IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 04916/14-15/ EC 3

In the matter between:

SIBANISO PHOSHERA **Complainant**

and

MUA INSURANCE ACCEPTANCES (PTY) LTD **First Respondent**

KPC BROKERS CC **Second respondent**

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

A. THE PARTIES

[1] Complainant is Sibaniso Phoshera, an adult male, legal manager of King Williamstown.

[2] First respondent is MUA Insurance Acceptances (Pty) Ltd (MUA), a company duly registered and which is an authorised financial services provider (FSP) with FSP No. 37947 of MUA House 26 Sturdee Avenue, Rosebank, Johannesburg.

[3] Second respondent is KPC Brokers CC (KPC) a duly registered close corporation with its principal address being noted in the regulator's records as 610 Moreleta Street, Silverton, Pretoria. KPC is a duly licensed FSP with FSP NO. 10669.

B. INTRODUCTION AND FACTUAL BACKGROUND

[4] In October 2012 complainant purchased a motor vehicle and on the 25th October 2012, entered into a contract of insurance for comprehensive cover in respect of the vehicle, (the policy). The insurer was Compass Insurance (Pty) Ltd (Compass), MUA were the underwriting managers and KPC the brokers.

[5] Before applying for cover, complainant carried out his own research into insurers and underwriters and, as he says, established that both Compass and MUA had a good reputation and profile and was satisfied with their service record.

[6] Complainant was fully compliant with his contractual obligation to pay premiums and was up to date when he was involved in an accident on the 10th August 2014. The accident happened on the N2 between King Williamstown and East London.

[7] The accident was reported to KPC who assisted complainant to process a claim against the policy. The claim forms were duly submitted to MUA. A short time after this the insurer's assessors report was filed indicating that the vehicle was a write-off.

REJECTION

[8] On the 10th September 2014 MUA wrote to complainant informing him that his claim had been rejected. The letter was delivered by registered post to complainant's address and copied to KPC. For purposes of this determination the following terms of the letter of rejection are important:

a) The policy number is given as POLJBM14034450;

b) The first paragraph of the letter states:

"We hereby give you notice that your above numbered claim for indemnity under the above policy, between yourself and Auto and General Insurance Company Limited ("Auto and General") represented my MUA Insurance Acceptance (Pty) Ltd ("MUA"), is rejected…"

c) The reason for rejection was that the vehicle was not in a roadworthy condition, as contemplated in the wording of the policy. The tyres were worn and were "*material to the cause of the loss".*

d) The letter also informs that MUA were "*underwriting on behalf of Auto and General Insurance Company Limited".*

e) The letter contains the following reservation of rights:

"Please be advised that the reason(s) for declining liability as stated above is not limited and that all rights and further remedies in favour of Auto and General are reserved."

[9] Notwithstanding making further submissions to MUA and Auto and General, the latter stood by their rejection of the claim.

C. THE COMPLAINT

[10] Complainant is aggrieved as it appears that MUA changed the insurer from Compass to Auto and General without notice to him. He states that he specifically did not want to have anything to do with Auto and General due to the latter's "*bad record for repudiating claims*". He states in no uncertain terms that if he was informed about the change of insurer, he would not have agreed to contract with Auto and General and would have chosen a different insurer to undertake the risk.

[11] Complainant states that the first time he found out about the change in insurer was when he received the letter of rejection. Until that time he believed that Compass was his insurer and that he was paying premiums to the latter and not to Auto and General. Complainant makes it clear that he had no dealings with any other company except for MUA and Compass. Accordingly, complainant points out that the letter of rejection requests him to address his complaints to Auto and General when he had not contracted with the latter. He pointed this out to MUA who advised him to direct his complaints to Warwick Roger-Scott who is the head of brokers at MUA. Written representations were then made to MUA.

[12] No response was received and complainant contacted KPC to find out what was happening to his claim. KPC then referred complainant's representations to a person called Crystal Vollenhoven at a company called Telesure. Again the complainant was perplexed as he had no contract with Telesure. The latter turned out to be part of Auto and General.

[13] Telesure merely confirmed that the rejection will stand. They stated as follows:

"We have independently reviewed the merits of the claim and advise that we are in agreement with the decision taken and that the decision is contractually correct."

Having exhausted his options at having the decision to reject reviewed, a complaint was made to this office.

[14] In complainant's own words, he summarises his complaint as follows:

"MUA Insurance Acceptance Pty Ltd changed my insurance risk carrier Compass Insurance Pty Ltd (my chosen underwriter) for my insurance cover without my knowledge and consent to their underwriter of their choice, Auto and General whom I never accepted as my underwriters or risk carriers, and whom I had consciously avoided as my insurer from the beginning."

[15] Complainant states that had he had notice of the change of insurers, he would have exercised his right to choose a suitable insurer and that it would certainly not have been Auto and General. He submits that another insurer, in the circumstances, would not have rejected his claim. Complainant wants the respondents to indemnify him for his loss.

D. THE ISSUES

[16] The issues can be defined as follows:

a) Did respondents give complainant notice of change in insurer;

b) Was complainant given a free choice in selecting an insurer;

c) Did respondents make disclosures as contemplated in section 7 of the General Code of Conduct (the Code);

d) If a finding of fact and law is made against the respondents regarding the above issues, what then are the consequences; and

e) Is there merit in respondent's submission that any other insurer, in the circumstances, would also have rejected the claim as the term of the contract relied on is standard in motor vehicle insurance throughout the industry.

E. RESPONDENTS' RESPONSE

[17] Both respondents responded to the complaint and made representations as to why they should not be held liable for indemnifying complainant for his loss. As far as the second respondent is concerned, a response was received from the latter as well as Auto and General, represented by Telesure Group Services (Pty) Ltd (Telesure). Auto and General is owned and operated by Telesure Investments Holdings. MUA also relies on the defence put up by Telesure.

[18] I will first deal with the response from Telesure. They address two issues; namely:

a) The notification to complainant in respect of MUA's change in risk carrier from Compass to Auto and General; and

b) The rejection of the claim.

[19] In respect of a), the notification, Telesure correctly refers to sections 4 and 7(1) of the Code and points out that the FSP must make full disclosure to client regarding its product supplier. Telesure then relies on a letter, dated 29th January 2014, from

MUA to KPC informing of the change in risk carrier from Compass to Auto and General. KPC, being the complainant's agent, received this notice. Accordingly, MUA "correctly advised" complainant's broker of the change in risk carrier. Telesure then concludes that MUA complied with its obligations in advising the customer of the change in risk carrier. Telesure also notes that complainant points out that KPC admitted to not forwarding the notice to complainant.

[20] In respect of b), the rejection, Telesure submitted that the claim was correctly rejected based on the terms and conditions of the policy. They point out that it was a term of the contract that the vehicle be kept in a roadworthy condition. When the accident occurred, the rear tyres of the insured vehicle were found to be not roadworthy. An expert found that the tyres did not meet the minimum tread requirements.

[21] Telesure concluded their response by pointing out that the rejection of the claim was not the result of a change in risk carrier. They stated:

"The customer's policy terms and conditions remained unchanged. We advise that MUA administers their own claims. The decision thus to settle or reject claims lies with MUA and not the risk carrier. The change in risk carrier therefore had no impact on the decision made to reject the claim."

I will deal with this statement below.

[22] Respondents' defence can be summarised as follows:

a) Notice of change in insurer was given to complainant, by sending a copy via email to the latter's broker;

b) Complainant's broker KPC did not forward this notice to complainant but nevertheless submits that the claim was correctly rejected;

c) Only the insurer was changed; the terms and conditions of the contract remained unchanged;

d) The condition relied on to reject, namely that the insured vehicle be kept in a roadworthy state, is a condition common to insurance policies within the industry and any other insurer would have similarly rejected the claim;

e) MUA made the decision to rejected the claim, not Auto and General, therefore the change in insurer made no difference to Complainant; and

f) Even if there was no notice of change in insurer, Complainant's claim would have been rejected by any other insurer, therefore there is no causal link between the rejection and MUA and/or KPC's failure to give notification of change in insurer.

ANALYSIS OF THE DEFENCE

[23] In the paragraphs that follow I deal with each of the respondent's defences as set out above:

THE NOTICE

[24] In terms of section 48A of the Short -Term Insurance Act , (Act 53 of 1998) (STIA), notice must be given to the insured where a binder agreement is being terminated.

[25] The General Code of Conduct for FSPs (the Code) provides for full disclosure of the product provider to the client; section 7.

[26] Section 7 of the General Code demands that clients be advised and that mandatory disclosures be made to allow clients to make an informed decision.

[27] Respondents do not dispute that Complainant was entitled to notice of change in insurer; in fact MUA claim that such notice was given. KPC admit that a notice was received from MUA but state that they omitted to send it to Complainant. They however allege that Complainant knew about the change to Auto and General as he had made another claim, prior to this one, which had been processed by Telesure on behalf of Auto and General.

[28] On the evidence before this office, KPC do not dispute that they failed to deliver the notice to Complainant. The dispute of fact in this regard must be resolved in favour of the Complainant.

[29] Having read the notice relied on by MUA, I am compelled to comment about the content of this notice. The first paragraph of this notice is noteworthy. The notice is dated 29th January 2014 and the first paragraph reads as follows:

"We are delighted to inform you that, MUA Insurance Acceptances (MUA) will underwrite on behalf of Auto & General Insurance from 1 April 2014."

The rest of the letter tells the insured a little about the new insurer and the advantages in changing to them.

[30] This is not a notice as contemplated in section 48A of STIA and section 7 of the Code. This notice merely tells the insured that MUA Insurance Acceptances (MUA) will underwrite on behalf of Auto & General Insurance from 1 April 2014. It is as if the insured is being faced with a *feit accompli.* What was required of MUA, was to give proper notice of 60 days that should state the following:

a) That there is an intention to change to a different insurer; and
b) That the insured had the choice to accept the change or to find another insurer of his own choice.

[31] On receipt of the notice sent out by MUA, a client could cancel the contract after finding an insurer of their own choice. But how many people know this? Most people are likely to accept the change and will not be aware that they can exercise a choice. MUA had simply acted in its own interests, if proper notice was given, clients could choose to go to another insurer. This would mean a loss of business for MUA. Instead, MUA merely told their clients that they have a new insurer and it will be to the client's advantage. Clearly this is not what the legislature had intended. The notice relied on by MUA is not a proper notice and must be condemned as it fails to treat the client fairly as required by the General Code of Conduct.

ONLY THE INSURER WAS CHANGED

[32] Respondents point out that although the insurer was changed, the terms and conditions of complainant's contract remained the same. Having checked the

policies, I came to the conclusion that this was true. After the 1st April 2014, there were no material changes to the policy wording, except that there was now a different insurer.

[33] The term relied on, to reject the claim, is exactly the same. However a material term of any contract of insurance, is the identity of the insurer. This ought to have been disclosed to complainant in terms of the Code, section 7. There must be a meeting of minds and no contract of insurance can come into place if the parties did not agree on the choice of insurer.

There can be no consent where the minds of the parties do not meet, or where there is no consensus. In the present case there was no consensus over the choice of insurer.

See: **Lambons (Edms) Bpk v BMW (SA) (Edms) Bpk 1997 (3) All SA 327 (A)**

Joubert v Enslin 1910 AD 6

[34] There is no factual dispute on the record, that complainant did not choose to insure with Auto and General. Nor is it in dispute that, given a choice, he would not have selected Auto and General and would have gone to a different insurer of his own choice.

That only the insurer was changed, is not a defence respondents can rely on.

THE CONDITION IS COMMON

[35] Respondents point out that the condition relied on to reject the claim is common within the industry. The condition that the motor vehicle, at all material times, must

be maintained in a roadworthy condition is to be found in all short-term policies for comprehensive motor vehicle cover.

[36] The contract with Compass did contain such a term and it is not disputed by complainant that he accepted such a term. No case is made out by complainant that:

a) such a term is not commonly included in contracts of this kind within the industry;
b) if such a term was included in a contract by an insurer of his choice, he would not have agreed to it; and
c) an insurer of his choice would have agreed to exclude such a condition from the policy.

[37] For purposes of this determination I make the following findings in this regard:

a) This term is standard throughout the industry;
b) No insurer is likely to exclude this term from their policy; and
c) Complainant is likely to accept such a term.

MUA MADE THE DECISION

[38] Respondents submit that complainant was not prejudiced by the change in insurer as it was MUA that made the decision to reject and not Auto and General. The argument is that even if Compass was the insurer, MUA was still the decision maker.

[39] The binder agreement between MUA and Auto and General and with Compass contains a limitation on the underwriter's mandate. In terms of the binder agreement all claims exceeding R300 000 – 00 had to be referred by MUA to the insurer for a decision. The claim in this case does exceed this limit. The decision to reject was certainly not made by MUA. This claim was referred to Auto and General.

There is no merit in this submission.

REJECTION BY ANY OTHER INSURER

[40] Respondents point out that in the circumstance of this claim, any other insurer would have rejected. The submission is that complainant should not be placed in a better position for the failure to give notice. In other words, complainant failed to show that there was a causal connection between the failure to give notice and the rejection of the claim.

[41] It is not in dispute that at the time of the incident, the rear tyres of complainant's vehicle did not have the minimum tread requirements and rendered the vehicle un-roadworthy. Both parties engaged experts, whose reports were made available to this office. The experts agree that the tyres did not meet minimum standards and contributed to the cause of the accident.

[42] The question is, would Compass have rejected this claim had they been the insurer? Complainant, through KPC, wrote a letter to MUA requesting them to ask

Compass if they would have paid this claim. There was no answer to this letter that even suggested a remote possibility that Compass would not have rejected. Nor did complainant provide any evidence that there are insurers within the industry who would have ordinarily paid this claim.

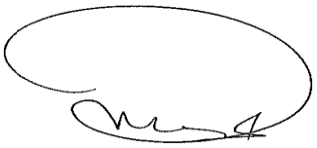
[43] Under the circumstances, there was a duty on the complainant to demonstrate that Compass would have paid the claim. Complaint failed to demonstrate this and is unable to show any causal connection between his loss and the failure to give notice of change of insurer.

On this basis alone, complainant's complaint falls to be dismissed.

F. ORDER

[44] For reasons set out above, the complaint is dismissed.

DATED AT PRETORIA ON THIS THE 11th DAY OF MAY 2016.



_____

NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS