

**IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS**

**Case Number: FOC 03241/09-10/GP (3)**

**In the matter between:-**

**Candida Buyile Nduna**

**Complainant**

**and**

**Aquarius Insurance Consultants CC**

**First Respondent**

**Maurizio Scolari**

**Second Respondent**

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

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**A. THE PARTIES**

[1] The Complainant is Candida Buyile Nduna, a female medical practitioner, of Kyalami Estates, Johannesburg Gauteng.

[2] First Respondent is Aquarius Insurance Consultants CC ("Aquarius"), a close corporation duly registered in accordance with the laws of South Africa. First respondent is also a registered Financial Services Provider (FSP no: 14576)

with its registered office, alternatively, principal place of business at 4 Malteser Road, Northriding, 2169.

- [3] Second Respondent is Mr Maurizio Scolari (“Scolari”), an adult male, key individual and authorised representative of the first respondent whose address is care of the first respondent. For convenience, I refer to both 1<sup>st</sup> and 2<sup>nd</sup> respondents collectively as respondent.

## **B. BACKGROUND**

- [4] According to complainant, she bought a motor vehicle, a Peugeot 206, on the 12<sup>th</sup> of June 2008. On the same day she sought and obtained a short-term insurance policy through Michelle Metcalfe (‘Michelle’) a representative of the respondent. Complainant informed the respondent that the regular driver of the said motor vehicle would be her son, Mr M.C. Nduna. She further faxed through his driver’s licence and copy of his identity document, indicating he was less than 25 years of age. According to complainant the monthly premiums were adjusted due to her son’s age.

- [5] On the 27<sup>th</sup> of July 2009 complainant’s son was involved in a motor vehicle accident. She contacted the insurance call centre for approval of the removal of the vehicle from the accident scene. She was informed that a towing service would be sent to the scene to remove the vehicle. The vehicle was subsequently removed to the authorised towing company’s storage facility.

- [6] Complainant formally lodged a claim through respondent and furnished the latter with all the requested documents. On the 1<sup>st</sup> of September 2009,

complainant's husband contacted respondent to find out about the claim. On the 8<sup>th</sup> of September 2009, he (complainant's husband) received an e-mail from Aquarius informing him that the claim was rejected. New National Assurance Company ('New National') declined the claim stating the following:-

*'.....decision to decline Liability in respect of this claim, "Inter alia" due to the following reasons.*

*1) The driver was not named under the policy.*

***We refer you to the policy wording on your schedule page 30 under condition (F) "No cover will apply under this section whilst the vehicle is being driven by or is in the custody of for the purposes of being driven by any person under the age of twenty – five unless that person has been named in the Schedule and accepted by Us.."***

[7] Complainant was subsequently contacted by the towing company and informed that the claim was rejected, therefore, she needed to remove the vehicle from their premises and pay the towing and storage fees. Complainant paid the charges and removed the vehicle to another storage facility pending resolution of the dispute.

[8] She later furnished the respondents with a copy of the policy schedule she received upon taking up the policy. The policy schedule clearly named the son as the regular driver of the vehicle. With that, complainant trusted the matter would be resolved.

### **C. COMPLAINT**

[9] The complainant's complaint may be summarised thus:

[9.1] She sought the services of the respondent in securing a policy when she purchased her vehicle. During the rendering of the financial service, she informed respondent that the vehicle was going to be driven by her son.

[9.2] She further submitted his driver's licence and identity document. Upon acceptance of the policy by the insurer, she was sent a policy schedule reflecting her son as the regular driver of the vehicle. When her son was involved in an accident approximately one year after the policy inception, her claim was rejected. The insurer alleged her son was not named as the driver of the vehicle.

[9.3] According to complainant, it was as a result of the failure to render financial services properly and in compliance with the FAIS Act that her claim was turned down by the insurer.

[9.4] Complainant holds respondent liable for her loss.

### **D. RELIEF SOUGHT**

[10] Complainant has requested this Office to compel the respondent to indemnify him for the loss she suffered in the same way the insurer would have done

had the financial service been properly rendered. In this regard, complainant has asked for the payment of R 90 000.

## **E. VERSION**

[11] The complaint was sent to the respondent requesting it to resolve it with the complainant, alternatively to furnish this Office with a detailed response. A detailed response was received from the respondents. What follows is a summary:-

[11.1] Scolari (on behalf of the respondent), states that when the policy was initially issued and underwritten, it was done correctly with the regular driver as Mr M.C. Nduna. This could be noted from the application form provided by complainant. The policy-holder was noted as Dr C.B. Nduna. According to Scolari there is actually no mention of a regular driver on the schedule, which according to him appears to have been a clerical mistake done by Niche Administrators.

[11.2] Scolari highlighted that during November 2008, the Financial Services Board suspended Niche Administrators' licence, and Aquarius together with other brokers had to find cover for their clients in a short space of time. He states that one Mr Collins from Xsure offered to take over all the policies at the same premium to Endbridge Financial Services ('Endbridge') where the insurer became New National. This was duly done and all the clients went on cover as from 1 November 2008 with New National as the insurer.

[11.3] Scolari further states that Xsure and Endbridge were aware that there may have been clients who did not necessarily fit the underwriting criteria; however those clients were nevertheless accepted. According to him the conduct of Xsure and Endbridge in taking over the insurance on an “as is” basis meant they committed themselves to accepting all the risks associated with the portfolio.

[11.4] Scolari contends that at no time were they informed of any undesirable risks on the portfolio, specifically, no one informed them that persons under the age 25 would not be covered. He further alleges that they furnished all files and data to Xsure/Endbridge to load on their systems and same was available at all times for inspection. He added Xsure and Endbridge failed to conduct a due diligence exercise to determine which clients would be excluded from the take-over. Based on this the Scolari is of the view that the claim should have been paid by the insurer.

[11.5] Scolari stated that he believes they acted in good faith and that oversight of the underwriting criteria falls on the shoulders of the administrators. He further questions, if the administrator was so concerned with the regular driver clause, why did it (the administrator) not obtain more details about the driver.

[11.6] According to him, the clients were not introduced in the normal course of new business. They were accepted on special terms, therefore he is of the view that the clause applicable to drivers under 25 years of age

should not apply. He tried to negotiate with the administrator to reconsider the claim, but his attempts were fruitless.

## **F. ENDBRIDGE'S VERSION**

[12] In addition to the respondent's version, this Office sought and obtained Endbridge's version, in particular, pertinent information relating to the transfer of the insurance book. Endbridge are the administrators. What follows is a summary:-

[12.1] According to Mr Swain ('Swain') the transfer was not a book of business 'take-over' as understood in its ordinary sense. He saw notification of cancellation of the insurance book underwritten by Niche Administrators from Saxum. The Financial Services Board was aware of the cancellation and alternative cover had not been arranged for the clients. According to Swain this notice also appeared in the Sunday Times newspaper well in advance.

[12.2] Endbridge was approached by Xsure who acted on behalf of a number of Niche brokers and requested insurance for their clients. Swain stated that they agreed to insure the clients, however, due to the loss ratio of the Niche, which was said to be close to 190%, the insurance was done subject to their policy terms and conditions and premium increases. It was understood that this would have been communicated to the client by the brokers.

[12.3] Swain states that there was never an agreement in place to take over the business on an 'as is' basis as this would have been financial suicide on their part, based on the loss ratio of Niche.

[12.4] On receipt of the claim, it was discovered that the driver was 21 years of age, and neither nominated as a driver nor named anywhere in the policy. The policy specifically excludes drivers under 25, unless named as the driver. According to Swain, if drivers under 25 were to be included, pertinent question would have been asked. Swain further stated that in this case, the premium did not relate to the rates for a young driver.

## **G. ISSUES**

[13] The issues are:-

[13.1] Whether there was a violation of the General Code of Conduct on the part of the respondents in rendering the financial service to the complainant? Specifically, were any of the respondent's duties as a provider rendering the financial services to complainant breached?

[13.2] Did such breach cause complainant's damage?

[13.3] Quantum?

## **H. COMPLIANCE WITH THE GENERAL CODE**



[14] It is now common cause that the respondent never informed the complainant of the transfer of her policy from the old insurer to the new. On his own version, the short-term insurance book was merely taken over to the new administrator after the Financial Services Board suspended the licence of Niche. To this end, respondent stated that the book was transferred “as is” and accepted on such terms by the new administrator. On his own version, Scolari failed to comply with the General Code of conduct. Perhaps Scolari fails to recognise that when the insurance was taken over by a different insurer, a new contract of insurance came into existence, therefore the material terms on which cover was provided ought to have been disclosed to complainant. The aforementioned is supported by the fact that he could not furnish this Office with any documents supporting his compliance with the General Code, especially clause 9 which clearly requires a client advice record to be kept.

[15] It is further common cause that no documentation was maintained in relation to the rendering of the financial service when complainant’s policy was transferred to the new administrator. In this regard, there is no proposal form, no quotation and no document of any sort to record the communication that took place between respondent and complainant. Scolari did not furnish this office with any evidence that Nduna was informed that the insurance policy was transferred and what the new insurer’s terms and conditions were. In short, no material disclosures were made when the insurance was moved to the new insurer. In terms of the General Code of Conduct for Authorised Financial Services Providers and their Representatives, (the Code), it is the

responsibility of the financial services provider or representative to make all material disclosures.

[16] It is clear from Scolari's statement to this Office that he failed familiarise himself with the terms and conditions of the new policy under which he insured all his clients in that he was unaware of the clause affecting persons under the age of 25. In this regard, his statement that the policies were taken on an 'as is' basis bolsters this view. On his own version, Scolari failed to make the material disclosures pertaining to the new contract to complainant. From this, it can also be said that Scolari failed to comply with the general duty imposed on providers when they render financial services to client by section 2 of the Code, namely, the duty to act with due skill, care and diligence.

[17] Part II, section 2 of the Code provides that:

***A provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry. (emphasis added)***

## **I. FINDINGS**

[18] Respondent failed to inform complainant that her short-term insurance policy was transferred to a new insurer.

[19] On his own version, Scolari failed to familiarise himself with the terms and conditions of the new policy under which his clients were insured, including the fact that complainant's son as a person under 25 needed to be insured

under new terms. This resulted in the risk not being appropriately underwritten which resulted in the claim being rejected.

[20] Scolari failed to comply with the provisions of the Code, in particular the duty to render financial services honestly, fairly, **with due skill, care and diligence**.

[21] On the facts before this Office, there is no evidence contradicting complainant's claim that she was adequately insured prior to the transfer of her policy; hence she would have enjoyed indemnity under the Saxum policy. Accordingly, Scolari's failure to comply with the Code was the sole cause of the rejection of complainant's claim. Therefore the respondents are liable to compensate Nduna for the loss suffered.

## **J. QUANTUM**

[22] The vehicle was insured for R 88 000. It was damaged beyond economical repair. Therefore the amount should be R 88 000, less the following excesses:

Basic excess of R 2 500; and

Additional excess of R 2 000 as the driver was under 25 years of age.

## **ORDER**

In the premises the following order is made:

1. The complaint is upheld;

2. Respondents are hereby ordered to pay, jointly and severally, the one paying the other to be absolved, to complainant the amount of R 83 500;
3. Interest at a rate of 15, 5%, seven(7) days from date of this order to date of final payment;
4. The respondents are to pay a case fee of R 1000, 00 to this office within 30 days of date of this order.

**DATED AT PRETORIA ON THIS THE 29<sup>th</sup> DAY OF MARCH 2012.**



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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**