IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 03440/16-17/ KZN 3

In the matter between:

BONGANI NXUMALO **COMPLAINANT**

And

CENTRAL FINANCIAL ADVISORS (PTY) LTD **RESPONDENT**

T/A COLER FINANCIAL SERVICES PROVIDERS

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

A. THE PARTIES

[1] The complainant is Mr Bongani Nxumalo, an adult male, of 46 years of age, whose full details are on file with this Office.

[2] The respondent is Central Financial Advisors (PTY) Ltd t/a Coler Financial Services Providers, a company duly incorporated in terms of South African law, with registration number (2014/025111/07). The respondent is an authorised financial services provider (FSP) (licence number 44521) with its principal place of business noted in the Regulator's records as No. 2 Horwitz Street, Universitas, Bloemfontein, 9301.

B. THE COMPLAINT

[3] The complainant, who is self-employed as a courier, purchased a 2011 Toyota Hilux 2.5d 4D P/U S/U on 23 July 2013. The vehicle was purchased with the intention of it being used as a courier vehicle and had been fitted with what is described as a 'High Volume Canopy', or 'Courier Canopy'.

[4] The complainant was assisted by the respondent to source insurance for the vehicle, which was subsequently secured with RENASA Insurance Company Limited ('RENASA') after the completion of the application form on 23 July 2013.

[5] On 30 July 2015 the vehicle was stolen and the complainant subsequently submitted a claim which was rejected by RENASA, the reason being that at the time of the loss the vehicle had been insured on a personal lines policy. Furthermore, the use of the vehicle had been captured as business use, when the vehicle had clearly been used for commercial purposes. RENASA referred the complainant to the relevant sections of the 'Domestic Policy' which specifically excluded this vehicle from cover.

[6] The complainant was disappointed in the outcome of the claim, as he claims to have specifically disclosed to the respondent that the vehicle would be used as a courier vehicle. He had been under the impression that the respondent had adequately provided for this vehicle after having insured it for business use. The complainant claims to have never been informed that he required a commercial insurance policy.

[7] The complainant as a result approached this Office, as he had relied on the expertise of the respondent in recommending the appropriate policy. As a result, he wants the respondent to be held liable for the losses incurred following the rejection of the claim.

C. RESPONDENT'S VERSION

[8] Respondents' response to the allegations raised by the complainant was received on 28 April 2017 following this Office's Rule 6 (b) letter of 12 February 2017. The salient features of respondent's response appear in the paragraphs immediately below:

8.1 The respondent argues that when it had assessed the short-term insurance need of the complainant, it had used the **official application form** (the respondent's emphasis.) provided by RENASA. The respondent then refers to the motor section of the application form and specifically the section that deals with the cover required. He states that there were only two options for class of use available for selection, being domestic use and business use, and that it had based on this 'limited' (Own emphasis) selection selected business use.

8.2 The respondent proceeds to make the following statement: "There is no official **section** (the respondent's emphasis) to choose commercial use as an option." (Note: The respondent fails to appreciate that the personal lines policy or domestic policy from the insurer was not appropriate to the complainant's needs and circumstances and that an application in respect of a commercial lines policy ought to have been recommended to have adequately addressed the purposes for which the vehicle would be used.)

8.3 The respondent is of the view that this matter is attributable to the negligence of RENASA in not insuring the complainant in accordance with the respondent's instruction on the application form, which was that the vehicle be insured for business use. In support of this claim, the respondent refers to RENASA's letter of rejection dated 23 September 2015.

8.4 From the rejection letter the respondent quotes the following: “We refer you to your “Motor Vehicles Section” of your “Domestic Policy”. The respondent cites this as proof of RENASA’s negligence stating that the application form was completed to reflect that the class of use was business use and not for domestic purposes as claimed by RENASA. (Note: The respondent has once again failed to appreciate that reference made to ‘domestic’ in RENASA’s correspondence is with regards to the type of policy applied for as having been a personal lines policy and not a commercial lines policy.)

8.5 In further references to the letter of rejection, the respondent cites the following passage: “Where the category of use is shown in the schedule as business or professional, the vehicle is only insured while being used for…business…purposes…” The respondent believes that in this and subsequent referrals to other exclusions, RENASA does not include a referral to the alleged actions, that being a courier service, and only refers to commercial travelling, which the respondent believes is not only vague and specific but not applicable to the insured risk.

8.6 The respondent believes that the repudiation of the claim by the insurer must be challenged. On this basis the matter should be referred to the Ombudsman for Short Term Insurance for further investigation, as this Office is not the appropriate forum. The respondent is of the view that the insurer should not be allowed to use technical definitions to justify the rejection of claims to manage and protect the company’s claims book.

8.7 The respondent also refers to the section of the application form which deals with security, and claims that the complainant in having answered ‘No’ to the question –

"Is there any form of business conducted on or from your premises" – clearly did not disclose the correct information regarding whether he operates a business. (Note: Not only does this in no way exonerate the respondent from its duty in terms of the Code to obtain all relevant and available information from the complainant, but this has no bearing on the class of use and the manner in which the vehicle was placed on cover.)

8.8 In providing this Office with its response, the respondent provided limited documentation, which included a document titled 'Declaration and Authorization' where respondent claims that the complainant had confirmed the class of use selected and that no form of business was conducted from his premises. The excerpt from this document offered in support of this reads as follows: "…and that I am satisfied with the way in which the application was handled. Furthermore, I confirm I have taken notice of all declarations made and are satisfied that this is indeed correct." (Note: Being a layperson the complainant would have been under the impression that the respondent, a registered FSP in whom the complainant had placed his trust, would have provided him with appropriate advice. There can therefore be no importance placed on the complainant having made this declaration based on the recommendation he received.)

8.9 In closing, the respondent once again reiterates that the matter be referred to the Ombudsman for Short Term Insurance and that this Office decline to investigate and or ultimately determine this matter. At the very least, respondent required that should this Office wish to proceed with the matter, that RENASA be included as a co-respondent.

D. INVESTIGATION

[9] In the interests of resolving the complaint, this Office sent a notice to the respondent in terms of Section 27 (4) of the FAIS Act on 24 October 2017, informing the respondent that it is viewed as a respondent in this matter, and that as the complaint had not been resolved this Office had the intention to investigate the matter. The notice in terms of Section 27 (4) further afforded the respondent the opportunity to resolve the matter with the complainant.

[10] This was followed by a recommendation in accordance with Section 27(5), where this Office once again raised possible contraventions of the Code. The respondent was asked to either provide documentation showing compliance with the identified sections, or alternatively to look to resolve the matter with the complainant.

[11] The respondent did not respond to either the notice or the recommendation issued by this Office.

E. DETERMINATION

[12] A broker is primarily the agent of the prospective insured, and the relationship between the broker and the client is governed by the ordinary law of agency. In the decision of *Rabinowitz and Another*[1] the court stated:

"Where a person employs an insurance broker to obtain insurance from him, the broker is his agent, and responsibility for the acts and omissions of the broker is governed by the ordinary law of agency. The communication of information relative to the proposed insurance during the course of negotiations therefore is plainly within the authority of an insurance broker".

[1] Rabinowitz and Another NNO vs Ned-Equity Insurance Company Ltd and Another 1980 (1) SA 407H – 408A

[13] The decision of the court in *Stander vs Raubenheimer*[2] stated that the relationship between an insurance broker and the insured is founded on the contract of mandate. In Havenga's *The Law of Insurance Intermediaries*[3] the broker undertakes to perform a mandate for a prospective insured, and consequently all the duties and rights flowing from a contract of mandate arise.

[14] One of the duties flowing from this agreement according to Havenga[4] is the duty to investigate the insured's needs. Reference is made to the decision of the court in *Stander vs Raubenheimer*[5] where the court was of the opinion that brokers implicitly agree to act with reasonable and proper care and skill in the exercise of their duties, and that this is consistent with what is legally expected from insurance brokers. This duty may therefore require that a broker not merely rely on the information provided by the insured, but to ascertain whether the information provided by the insured is a correct representation of his or her needs.

[15] This well-established principle regarding a broker's general responsibility is also succinctly summarized in Ivamy's *General Principles of Insurance Law*[6]:

"It is the duty of the agent to carry out the transaction which he is employed to carry out, or, if it is impossible for him to do so, to inform the principal promptly in order to prevent him from suffering loss through relying on the successful completion of the transaction by the agent. Thus, an agent employed to effect or renew an insurance must effect it or renew it effectively, or, if he is unable to do so, must notify his principal of his inability as soon as possible so as to enable the principal to take steps to insure elsewhere. And where, as here, the client without giving particularised instructions relies on the broker to see that the

---

2 Stander vs Raubenheimer 1996 (2) SA 670 (O)
3 (1st ed., 2001) at p 21
4 (1st ed., 2001) at p 29 – p 30
5 At 675B
6 (5th ed., 1986) at p 514

client is protected and the agent has agreed to do business on those terms, "then he cannot afterwards when an uninsured loss arises, shrug off the responsibility he has assumed."

[16] The obligations of a broker when procuring insurance for his or her clients, are also stated in our common law as follows:

"...in our law, as in English law, the duty to exercise reasonable care and skill in appropriate cases extends to the duty to take reasonable steps to elicit and convey material information both from and to the insured. This includes information about terms of the policy which, if contravened, might leave the insured without cover. It is part and parcel of the broker's general duty to use reasonable care to see that the insured is covered."[7]

[17] To a large extent, the duties of a broker as detailed above are "codified" in the General Code of Conduct for Authorised Financial Services Providers and Representatives ('the Code') under the Financial Advisory and Intermediary Services Act, No. 37 of 2002.

A Financial Services Provider ('FSP') is required in terms of sections 8 (1) (a) (b) and (c) of the Code to obtain all relevant and available information from the prospective client so that after an analysis is conducted a recommendation can be made that is appropriate in terms of the complainants' needs and circumstances. Establishing the details of the complainant's employment status for instance, which was that of a self-employed courier, was not only information that was readily available, but relevant and material in determining the appropriate class of use for the complainant's vehicle. No documentation has been provided to indicate that this section of the Code was complied with. Had the respondent in fact complied with this section, then it would have been in a position to recommend to the complainant that a commercial lines policy would have been the appropriate option,

---

7 *Lenaerts v JSN Motors (Pty) Ltd and Another* 2001 (4) SA 1100 (W)

considering the purpose for which the vehicle would be used. Instead, the respondent resorted to placing the complainant in a personal lines policy, with the class of use specified as business use; the complainant being none the wiser as to the implications thereof.

[18] It is evident from the respondent's response and the documentation provided that the complainant, a layperson, was simply required to answer a question of whether the vehicle would be used for 'private use' or 'business use', without the respondent ever seeking to fully understand and appreciate the complainant's circumstances. The complainant, who would not have appreciated the implications or the limitations of the options provided, selected business use as the option which best suited his specific circumstances. It is safe to say that had the respondent complied with his duties in terms of the Code, the complainant would have been placed in a position to make an informed decision as to the cover option that was appropriate to his needs and circumstances, as provided for in terms of section 7(1)(a) of the Code.

[19] The respondent's references to commercial usage not having been an option provided by the insurer on its 'Domestic' insurance policy application form, and its continued stance in this regard, despite numerous correspondences from this Office, casts doubt on the respondent's competency to advise and or provide an intermediary service with regards to short term insurance products. The evidence, the majority of which is the respondent's own utterances, confirm that the respondent had no understanding or appreciation of the insurers product offerings and which option was appropriate to the complainants needs and circumstances. The respondent as a result failed to conduct the financial service in accordance with the required due skill care and diligence as provided for in section 2 of the Code.

[20] Section 9 of the Code, read in conjunction with section 3 (2) requires that a provider must employ the appropriate procedures and systems to maintain a record of the advice furnished to a client. This record must reflect the basis on which the advice was given, a brief summary of the information and material on which the advice was based, the financial products considered and the financial product ultimately recommended, together with an explanation of why the product selected is likely to satisfy the client's identified needs.

[21] The respondent has failed to provide this Office with any documentation showing compliance with this section of the Code. The consideration of documents such as a needs analysis as contemplated in section 8 of the Code, and a record of advice as detailed above, are key to determining whether a provider has not only complied with the provisions of the Code, but that the provider discharged his or her duty of care towards the client. However, as was the case in this matter, providers, especially in the short-term insurance space neglect the requirements to obtain all relevant and available information to ensure that any recommendation is appropriate to the clients needs. An aspect that is highlighted by the failure to maintain the appropriate records as required by the Code.

[22] With regards to respondent’s claims that this Office is not the appropriate forum to investigate this complaint and that any determination should include RENASA, Section 1 of the Financial Advisory and Intermediary Services Act defines a complaint as: a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative -

a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage.

b) has willfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or

c) has treated the complainant unfairly.

[23] It is evident from the respondent's very own version of events, as well as the determination that follows that this matter falls within the jurisdiction of this Office. The respondent not only provided a financial service, but failed to comply with a number of the provisions of the FAIS Act and its corresponding General Code of Conduct, which resulted in the complainant being financially prejudiced as a result.

[24] Furthermore, not only does this matter satisfy the definition of a complaint, but there is no question that between the complainant and the respondent, there existed a contractual relationship to render financial advice. In discharging these obligations towards the complainant, the respondent was duty bound to observe the FAIS Act and the Code and align the standard of such service to the Code. I am therefore satisfied that this Office remains the appropriate forum to adjudicate on this complaint, and I find no reason to cite the insurer, RENASA, as a co-respondent when it had merely actioned the application form in accordance with the instructions provided.

F. CAUSATION

[25] The question must still be answered whether respondent's failure to comply with the provisions of the Code caused the loss.

[26] The actions of respondent amount to a breach of the Code and consequently, a breach of respondent's duty to appropriately advise complainant. See also J & G Financial Services Assurance Brokers (Pty) Ltd & O v Dr Robert Ludolf Prigge[8]:

'43…. In the case of a provider under the Act more is required namely compliance with the provisions of the Code. Failure to comply with the code can be seen in two ways. The Code may be regarded as being impliedly part of the agreement between the provider and the client and its breach a breach of contract. The other approach is that failure of the statutory duty gives rise to delictual liability.

44. In both instances the breach must be the cause of the loss. We stress this point because the Ombud's reasons give the impression that any breach of the Code makes a provider liable for damages without due regard to this aspect of causation, namely did the failure to comply with the Code cause acceptance of the advice.'

[27] There is no doubt that respondent's negligence in failing to adequately advise the complainant as to the appropriate policy cover his vehicle, is the reason for the loss suffered by complainant.

[28] That, as Corbett CJ[9] said, does not conclude the enquiry. It is still necessary to determine legal causation, i.e. whether the furnishing of the poor advice was linked sufficiently closely or directly to the loss for legal liability to ensue, or whether the loss is too remote. The test: "*is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a legal policy, reasonability, fairness and justice all play their part*[10]"

[29] The learned judge added that:

---

8 J & G Financial Services Assurance Brokers (Pty) Ltd &O v Dr Robert Ludolf Prigge Case No FAB 8/2016 – para 43 to 44

9 ACS Financial Management CC v P S Coetzee, Case No. FAB 1/2016, September 2016, paragraphs 61-63

10 See footnote 19 *supra*

"*the reasonable foreseeability test does not require that the precise nature or the exact extent of the loss suffered or the precise manner of the harm occurring should have been reasonably foreseeable for liability to result. It is sufficient if the general nature of the harm suffered by the plaintiff and the general manner of the harm occurring was reasonably foreseeable.*

The main factor limiting liability is the absence of reasonable foreseeability of harm. This is an objective question[11]."

[30] By the respondent's own admission, it had assessed the short-term insurance need of the complainant. However, upon completion of the 'Domestic' proposal form it had only been provided with two options with regards to the use of the vehicle, that being private and business use, and based on these 'limited' (Own emphasis) options, selected business use. In respondent's own words, "There is no official **section** to choose commercial use as an option." By proceeding with the proposal despite there being no option that satisfied the complainant's needs, the respondent acted negligently and the damage to the complainant was not only foreseeable but inevitable. I am therefore satisfied that the respondent legally caused the loss suffered by the complainant and that the respondent be liable to compensate the complainant for such loss.

G. QUANTUM

[31] RENASA have confirmed that in the event that there was a valid policy that would have indemnified the complainant for the loss incurred and the claim lodged as a result, that an amount of R144 500 would have been payable in settlement of such claim. This amount

[11] ACS Financial Management supra,

was derived by considering the retail value of the vehicle at the time of the accident, which was R152 200, and deducting the applicable excess of R7 610 (5% minimum R2 500).

[32] But for the conduct of the respondent, in failing to secure insurance cover which suitably met the complainant's financial needs, the complainant would have been indemnified in terms of a valid policy of insurance providing cover for such eventuality.

H. THE ORDER

[33] In the result, I make the following order:

1. The complaint is upheld.

2. The respondent is therefore ordered, to pay the complainant the amount of R144 590;

3. Interest on this amount at a rate of 10% per annum from the date of determination to date of final payment.

DATED AT PRETORIA ON THIS THE 13th DAY OF DECEMBER 2018.

NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS