IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FOC 760 / 05 / KZN / 03

In the matter between:

ANTHONY NAIDOO Complainant

and

ABSA BROKERS (PTY) LTD Respondent

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

A. PARTIES

[1] The complainant is Anthony Naidoo, an adult male person residing at 26 Brighton Sands, Munster Road, Bluff, Durban, 4052.

[2] The respondent is ABSA Brokers (Pty) Limited, a company duly registered as such in accordance with the company laws of the Republic of South Africa. The Respondent is also registered as an authorised financial services provider in terms of the FAIS Act. The respondent's registered office alternatively its principal place of business is situated at 267 Kent Avenue, Randburg, 2125.

B. BACKGROUND FACTS

[3] The complainant secured a short term insurance policy (the policy) for purposes of insuring his vehicle on 10 May 1999 with Mutual and Federal Insurance Company Limited (M & F) and Santam Limited as the joint product providers and underwriters, through the intermediation of the respondent. The insurers are simply referred to as 'M & F' for the sake of convenience as it was the latter that sent out the renewal notices. In any event, nothing really turns on that aspect.

[4] During July 2003, the complainant purchased a Toyota RunX RSI (the vehicle). At the time the vehicle was valued at R200 000.00. The vehicle was added to the policy through the intermediation of the respondent.

[5] In March 2004, the complainant received a letter (renewal letter) from the respondent advising him that the policy falls due for renewal and that

it will automatically be renewed on his behalf. In March 2005, the complainant received another renewal letter from the respondent which was couched in similar terms. The renewal letters received by the complainant further contained a paragraph that is important for present purposes. It reads as follows:

> *"In your own interest it is necessary to update the sums insured at regular intervals to avoid the negative effects of underinsurance. The omission of regularly revising the value of insured property to take account of the increasing rate of inflation, VAT and the diminishing value of the Rand, is having an adverse effect on the adequacy of sums insured."* [Own emphasis added].

[6] Having these background facts in mind, I now turn to deal with the pertinent issues raised in the complaint that has been referred to this Office.

COMPLAINT

[7] During or about February 2006, the complainant contacted the respondent enquiring about the premiums that he would be charged on a new vehicle which he intended to add on to the policy. During the course of making the aforementioned enquiry, complainant became

aware that as motor vehicles usually depreciate in value annually, the value for insurance purposes could be adjusted accordingly, with a consequential reduction in premium payable. He realised that until then, he had been paying more on his premiums for the Toyota Run X RSI than he would have, had its value been adjusted annually. The complainant there and then discussed with respondent the reduction of value of the vehicle and an appropriate downward adjustment of the premiums. The monthly premiums together with the sum assured were adjusted accordingly.

[8] Immediately after the premiums were adjusted, the complainant enquired further from the respondent about the following:

8.1 the reasons for the vehicle remaining insured for the original purchase price from the date of its purchase to the date of the inquiry;

8.2 whether he previously qualified for any discount or reduction in the premiums payable for insuring the vehicle; and if so

8.3 why the respondent did not alert him to such discount or reduction in the premiums payable.

[9] The complainant alleges that the respondent informed him that the onus of ensuring that the vehicle is insured for the correct yearly market value rests upon the complainant and not the respondent. The respondent

further advised him that it was not aware of any accessories or modifications to determine the yearly market value of the vehicle. The complainant was not pleased with respondent's answer to his enquiry.

[10] The complainant forwarded a formal enquiry in writing to the respondent and M & F. In response M & F stated that a renewal letter had been sent to complainant through the respondent requesting him to adjust the insured values annually lest he would be under insured. It is important to note that only under insurance is mentioned in the letter. Nothing is said about possible over-insurance. According to M & F it was and remained the responsibility of the complainant to adjust the insured amounts due to the fact that he is the only person privy to any changes in the value of his vehicle.

[11] In reply to the response offered by M & F, the complainant enquired from M & F as to why he was not entitled to a refund for the extra premiums that he had paid in the past months when the premiums had increased whilst the value of his vehicle depreciated.

[12] The complainant did not receive any response from M & F. Consequently, the complainant escalated his complaint to this Office for assistance. Upon receipt of the complaint this Office forwarded it with a letter to the respondent urging it to resolve the matter with the

complainant within a period of fourteen days from the date of receipt of the letter.

RESPONDENT'S ANSWER TO THE COMPLAINT

[13] Despite the additional time granted, the respondent failed to resolve the matter with the complainant. Instead, in its answer the respondent objected to the jurisdiction of this Office to adjudicate upon the matter. It said because 'the policy in question [had] been in-force since May 1999 [and] the particular vehicle that is the subject of the complainant's dissatisfaction was added to the policy in July 2003', this Office had no jurisdiction to hear the complaint. In other words, the respondent is of the view that the financial service that was rendered to the complainant occurred prior to the coming into operation of the FAIS Act.

[14] The respondent further submitted that in any event the complainant "would have been duly informed of his obligations in terms of his policy, specifically with regard to ensuring that items insured under the policy were insured for the correct value" (emphasis added). I mentioned earlier that he was only informed about ensuring that he is not **under** insured.

[15] On 28 August 2006, this Office issued a notice in accordance with the provisions of Section 27(4) of the FAIS Act, informing the respondent that the complaint was to be the subject of a formal investigation. In addition, this Office requested copies of all the documents that are contained in the respondent's file in relation to the complaint including a response to the complainant's allegation.

[16] The respondent:

16.1 referred this Office to its letter dated 2 August 2006 wherein it stated that the complainant would have received a policy document informing him, *inter alia*, of his options in terms of the policy, which could result in him paying a lower premium. I note that neither the policy document nor the letter any makes reference to a lower premium;

16.2 said that no file of papers existed as the original file was destroyed;

16.3 strongly believes that it is not liable to compensate the complainant for any of his alleged losses; and

16.4 repeated that as the advice was first given in 1999 the complaint is not justiciable before this Office.

[17] The respondent furnished this Office with copies of five letters variously dated between 20 March 2004 and 24 January 2006 (both dates inclusive). None of those letters contain any advice which could lead to

complainant enjoying a reduction in premiums arising out of a reduction in the value of the vehicle due to depreciation.

RECOMMENDATION

[18] During March 2008, this Office issued a recommendation to the Respondent. The salient points of the recommendation were:

18.1 That according to the responses received from the respondent, it appeared that the respondent is confusing the concept of a ‘new business’ with a ‘new contract’. In this case, the business was initiated in 1999 but the contract was for a term, that is, it was a so-called month to month contract renewable annually.

18.2 When a contract is renewed, a new contract is created and the duty to disclose arises just as it did when the old contract was originally concluded. The new contract replaces the old contract when the term of the old contract comes to an end. Therefore, when the old contract was renewed after this Office was vested with jurisdiction on 30th September 2004, the respondent had to comply with the FAIS Act.

18.3 That the respondent failed to comply with the provisions of the FAIS Act and the General Code of Conduct for Authorised

Financial Services Providers and Representatives ('the Code') framed thereunder in the following respects:

18.3.1 Upon receipt of the renewal letter from M & F, the respondent failed to advise its client on an important matter relating to the revaluation of complainant's vehicle to ensure that the insurance premiums payable were in line with the value of the vehicle.

18.3.2 Consequently, the respondent failed to render the financial service with due skill, care and diligence and in the interests of the client. The respondent has the necessary skill or should possess the necessary skill, and is vested with the necessary knowledge or should possess the necessary knowledge to enable it to know that the market value of the vehicle will depreciate with each passing year.

18.3.3 The respondent therefore ought to have advised its client about this aspect and not merely act as a conduit for conveying letters from the insurer to the complainant. The respondent was engaged by the complainant to render financial services to him and should therefore have ensured that it fulfils its side of

the bargain by advising its client regarding the depreciation of the market value of the vehicle.-

18.3.4 That as a direct consequence of this non-compliance, the complainant suffered financial loss.

18.3.5 In order to settle the matter it was recommended in terms of Section 27(5)(b) of the FAIS Act that the respondent should:

18.3.5.1 ascertain the values that the vehicle would have been insured for annually on a depreciating scale at renewal of the policy after 30th September 2004;

18.3.5.2 consult with the product provider and establish what the premiums would have been at the time; and

18.3.5.3 compensate the complainant an amount equal to the extra premiums he paid since 30th September 2004.

RESPONDENT'S RESPONSE TO THIS OFFICE'S RECOMMENDATION

[19] On 9 April 2008, the respondent wrote to this Office that it does not accept the recommendation.

[20] In a letter dated 12th May 2008, the respondent gave the following reasons for not accepting the recommendation of this Office:

20.1 It disagrees that a whole new round of disclosures had to be made according to the FAIS Act if there was indeed a renewal of the policy on an annual basis;

20.2 It disagrees that there was a duty on it to advise its client regarding the depreciation of the vehicle and to ensure that the vehicle was insured for the correct value assuming there was a renewal of the policy on an annual basis;

20.3 It is of the view that the policy was a month to month policy and does not agree that a new contract came into force each year upon renewal of the policy.

20.4 It, however, offered to compensate the complainant for the difference in premiums that he would have paid had the value of

his vehicle been adjusted on a regular basis and the amount he actually paid.

ISSUES FOR DETERMINATION

[21] The issues that fall for determination by this Office are:

21.1 Whether the “month to month” policy can be classified as an annual renewal of the insurance policy which constitutes or brings into existence a new insurance contract which requires a re-assessment of risk and/or disclosures;

21.2 Whether the respondent had failed in its duties to advise complainant appropriately regarding the insurance of the vehicle;

21.3 Whether failure by respondent to execute its duties resulted in the complainant suffering financial loss; and

21.4 Whether this Office has jurisdiction to adjudicate upon the complaint.

[22] I will deal with each of them in turn.

DETERMINATION AND REASONS THEREFORE

Whether the "month to month" policy can be classified as an annual renewal of the insurance policy which brings into existence a new insurance contract that automatically calls for re-assessment of risk and disclosures

[23] A short term insurance contract is, as the name indicates, for a specified period. Therefore, at the end of such period it may be renewed by mutual agreement between the insurer and the insured. The duty to disclose rests upon both insurer and insured. The Concise Oxford English Dictionary[1] defines "renew" as:

> "*1 resume or re-establish after an interruption. 2 give fresh life or strength to. 3 extend the period of validity of (a licence, subscription, or contract). 4 replace or restore (something broken or worn out).*"
> *"Renewable" is defined as:*
> *"1 capable of being renewed.*
> *". . ."*

[24] The difficulty I have is with the concept of a "month to month contract renewable annually". The very phrase "month to month contract" denotes that it is a contract for one month at a time which leads one to the conclusion that it was a new contract every month. To then say that it is renewable annually is a contradiction in terms.

[1] Eleventh Edition, Revised. Edited by Catherine Soanes and Angus Stevenson

[25] It is worth noting how the term of the policy is dealt with in the insurance policy ('MUFED 1896 9/99'). It states:

"8. CANCELLATION

8.1 Annual policy

This policy or any section of it may be cancelled or amended by us or by Absa Brokers by giving 30 days' notice in writing. On cancellation by us you may claim a proportionate refund. (my emphasis)

8.2 Monthly policy

The premium will be debited on the first working day of each month. If the premium is not paid the policy will be cancelled at 16h00 on the first day of the month for which the premium was unpaid. We may cancel or amend this policy or any section of it by giving notice in writing to you.

8.3 Monthly and Annual policies

You may cancel this policy by giving two calendar months' notice in writing to Absa Brokers. On cancellation by you we may retain the customary short period or minimum premium." (my underlining)

[26] It will be immediately noticed that sub-paragraphs 8.1 and 8.2 refer to when the insurer or the respondent may cancel either an 'Annual' policy or

a ‘Monthly’ policy whereas 8.3 deals with when the insured may cancel ‘Monthly and Annual’ policies. Given that the policy is styled a ‘monthly policy renewable annually’ the distinction between annual and monthly policies do not make sense. Whereas the insurer or respondent may give 30 days’ notice to cancel or amend an annual policy, no time period is stated after which it may cancel or amend a monthly policy. The insured, however, is obliged to give two calendar months’ notice of cancellation of the policy in respect of both monthly and annual policies. The monthly policy may expire through effluxion of time – why then the requirement to give two months’ notice? The wording is certainly not a model of clarity – in fact it is confusing.

[27] The law is clear: where there is ambiguity in a contract of insurance the offending clause must be interpreted ‘*contra preferentem’* the drawer of the policy. Havenga[2] says: *“In the insurance context this rule provides that if there is a real ambiguity in the policy the insurance contract must be construed against the person who drew it up”.*

[28] The fact that renewal letters were sent annually on the anniversary date of the policy points to the policy being an annual one even though it may have been styled a “month to month” policy.

[2] Peter Havenga: The Law of Insurance Intermediaries [2001] p32

[29] The crisp issue is whether the respondent had to comply with the FAIS Act in respect of a policy of insurance which incepted before the coming into operation of the Act, the Rules and the Code but which continued to be renewed thereafter. Havenga[3] says:

> "*It must be remembered that a renewal is nothing other than the conclusion of a new contract, and the duty to disclose arises just as it did when the contract was originally concluded. The renewed contract replaces entirely the contract which has expired, although it is on the same terms as the old one. (Footnote omitted.)*
>
> *"If a broker is involved in renewing a contract . . . the broker will have the same obligations that he or she had when the contract was originally concluded." (*At footnote 165 the learned author refers to the case of *Knapp and Knapp v Ecclesiastical Insurance Group Plc and Smith [1999] Lloyd's Rep IR 390 (CA).)*

[30] It is clear therefore that upon renewal of the policy after the FAIS Act came into operation a new contract arose once again and the respondent had to comply with the Act's provisions including the one that he must at all times act in the interests of the client[4].

[31] In terms of Part II Clause 2 of the Code the respondent has the duty at all times to render financial services honestly, fairly, with due skill, care

[3] Op cit p44 – "Duties on renewal of a policy"
[4] Clause 2 of The Code

and diligence, and in the interest of clients and the integrity of the financial services industry generally.

[32] “Financial service” is defined in the FAIS Act as the furnishing of advice, or furnishing of advice and rendering of intermediary service, or rendering of an intermediary service.

[33] At the time that complainant added his vehicle to the policy in 2003, the sum assured for the vehicle was R200 000.00. This value would not have remained constant for ensuing years. Should anything have happened to the vehicle, M & F would not have compensated complainant R200 000.00 but his loss. This would have been the prevailing market or replacement value.

[34] A reduction in premiums due to depreciation of the insured article can only be in the interest of the client whereas a higher premium swells the coffers of the insurer and also invariably results in a higher commission for the broker. In this respect, although the focus of this enquiry is into the conduct of the respondent, it is significant to note that nowhere in its correspondence with the insured did the insurer mention the downward movement in the value of the vehicle which would have resulted in lower premiums. Instead, as I have mentioned, it focuses to its obvious advantage on the possibility of an increase in the value of the object of

insurance. The insurers conduct, also does not inure to the principles of fairness, consumer protection or the integrity of the financial services industry. I am confident that the regulator will take appropriate steps to prevent this type of conduct occurring in the future.

[35] Consequently, the respondent failed to render the financial service with due skill, care and diligence and in the interests of the client. The respondent has or should have the necessary skill and knowledge to know that the market value of the vehicle will depreciate with each passing year.

Whether failure by respondent to execute its duties has resulted in the complainant suffering financial loss

[36] It is important to note that for the purpose of this determination, the focus is on the role of the intermediary when rendering financial service to his or her client and not the relationship between the insurer and the insured.

[37] A reduction in the value of the vehicle should of necessity (other things being equal) result in a reduced insurance premium. When complainant made the inquiry about the adjustment of the premiums in line with its depreciating value, respondent immediately attended to it and the result was a reduction of the monthly premium. It is clear therefore that the complainant has suffered financial loss. The respondent has offered an ex *gratia* payment of R2 102.30 to complainant being, it says, the

difference in premiums that he would have paid had the value of his vehicle been adjusted on a regular basis between 2003 and 2006 and has since requested this Office to facilitate the acceptance of the offer by complainant. This offer is contained in the respondent's letter dated 12 May 2008 in which it responds to this Office's recommendation.

Whether this office has jurisdiction to adjudicate upon the complaint

[38] Respondent's *ex gratia* offer is conditional upon accepting that the respondent does not acknowledge that it had a duty to disclose in terms of the FAIS Act and the Code because of its view that since the contract incepted in 1999 this Office does not have jurisdiction to entertain the complaint.

[39] I have already determined[5] that renewal of the insurance contract after the coming into operation of the FAIS Act requires the respondent to comply with the provisions of the Act. Consequently, it goes without saying that this Office has jurisdiction to entertain any complaint against a financial services provider or representative regarding the rendering of a financial service in such circumstances.

[5] Par [30] above

ORDER:

I make the following order:

1. The respondent is ordered to pay complainant R2 102.30 within 14 days of 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 2 July 2008 being the date of the conditional offer to the date of payment.

3. Respondent is to pay the case fee of R1 000.00 plus VAT to this Office within 30 days of date of this order.

DATED AT PRETORIA ON THIS THE 26th DAY OF NOVEMBER 2008

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CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS