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IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

HELD IN PRETORIA **CASE NO: FOC 769/05/L/(3)**

In the matter between:

RENIER REYNEKE TRANSPORT CC
t/a PREMIUM TRUCKING **Complainant**

and

SMIT GARUN BROKERS (Pty) LTD **Respondent**

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

PARTIES

1. The Complainant is Renier Reyneke Transport CC trading as Premium Trucking, a close corporation duly incorporated in terms of the laws of the Republic of South Africa with its principal place of business in Broederstroom, Tzaneen, Limpopo Province.

2. The Complainant in these proceedings is represented by Renier Reyneke, ('Renier'), the managing member.

3. The Respondent is Smit Garun Brokers (Pty) Ltd, a company duly incorporated in terms of the laws of the Republic of South Africa and an

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authorised financial services provider in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 ('FAIS Act'), with its principal place of business at 7 Loop Street, Tzaneen, Limpopo Province.

4. At all times material hereto, Complainant dealt with one Jaco Nel, ('Jaco'), an authorised representative of the Respondent

THE COMPLAINT

5. In May 2005, the Complainant lodged a complaint with this Office comprising of a number of allegations to the effect that the Respondent had rendered financial services to it in a negligent manner and contrary to the requirements of the provisions of the FAIS Act.

6. The allegations are:-

   6.1 That the Respondent failed to place all material information relating to the Complainant's claims history before a prospective insurer with whom it subsequently placed the insurance. As a consequence of this failure, the new insurer repudiated a claim lodged by the Complainant in March 2005 and summarily cancelled the insurance policy for the Complainant's trucks from date of inception, causing the Complainant to suffer financial prejudice;

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6.2 That the Respondent failed to inform the Complainant timeously that the insurance policy for its trucks had been cancelled by the new insurer, leaving the Complainant's trucks without insurance from about 14h30 on the 11th April 2005 to 08h00 on the 12th April 2005;

6.3 That the Respondent further failed to notify the insurer for goods in transit ('GIT'), Lion of Africa, when the number of the Complainant's vehicles increased, notwithstanding that it had been advised of the increase;

6.4 That the Respondent, who had been mandated to arrange group life cover for the Complainant's employees, negligently advised the Complainant that medicals were not necessary. As a result of the

Respondent's conduct, the death benefit in respect of the employees is now limited to R250 000. The Complainant argued that had one of its employees died, dependants could have suffered damages as a result of the Respondent's conduct;

7. Since lodging this complaint, the Complainant is only pursuing the first claim set out above. This determination is, therefore, concerned only with

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the complaint against the Respondent set out in that paragraph, that is the allegation of negligent conduct and / or non compliance with the provisions of the FAIS Act which led to the repudiation of the claim by the Complainant's insurer.

8. In respect of that allegation, the Complainant is seeking relief in the amount of R276 957.64 from the Respondent, being the financial damage it has suffered, through non-payment of the claim lodged in March 2005 together with a refund of commission paid to the Respondent in the amount of R39 322.60

THE BACKGROUND AND UNCONTESTED FACTS OF THIS CASE

9. Complainant runs a trucking business comprising of a fleet of 25 trucks with an estimated value of R23 million. The trucks transport goods throughout the Republic of South Africa.

10. During 2004 and up to and including the 31 December 2004, the Complainant's trucks were insured with Imperial Commercial Insurance, ('ICI') then a division of Regent Insurance Company, and the goods in transit ('GIT') were insured with Senate Transit Underwriters (Pty) Ltd, ('Senate')

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11. On the 7th of October 2004, Complainant signed a mandate in favour of the Respondent and addressed to ICI to enable the Respondent to obtain from ICI all relevant information relating to the insurance for the trucks.

12. On the same day, the Respondent wrote a letter to ICI requesting the complete insurance schedule for the trucks.

13. During November 2004, the Respondent also requested a claims history from Senate in respect of the GIT.

14. On or about the 23rd October 2004, one of the Complainant's trucks overturned causing damage to the truck in the sum of R838 245.97. A claim for this amount was lodged with ICI. A separate claim in respect of GIT in the amount of R30 000, arising from the same incident, was lodged with Senate. ICI and Senate duly paid these claims during or about December 2004.

15. ICI supplied the insurance schedule together with the claims history. Senate supplied the claims history in respect of GIT. The Respondent received the policy schedule and claims schedule for the trucks from ICI during or about the 11th of October 2004. The claims history in respect of the GIT from Senate was received on the 29th of November 2004.

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16. The policy schedule supplied by ICI to the Respondent states that it covers the period of insurance from 1st March 2004 to 31st October 2004, both dates inclusive. The schedule contains details of the Complainant's fleet of trucks, their values and a claims history for that period. That claims history, however, did not include any reference to the accident, which occurred on the 23rd October 2004 or to the claim arising from it.

17. The claims history supplied by Senate, in its last entry on the schedule, sets out that there was a claim from the Complainant, described as 'pending', in respect of GIT for R30 000 arising from a truck 'overturning' on the 23rd October 2004.

18. In December 2004, a proposal form to apply for insurance for the Complainant's fleet of trucks was completed by the Respondent and given by the Respondent to the Complainant for signature. On Page 2 and against point 6 of the proposal form, in response to the request for information on the claims history of the Complainant, the Respondent had written the words 'As per information in your possession'.

19. The Complainant signed the proposal form on the 9th December 2004.

20. The Respondent using the proposal form prepared by it and signed by the Complainant, and the claims histories supplied by ICI and Senate, placed

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the insurance for the trucks with the Association of Motor Underwriters ('AMU') and the GIT with Lion of Africa. Insurance cover for both the trucks and the GIT commenced on the 1st January 2005.

21. On the 15th March 2005, an accident occurred involving a Freightliner, registration number FFP 275N and an Interlink trailer, registration number FFC 568 N, both belonging to the Complainant, and another vehicle, registration number FFC 570 N. A claim in respect of the Complainant's vehicles was lodged with AMU.

22. Whilst perusing the Complainant's claims history for the trucks, AMU came across the claim of R838 245.97 in respect of the truck which had overturned on the 23rd October 2004. This claim had not been disclosed to AMU prior to it accepting the risk.

23. AMU repudiated the Complainant's claim. On the 11th April 2005, a letter was sent to the Complainant and the Respondent advising that AMU was repudiating the claim on the grounds of material non-disclosure. The letter further advised that insurance for all the trucks was summarily cancelled with effect from date of inception. It also contained an undertaking to refund the premiums less relevant costs including commission paid to the Respondent.

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24. A further letter confirming the refund of R398 042.36 in respect of premiums paid was sent by AMU on the 14th April 2005 to the Respondent's offices.

25. Another letter dated the 22 April 2005 was sent by AMU to the Complainant and to the Respondent via Oakridge confirming that 'all premiums received from the client, net of brokerage and claims costs, have been refunded to the aforementioned client as cover has been terminated with effect from inception….'

    This letter further requested the Respondent to liaise directly with the Complainant for a further refund in respect of the brokerage portion.

THE RESPONSE TO THE COMPLAINT

26. Upon receipt of the complaint, this Office advised the Complainant to first lodge the complaint with the Respondent. This was duly done.

27. The complaint had still not been resolved after four months, a period well in excess of the period allowed in the Rules on Proceedings of this Office (the Rules) within which a complaint must be resolved by the Financial Services Provider with its client, The Respondent disputed liability and directed the Complainant to AMU for relief.

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28. On the 1st of July 2005, a notice in terms of section 27 (4) of the FAIS Act was sent to the Respondent advising it that the matter would be proceeding to investigation. The letter further requested the Respondent's version of events in writing together with any documents in its possession, which would assist the Respondent in its case.

29. On the 15th of July 2005, the Respondent wrote to this Office responding to the notice in terms of section 27 (4). The Respondent refuted liability. In support of its version, the following documents were attached to the response:-

    i) A copy of a quote from Oakridge Consultants (Pty) Ltd, the Financial Services Provider who assisted the Respondent to place the insurance business with the new insurer;
    ii) Copy of the claims history from Senate in respect of the GIT;
    iii) Copy of the claims history from Regent in respect of the trucks;
    iv) A copy of the original proposal form signed by Renier on behalf of the Complainant.

30. In its letter, the Respondent refers to:-

    30.1 A claims history from Regent, which sets out the claim which occurred on the 24th October 2004, a time (according to the

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Respondent), which is between the furnishing of information and the date of the signature on the application form.

30.2 Page 2 point 6 of the proposal form with a statement from the Respondent that the Complainant had the opportunity to declare its previous losses but failed to do so;

30.3 A statement that a Mrs van Wyk of the Respondent's office had discovered the claim for R30 000 arising from the loss of GIT in the accident of 23rd October 2004, which the Respondent claims had also not been disclosed by the Complainant;

30.4 The Respondent further alleges that Renier was a broker for 20 years and avers that Renier did some of his negotiations telephonically with Oakridge but also failed to disclose the claims to them.

DISPUTED FACTS

31. There are a number of disputed facts on the papers. In particular, there is a dispute between the parties as to whether the Complainant ever notified the Respondent about the accident of the 23rd October and the claim

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made in respect of it. The Claimant says it did. The Respondent denies that it did.

ISSUES

32. There are five issues in this case, one procedural, the other four concerning the merits of this case. These issues are:-

(a) Whether this matter can be determined on the uncontested facts or whether it is necessary to pursue any further procedural steps including a hearing before a proper determination can be made.

(b) Whether the Respondent rendered the financial service to the Complainant in non-compliance with the FAIS Act and/or negligently.

(c) If so, whether that non-compliance or negligence has caused the Complainant to suffer damages.

(d) Whether the Complainant's discussions with Oakridge have any effect on the Respondent's liability to the Complainant.

(e) The quantum of the damages.

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DETERMINATION AND REASONS

33. Whether this matter can be determined on the uncontested facts or whether it is necessary to hold a hearing in respect of it.

(i) It is submitted on behalf of the Respondent that there are disputed facts in regard to liability in this matter. It is, therefore, necessary that those disputed facts be adjudicated upon after they have been examined and tested under cross-examination in an oral hearing. In particular, it is submitted that there is a dispute as to whether the Complainant told the Respondent about the accident of the 23rd October. The Complainant says it did. The Respondent says it did not.

(ii) It is not necessary that this matter be referred to an oral hearing. The essence of this case lies in the nature of the duty owed by a service provider in terms of the FAIS Act or a broker in terms of the common law and whether the Respondent has complied with or breached that duty. A decision can be made on the undisputed facts of this case.

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34. Whether the Respondent has rendered the financial service to the Complainant in non-compliance with the FAIS Act and/or negligently.

(i) It is not in dispute that the actions of the Respondent constituted the rendering of a financial service in terms of the FAIS Act and that he was acting as a provider. At issue is whether the Respondent rendered that service in contravention of its duty in terms of the FAIS Act and / or negligently in terms of common law.

(ii) The general duty on a financial services provider providing a financial service to a client is set out in Part II, section 2 of the General Code of Conduct for Authorised Financial Service Providers and Representatives established under the FAIS Act. It states 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'.

(iii) That corresponding duty for a broker, in terms of the common law, has been described in the case of *Lenaerts v JSN Motors (PTY) Ltd and Another 2001 (4) SA 1100 at 1108, F-H,* by Potgieter AJ, as he then was:

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'On general principles it seems clear enough that the position in South Africa is that an insurance broker performs a mandate on behalf of the insured. Accordingly he owes the insured a duty to exercise reasonable care and skill in the execution of the mandate…. This is the fundamental quality of the general duty owed. It stands to reason that in order to perform the general duty the broker will have to take reasonable steps depending on the circumstances. The nature of the steps to be taken will differ from case to case. They have not been the topic of much discussion in reported South African decisions. Some of these steps have been identified judicially by English Courts (which recognise the same fundamental duty by the broker to include the following:

'(i) He must ascertain his client's needs by instruction or otherwise;

(ii) He must use reasonable skill and care to procure the cover which his client has asked for, either expressly or by necessary implication;

(iii) If he cannot obtain what is required, he must report in what respects he has failed and seek his client's alternative instructions.'

35. While in some cases it may be necessary to distinguish between the duty of the service provider as set out in terms of the FAIS Act and that

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required of a broker in terms of the common law, as described by Potgieter AJ, it is not necessary to do so in this case. Even if there is a difference between the two definitions of the duty, the result on the facts of this case is the same.

36. While each case must be determined on its own facts, assistance as to how the general duty has been applied by the courts in cases similar to this case can be found in:

Mc Nealy v The Pennine Insurance Co. Ltd West Lanc Insurance Brokers Ltd and Carnell, Lloyds Law Reports [1978] Vol 2 page 18, (at page 20 col 2 and 21 col 1); and *Warren v Henry Sutton & Co, Lloyds Law Reports 1976 Vol 2 276.*

37. In the former case, the Plaintiff was a property repairer and a part-time musician. He instructed an insurance broker to effect comprehensive insurance on his car. The policy was effected with Pennine since they offered very low rates to a limited class of motorists. The company's underwriting instructions, of which the brokers were aware set out a list of risks which were not acceptable including, *inter alia* whole or part-time musicians. The Plaintiff in reply to a question as to his occupation said that he was a property repairer. The risk was acceptable to the insurance company and the policy was issued. When the Plaintiff was involved in a car accident and his passenger injured, the insurance company denied

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liability on the ground that the Plaintiff was a part-time musician. The Plaintiff brought an action claiming damages against the insurance brokers.

It was held that it was the broker's duty to make as certain as they could that the Plaintiff came within the categories acceptable to the insurance company and the only way they could properly have done that was to go through the list of unacceptable activities with their client to highlight the fact. The court found that the brokers had not done all that was reasonable to see that the Plaintiff was properly covered.

38. In the latter case, Mr Warren, the insured wished to have his friend, a Mr Wright covered as the second driver for his vehicle for their intended trip to France. He got him covered as an additional driver for the car at an extra premium. The insurance company were led to believe that Mr Wright was a driver who had a clean record. When the two men were getting near to Paris, with Mr Wright driving, they had a very bad accident, which saw the sports car completely written off. In addition there were personal injuries to people amounting to at least 5000 or 6000 pounds. The insurance company Legal and General repudiated liability on the basis of misrepresentation that Wright had no accidents, convictions or disabilities. The plaintiff claimed damages against the insurance brokers on the ground that they had made the misrepresentation. Amongst the

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arguments raised by the Defendant brokers was the fact that it was the plaintiff's omission to disclose Wright's record, which occasioned his losses.

The Court of Appeal rejected this argument. It held that on the evidence, the defendants had made the misrepresentation. The court also held that the misrepresentation made by the defendants was due to their omission to make inquiries and not to the plaintiff's omission to communicate to them what he knew about Wright's record. (page 284, col 1).

39. From the reasoning of the courts in these cases, it is clear that there is a general duty on a service provider or a broker to take steps to ensure that, as far as reasonably possible, the information that he receives from or on behalf of his client and passes on the prospective insurer is correct.

40. In this case the Complainant gave the Respondent a mandate to investigate and arrange for insurance cover over its trucks and GIT. Implicit in that mandate was the duty to do all things necessary to obtain the requisite insurance. The Respondent was required to obtain all the necessary and relevant information pertaining to securing the insurance, to collate that information and to present it to the prospective insurer in acceptable form. In carrying out that mandate, there was a duty on the Respondent to take reasonable steps to ensure that the act of collecting

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and collating the information required by the new insurer was carried out properly and that, as far as was reasonably possible, the information put before the prospective insurer was correct to obtain the insurance.

41. The Respondent failed in that duty in two respects:-

41.1 Firstly, Respondent requested and obtained the claims histories

41.2 directly from ICI and Senate. The claims histories were sent to it. The Respondent failed to notice and to enquire about the discrepancy between the two claims histories provided to it by the Complainant's then insurers. The two claims histories were in its possession when it completed the proposal form for signature by the Complainant and at the time that it submitted that proposal form with the new insurers. They formed part of the Complainant's proposal to the new insurers.

The Respondent should have seen the discrepancies between the two histories and made enquires of the Complainant and asked it for an explanation concerning them. It should have asked the Complainant about the relevance of the claim of R30 000 to the ICI claims history. Thereafter, it should either have corrected the claims history by its own addendum or asked ICI to correct the claims

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history provided by it.

The Respondent did not see the discrepancy; nor did it check the accuracy of the ICI claims history with the Complainant. These were culpable errors and omissions on the Respondent's part.

41.3 Secondly, there was a delay of more than two months between ICI supplying the claims history to the Respondent and the preparation, signature and submission of the proposal with the claims history to the new insurer. The Complainant was operating a large-scale transport business. It is easily foreseeable that claims other than those set out in the claims history might have arisen in the intervening period. The claims history should have been checked and, if necessary, updated before their submission as part of the Complainant's proposal to the new insurer.

Even if it might have been understandable that the Respondent missed the discrepancy between the claims histories (which it is not), the Respondent's duty extended to taking reasonable care to ensure that the claims histories supplied by it to the two new insurers were accurate as at the date that the proposals were submitted to the new insurers.

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Nowhere in its reply to the complaint against it does the Respondent say or suggest that it that it made any enquiry of the Complainant concerning the accuracy of the claims histories, either at the date of signature of the proposal form or before they were submitted to the new insurer. There is no suggestion in the papers that it did so. It should have done so. It did not do so.

42. The Respondent makes two points in its defence.

42.1 Firstly, it submits that it was the Complainant's responsibility to tell it about the October 2004 claim. That might have been the position if the Respondent had made any enquiry to the Complainant concerning the claims histories, either in general or with particular reference to the apparent discrepancy between the ICI and the Senate claims histories. This was not done.

On the facts, the nondisclosure of the 23rd October 2004 claim to the new insurer was a nondisclosure by the Respondent. It had a mandate to obtain all relevant information. It obtained the claims histories. It filled in the proposal form. It submitted the claims history to the insurer as part of the proposal.

42.2 Secondly, the Respondent submits that it is exculpated from liability

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by reason of the Complainant's response to point 6, Page 2, of the proposal form, where, in reply to the insurer's request for information on the claims history of the Complainant, the words 'As per information in your possession' have been inserted.

Once again the Respondent might be exculpated if the Complainant had prepared the proposal form and the quoted words were the Complainant's. That is not the position. The Respondent completed the form and the words are its own. It cannot escape liability by reason of its own actions.

In the result the Respondent failed in its duty both as a financial services provider in terms of the FAIS Act and as a broker in terms of the common law.

43. **Did the Respondent's non-compliance with the FAIS Act or negligence cause the Complainant to suffer damages?**

43.1 The Respondent owed a duty to the Complainant, which has already been described. It did not comply with that duty. It did not take the steps necessary to ensure, as far as was reasonably possible, that the information that it gave to the prospective insurer was correct. There can be no doubt that the failure to observe that

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duty caused the Complainant a loss. The insurer discovered that the information was incorrect and it repudiated liability to the Complainant. The Complainant had to bear the loss arising from an accident for which it believed it was insured.

44. Would the Complainant's discussions with Oakridge have any effect on the Respondent's liability to the Complainant?

44.1 The fact that the Respondent used Oakridge to help it place the insurance that the Respondent obtained for the Complainant and that the Complainant may have had some discussions with Oakridge does not affect the Respondent's liability in this case. There is no direct relationship between the Complainant and Oakridge.

The Complainant's mandate was given to the Respondent not Oakridge. On accepting that mandate the Respondent assumed responsibility for carrying the mandate through. The fact that it used a third party to assist it in its work is a matter between the Respondent and the third party.

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THE QUANTUM OF THE DAMAGES

45. The Complainant seeks to recover the sum of R276 957. 64 together with commission in the amount of R39 322.60. The amount of R276 957.64, the Complainant claims is the amount it would have been compensated for had the insurer upheld its claim of March 2005. The amount of R39 322.60, represents commission paid to the Respondent. This amount is claimed on the basis that the Respondent is not entitled to commission as it had failed to keep its side of the bargain in terms of its agreement with the Complainant.

46. There has been extensive communication between this Office and Respondent's attorneys who have interposed themselves without observing the provisions of the FAIS Act, in particular, section 27 (5) (a). Various issues have been raised in the correspondence by the Respondent's attorneys some of which have been dealt with in this determination whilst others are not considered appropriate to deal with in this determination. The Respondent is not entitled to any commission based on its failure to properly execute the mandate entrusted to it by the Complainant. Thus at this stage relief for the claim of commission in the amount of R39 322.60 is granted. The rest of the claim in respect of the amount of R276 957 is to be held over to give the parties further opportunity to deal with.

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ORDER

It is hereby ordered that:-

1. The Respondent is liable to compensate for the loss suffered by the Complainant as a result of non compliance and or negligence in rendering the financial service herein, the quantum of which is to be determined at a later stage;

2. The Respondent pays the Complainant the sum of R39 322.60 in respect of commission;

3. Interest shall accrue on the said sum of R39 32.60 at the rate of 15.5% from the date of this order to date of payment;

4. The Respondent is to pay the case fee of R1000 together with Value Added Tax to this Office.

DATED AT PRETORIA ON THIS THE 3rd DAY OF MAY 2006

Charles Pillai
Ombud for Financial Services Providers

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