IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA CASE NO: FOC 976/06-07/GP (3)

In the matter between:

MORE FLOWERS C C Complainant

and

KILLIAN INSURANCE BROKERS Respondent

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

PARTIES

[1] Complainant is More Flowers CC; a close corporation duly incorporated and registered in terms of South African laws, with its principal place of business at Shop 7 Club Street, Linksfield Shopping Centre, Linksfield,

Gauteng Province. Complainant is duly represented by its authorised representative, Mrs Grazia Maia, ('Maia'). Complainant is the insured.

[2] The Respondent is Killian Insurance Brokers, duly represented by Rainier Killian, an adult male, an authorised financial services provider, of 11 Oxers Energy House, 197 Smit Street, Fairland, Gauteng Province.

THE COMPLAINT

[3] The complaint relates to damages allegedly suffered by Complainant as a result of non-compliance with the provisions of the FAIS Act and or negligence on the part of the Respondent whilst rendering financial services.

BACKGROUND

[4] On 9th February 2006, Complainant purchased a 2006 Nissan Champ 1400, ('the vehicle') from Bruma Nissan in Gauteng Province. Complainant was referred to Respondent in order to secure insurance for the vehicle on the same day. One Celeste Botes, ('Botes'), then in the employ of the Respondent faxed a proposal form to Complainant for completion. Complainant partially completed the form, inserting *inter alia*, information relating to the name of the insured and bank details. Maia then

placed her signature on the proposal form. Complainant's reason for this is that Maia was only asked to fill in those details and sign the form. This is however denied by Respondent. One of the material questions not answered in the proposal form related to the insured's claims history. The form was thereafter faxed to Respondent. There is no dispute as to the Respondent's acceptance of the form in its partially completed state. There is also no dispute about Botes being the person who rendered the financial service to Complainant.

[5] On 10 February 2006, Respondent addressed a letter to Complainant which confirmed *inter alia* the policy number, a once off fee of R200 which was to be debited from the insured's bank account and the name of the insurer was disclosed as South African Underwriters ('SAU'). A letter of introduction was also included in the letter setting out Respondent's license number. The letter of introduction states *inter alia*, the following:-

> 'I, Celeste Botes, am a representative and work under the supervision of
> Mr R Kilian and only introduce personal line products of Santam, Hollard Insurance, TJB – New National and Auto and General.'

[6] On 23rd May 2006, Complaint's vehicle was stolen. A claim was lodged with SAU. On 2nd June 2006, Complainant received notification of the insurer's decision to repudiate the claim on the basis of non – disclosure of previous losses. There is indication from the papers that Complainant

advised Respondent of the repudiation, and complained about the inaccurate information communicated to SAU. The matter, however, was not resolved. A complaint was lodged with this office on 26 June 2006. In the letter of complaint, Complainant contended that it is Botes who misled the insurer into believing that the insured had no claims in the previous three years. Referring to a conversation she had with Botes at the time, Complainant stated that she had told Botes that the insured had previous claims over a period of three years as was asked in the proposal form. In this regard, Complainant referred this Office to the different hand writing on the proposal form, stating that she did not complete the question relating to claims experience. A copy of the proposal form accompanied the complaint. There is no question as to who completed the question between the parties. Botes admittedly did.

[7] It is further common cause between the parties that a conversation had been held between Botes and Complainant. The form according to Respondent was completed with information obtained from Complainant during the telephonic conversation. In support thereof, Respondent provided this Office with an affidavit deposed to by Botes. The details of the affidavit are of particular interest for reasons that will appear later in this determination. It states:

> 'I Celeste Botes, sold More Flowers Linksfield an insurance policy. A proposal form was sent to the client to complete and was sent back to me with

only half of the information. I contacted the client and completed the rest of the proposal form with the client over the telephone. Inception date, previous insurer, finance bank, vehicle details and previous loss history was completed by me. Our voice logging started on the 10th February 2006.'

[8] The word 'NONE' appears on the proposal form in response to the question, '*Claims Experience last three years*'.

[9] On 29 August 2006, the complaint was referred to Respondent for resolution. The complaint was not resolved. It was accepted for investigation on 21 November 2006. Simultaneously, a notice in terms of section 27 (4) of the FAIS Act was dispatched to Respondent.

[10] On 30th November 2006 Respondent provided the Office with its reply. The relevant extracts of this letter are set out below:-

[10.1] 'The Complainant completed the form partially and conveniently omitted her claims history with other insurance companies which is the cause for the rejection of her present claim.

[10.2] Mrs. Botes subsequently phoned the complainant and obtained the omitted information from her which she inserted on the form which the complainant now denies.

[10.3] The complainant is from the history of her previous claims, well experienced in what is required of her in the completion of the necessary forms. She knew very well that should she have completed the form with the omitted information regarding her claims history it would have effected (sic) her policy by either the relevant insurance company refusing to insure her vehicle alternatively that she would have to pay a higher excess.

[10.4] Ms Botes on the other hand had no reason to insert incorrect information on the form as she stood nothing whatsoever to gain thereby. The policy had no broker fees to it to accommodate the high rate.

[10.5] The complainant has a remarkable history of claims. On 16 July 2005 she claimed for loss of her Nissan 1400 which was stolen and recovered. On 5 February 2006 she claimed for the damage caused to the same vehicle which was involved in a collision and on 23rd May 2006 her present vehicle was stolen again which forms the subject of her present claim.'

[11] Respondent concludes by submitting that Complainant is the sole cause of the rejection of her claim. Ms Botes from Respondent's point of view had been an honest and reliable person.

[12] On 14 March 2007 a letter was directed to the Respondent by this Office calling for tape recordings of the conversation or any written material in support of Respondent's version. In its reply of 20th March 2007 Respondent states:-

> 'We are not aware of any statutory condition albeit in the FAIS Act, the General Code of Conduct or any other statutory provision which requires the recording of any material for the issue of an insurance policy. This is merely done as a safety measure by brokers for the purpose of a record of information furnished by clients. As I have pointed out in my letter dated 30th September 2006, we only commenced with this system as from the 10th of February 2006'.

DETERMINATION AND REASONS

[13] The issues to be determined are:-

[13.1] whether there had been any non compliance and or negligence on the part of Respondent whilst rendering the financial service;

[13.2] whether such non compliance and or negligence caused Complainant to suffer any loss;

[13.3] The quantum of such loss.

DISPUTED FACTS

[14] The single material disputed fact in this matter is whether it was the Complainant who gave the response ‘None’ to the question on claims experience or whether it was the Respondent. Complainant’s version is that she had told Respondent in the telephonic conversation with Botes that indeed, the insured had previous claims. There is also a dispute as to whether Complainant was in fact requested to only complete bank details and sign the form. The latter is in my view not material as will appear from the reasoning in this determination.

(a) Was there non compliance with any of the provisions of the FAIS Act on the part of the Respondent whilst rendering financial services to Complainant?

[15] Before I deal with this issue, I am compelled, at this stage, to entertain the question whether this material dispute of fact could bar this Office from determining the matter.

[16] This material dispute of fact can, in my view, be resolved by dealing with the compliance issues which are fundamental to this complaint. In terms of the General Code of Conduct for Authorised Financial Services Providers and Representatives, (‘the General Code’), Part II, section 3 (2):

(a) 'A provider must have appropriate procedures and systems in place to-

(i) record such verbal and written communications relating to a financial service rendered to a client as are contemplated in the Act, this Code or any other Code drafted in terms of section 15 of the Act;

(ii) store and retrieve such records and any other material documentation relating to the client or financial service rendered to the client; and

(iii) keep such client records and documentation safe from destruction.

(b) All such records must be kept for a period of five years after termination, to the knowledge of the provider, of the product concerned or, in any other case, after the rendering of the financial service concerned.'

[17] A further provision which would be relevant is Section 7(2) of Part VI of the General Code which provides:

'No provider may in the course of the rendering of a financial service request any client to sign any written or printed form or document unless all details required to be inserted thereon by the client or on behalf of the client have already been inserted.'

[18] Yet another provision which impacts directly on the facts of this case is Part IX of the General Code, Section 11 on control measures, which provides:

> 'A provider must 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**.' (own emphasis)

The responsibility to record verbal and written communications in terms of section 3 (2) (a) of the General Code

[19] When asked to furnish a record of the financial service rendered, Respondent failed to furnish the record. Not only did it fail to do so, but further submitted (refer to paragraph 12) that it is not required by any law to have such record. In Respondent's view providers maintain records out of will as some safety measure. This is despite this provision of the Code. There is cause for concern for this approach adopted by Respondent as a licensed provider in terms of the FAIS Act. Respondent ought to be familiar with this basic provision of the FAIS Act.

The use of Botes's affidavit which was deposed on 27th June 2006, four months from the date of rendering the financial service cannot in my view be accepted as compliance with the provisions of section 3 (2) (a) of the General Code. Acceptance of the affidavit would defeat the object of the General Code. In addition to the obvious issues of credibility, there will always be the issue of the intention to circumvent the General Code in order to do business the easier way. The objectives of the FAIS Act of protecting the consumer and strengthening the integrity of the financial services industry would be compromised.

The prohibition of providers from requesting clients to sign documents unless details required have already been inserted.

[20] There is no dispute that the proposal form faxed to Respondent was only partially completed. Material information was not inserted therein. Section 7 (2) of Part VI prohibits providers from requesting clients to sign any form or document unless all the required details have been inserted therein. Available evidence suggests that Respondent had no discomfort in accepting the form in the state in which it was. This provision is aimed at combating the practice of people committing themselves to agreements the terms of which they are not aware. The origins of this can be traced to

the requirements of contract, ie, that there should be consensus between contracting parties. There can be no consensus where one of the parties is aware of the terms of the contract and the other not. To advocate that the provision should not apply would frustrate the objective of suppressing the mischief aimed at by the legislature.

[21] The provision is there to suppress the mischief of introducing information (which would form part of the terms of the contract) without the other party being aware of such information. This form of interpretation has been confirmed by our courts in *Glen Anil Development Corp v Secretary for Inland Revenue 1975 (4) SA 715 (A) 727 H- 728* where the Court chose

> to advance the remedy provided by the section and suppress the mischief against which the section is directed.'

Also in *Sefalana Employee Benefits Organisation v Haslam and Others 2000 (2) 415 SCA at 419, A- C* where the court said:

> 'Parliament may well intend the remedy to extend beyond the immediate mischief.'

As against the above, I bear in mind that it should not lightly be presumed that the Legislature intended (to borrow the words of Bennion Statutory interpretation 3rd ed (1997) at 725)

‘to apply coercive measures going wider than was necessary to remedy the mischief in question’.

[22] SAU repudiated the contract because the risk they were underwriting had not been properly placed before them. Relying on the information provided in the proposal form which is being disputed by Complainant, they underwrote the risk. Had Respondent complied with the provisions of the FAIS Act detailed above, Complainant would have had to advance evidence to this Office as to why she is disputing information completed by her on the form. When providers accept business on the basis of incomplete forms or partially completed documents, they will always find themselves in an invidious position.

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

[23] No record could be produced to support Respondent’s claim that the information used to complete the proposal form by Botes emanated from

Complainant. Botes rendered the financial service on her own. This is clearly confirmed in her affidavit where she states,

> 'I Celeste Botes, sold more Flowers Linksfield an insurance policy.'

This leads me to question the accuracy of the information set out in the letter of introduction sent to Complainant on 10 February 2006 following the sale of the financial product. That letter states.

> 'I Celeste Botes, am a representative and work under the supervision of Mr R Killian and only introduce personal line products of Sanlam, Hollard Insurance, TJB – New National and Auto and General.'

There is no doubt that this is the so called 'standard letter' used by a number of providers in the context of rendering financial services. Sadly as evidenced in this case the content of these standard letters cannot be trusted. Introducing something is simply not the same as selling.

[24] It must be emphasised that the point here is not whether I would like to believe the version of the Complainant as opposed to that of the Respondent. There simply would have been no question of whether or not to believe Respondent or Complainant in this case had Respondent complied with all the relevant provisions of the FAIS Act.

[25] I am therefore persuaded to accept Complainant's version. There is however one qualification to make. Complainant has sought insurance

before for motor vehicles. It is not in dispute that she has done so several times before. She must surely have known that it would have taken a lot more information to insure the vehicle than simply providing the name of the insured and bank details. I would be encouraging irresponsible behaviour if I were not to apportion liability in these circumstances. I shall return to this aspect of the determination below.

(b) Did the non compliance on the part of Respondent cause Complainant's loss?

[26] The letter from SAU states that the reason for the repudiation of the claim is the non disclosure of Complainant's claims experience. Respondent in my view must accept that it is its failure to comply with the FAIS Act, in particular the General Code that has led to this situation. Had the Code been complied with, the record would speak for itself. However, having said that, I am of the view that the result must be tempered with what is equitable in all the circumstances. Section 20 (3) of the FAIS Act empowers me when disposing of a complaint to have 'reference to what is equitable in all the circumstances'. Thus in applying what I am empowered to do when adjudicating a complaint in terms of the FAIS Act, I believe that it would be equitable in all the circumstances that I reduce the liability that Respondent would have to bear by holding that Complainant also has to accept some responsibility for her actions.

The only rational conclusion to reach on the facts is that both Complainant and Respondent were responsible for causing Complainant's loss.

(c) Quantum

[27] The sum insured in the SAU proposal form is set out as R66 980. This is the sum for which SAU had agreed to indemnify Complainant. It therefore follows that the Complainant's loss is the sum insured less any reasonable adjustments to be made to the claim as if the insurance had been properly put into place.

Conclusion

[28] For all the reasons set out in this determination, I am of the view that it would be equitable that Complainant's claim is upheld to the extent of seventy per cent (70%) of her loss, after any reasonable adjustments have been made to the claim as if the insurance had been properly put in place.

ORDER

(a) It is ordered that Respondent pay for 70% of Complainant's loss subject to the necessary adjustments. Respondent must compute

the amount within SEVEN (7) days of date of this order and refer it to this Office for confirmation;

(b) Payment is to be made within SEVEN (7) days of confirmation of the amount by this Office;

(c) Interest to accrue on the amount as computed and confirmed by this Office at 15.5% p.a. with effect seven (7) days of this order;

(d) Respondent is to pay the case fee of R1000 to this office.

DATED AT PRETORIA ON THIS THE 31st DAY OF MARCH 2008

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CHARLES PILLAI
Ombud for Financial Services Providers