event, he would not have had any cause to believe that the policy documents would differ materially from the advice he received at the time the product was sold.

[35] The General Code places a duty of disclosure on financial services providers. Accordingly first respondent's representatives ought to have brought to the complainant's attention, at the time the product was sold, any:

> ‘special terms or conditions, exclusions of liability, restrictions or circumstances in which benefits will not be provided’.
>
> (Clause 7(1) (c) (vii) of the General Code of Conduct)

The duty is on the first respondent to show that such disclosures were made. As mentioned above, the respondents are unable to provide us with any evidence that the relevant disclosures were made.

[36] In my view, the probabilities favour the complainant’s version that he was not informed of the requirement of a Vesa approved immobilizer and gear lock.

[37] As the key individual of the first respondent, it was the duty of the second respondent to ensure that the General Code of Conduct is complied with during the rendering of financial services to the complainant. This would include ensuring that all material disclosures are made. There is no evidence that this was done and I am persuaded to find in favour of the complainant. In so doing, I find that the complainant’s financial loss is directly attributable to the second respondent’s conduct.

Whether the first and second respondents should be held jointly and severally liable, the one paying the other to be absolved

[38] In light of my finding above, it is now appropriate to deal with the issue of whether liability can be extended to Mortimer, the second respondent who was the key individual of the first respondent at all material times.

[39] I have previously held in *Esterhuyser vs Gavin Grobler and Plum Portfolio Solutions* [3] that it could not have been the legislature's intention that a financial services provider such as the first respondent rendering a financial service through its representative should be protected by the proverbial 'corporate veil.'

[40] On the contrary, as stated in that determination the proviso to Section 8(1) reads:

> 'Provided that where the applicant is a partnership, a trust or a corporate or unincorporated body, the applicant must, in addition, so satisfy the registrar that any key individual in respect of the applicant complies with the said requirements in respect of –
>
> (i) Personal character qualities of honesty and integrity;…

[41] There is no reason for this principle not to apply in this matter. I am accordingly of the view that the second respondent should be held liable jointly and severally together with first respondent.

[42] As stated above, the first respondent's business assets were transferred to Goldex Risk Insurers 'unencumbered' by its liabilities. The sale of the business assets does not affect the liability of the first respondent for any potential claims against it for liabilities incurred prior to the sale of its business assets even though it may have changed the nature of its business.

[43] According to Mr De Lange of Goldex, the first respondent's authorised representative at the time of the sale of its assets did not disclose the fact that

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this Office was investigating Mathebula's complaint against it. Whilst a complaint to this Office is not litigation in the usual sense, a determination pursuant thereto has the effect of a civil judgment. It would therefore have been incumbent upon Mortimer to have disclosed to the prospective purchaser that this Office was investigating its conduct.

[44] Furthermore, while it is not an express requirement of the legislation that Mortimer notify this Office of the sale of the business assets, in light of the serious implications of a decision by this Office, it would appear reasonable to expect Mortimer to have informed this Office of the sale.

[45] It would be equitable in all the circumstances of this case to hold the second respondent jointly and severally liable together with first respondent for the loss suffered by the complainant.

Quantum

[46] At paragraph 16 of my recommendation, the issue of quantum was addressed.

It reads as follows:

> '[16] Following the valuations generally accepted by courts and the industry as per the Mead and McGrouther, a 2001 Toyota Tazz 130, with date of loss being 22 February 2005 reflects a market value (average of trade and retail values) of R51 000, 00. The sum insured for the motor vehicle was R50 000, 00. As the sum insured was less than the market value,

the insurer's liability would have been R50 000, 00 less the applicable excess of R5 000, 00'.

[47] It was then recommended that the first respondent settle the claim by paying the complainant the sum of R45 000, 00.

[48] The amount was subsequently confirmed by Santam who indicated that, had it accepted the claim, it would have paid out an amount of R45 000, 00 calculated as follows:

Insured value	R50 000, 00
Less excess of 10% (minimum of R3000)	R 5 000, 00
Amount payable	R45 000, 00

I accordingly make the following order:

1. First and second respondents are held jointly and severally liable, the one paying the other to be absolved, for the complainant's loss in an amount of R45 000, 00 (forty-five thousand rand) payable within 14 days of date of this order.

2. Respondents are to pay interest on the said sum at the rate of 15.5 per cent per annum from the date which is 14 days after 19 October 2007 being the date of the recommendation, to date of payment.

3. Respondents, jointly and severally, are liable to pay the case fee of R1 000, 00 (one thousand rand) to this Office.

DATED AT PRETORIA ON THIS THE 30th DAY OF MARCH 2009.

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CHARLES PILLAI

OMBUD FOR FINANCIAL SERVICES PROVIDERS