IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 02596/18-19/ GP3

In the matter between:

JACOBUS FREDERIK ROUX T/A

GRANDE ROUX STUD AND FEEDS **COMPLAINANT**

And

TOP LIFE FINANCIAL SERVICES CC **FIRST RESPONDENT**

MORGAN ROODT **SECOND RESPONDENT**

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

A. INTRODUCTION

[1] The complainant, whose core business is the breeding of horses and supply of grass feeds, sought advice from the respondent to appropriately insure, amongst others, the lives of his breeding stock.

[2] Following the loss of a pregnant mare, the complainant duly submitted a claim to the insurer. The claim was rejected on the grounds that the complainant did not have the required cover in place. Cover that the complainant had been under the impression had been procured by the respondent.

[3] The complainant is holding the respondent, who had knowledge of the nature of the complainants business, liable for the loss that he suffered.

B. THE PARTIES

[4] The complainant is Mr Jacobus Frederik Roux, an adult male whose full details are on file with this Office.

[5] The first respondent is Top Life Financial Services, a close corporation duly incorporated in terms of South African law, with registration number 2010/149091/23. The respondent is an authorized financial services provider (FSP) with license number 48089. The license has been active since 6 June 2017. The principal place of business noted in the regulator's records as 106 Voortrekker Street, Heidelberg, 1441. The respondent's letterhead however reflects the address as 1 Du Preez Street, Heidelberg, 1441.

[6] The second respondent is Morgan Roodt, an adult male key individual and representative of the first respondent. The address of the second respondent is the same as that of the first respondent.

[7] It should be noted that at the time the second respondent rendered the advice to the complainant, he was a representative of Old Mutual Life Assurance Company (SA) Ltd (FSP number 703) who was duly noted as the intermediary on the Santam policy wording. However, the second respondent remained the representative of the complainant throughout the period of insurance. Santam confirmed that the FSP for the said policy changed to the respondent on 1 September 2017.

C. THE COMPLAINT

[8] The complainant is self-employed and operates a stud farm where his core business is the breeding of horses and the supply of grass feeds. According to the complainant, he met

with the second respondent in April 2016 to review his insurance portfolio. He held an agriculture policy with Santam at the time. The respondent suggested that he also adds insurance on the life of his 10 horses. The complainant alleges that he specifically indicated that the horses should be covered for breeding purposes.

[9] Subsequent to the meeting, the complainant was provided with a quotation via e-mail by the respondent, which, amongst others, confirmed that each horse would be covered for R200 000. The complainant duly accepted the cover.

[10] On 8 September 2017, one of the pregnant mares suffered a uterine torsion complicated by uterine artery rupture, and euthanasia was performed on humane grounds. The complainant submitted a claim to the respondent for the death of the mare. Following submission of the necessary veterinary reports, Santam rejected the claim on the basis that the loss does not fall within the ambit of the policy. Santam advised that the complainant held a farming policy in terms of which cover is only provided for the death of an insured animal caused by fire, lightning or explosion. The policy held by the complainant did not provide "life insurance" on his horses. The policy was one of short term insurance and was based on pre-determined perils.

[11] The complainant was aggrieved with the outcome, as he claims to have specifically instructed the respondent to provide life cover for the horses. He had been under the impression that the respondent had adequately provided for this cover after having insured the horses for business use. The complainant claims to have never been informed that the insurer does not provide cover on the life of the animals and that it only provided short term insurance cover.

[12] The complainant approached this Office for assistance, 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.

D. RESPONDENT'S VERSION

[13] The respondents' response to the allegations raised by the complainant was received during September 2018, following this Office's Rule 6 (b) letter of 6 August 2018. The salient features of the reply appear below:

13.1 The respondent argued that when he met with complainant in April 2016, he wanted to cover additional items on his farm on an existing policy. The complainant was concerned about farm fires, and wanted cover for the hay bales, buildings and horses. The complainant also informed him that he trains, feeds and sells off the horses. The respondent stated that he completed a proposal form with the complainant, and provided a quote via e-mail. (Note: I pause to record that this quotation was not a formal response from the insurer concerned, but merely a typed note on e-mail providing amounts and items that will be insured with the respective premiums.)

13.2 The respondent further stated that the complainant phoned his offices on 8 September 2017 to submit a claim for a foal that was still born, however this was "clearly stated in the policy document" as an exclusion. (Note: Having considered the policy schedule provided as annexure B in the respondent's reply, I could not find such an exclusion.)

13.3 The respondent also relied on the fact that the complainant was provided with a policy schedule on several occasions, and the complainant in his view was

therefore fully aware of the cover he had. He further claimed that the said cover was discussed with the complainant, and was in line with the complainant's needs.

13.4 The respondent concluded that the complaint has no reasonable prospects of success, and should therefore be dismissed.

[14] The respondent in his reply provided limited documentation to the Office. Most importantly, no record of advice was provided. The e-mail containing the quotation for the various items the complainant requested, makes no reference to the limitation of cover; specifically that the horses will only be covered for fire, lightning and explosions. What was stated, is the following:

"Lewende Hawe 10 Perde waarde R200 000 elk[1]*"*

[15] Similarly, the schedule makes no reference to the limitation of cover. The schedule itself makes reference to a policy wording, however, the wording was not included with the response, nor is there any indication that the complainant was provided with a policy wording that could have explained the limitation or extent of the cover provided.

E. INVESTIGATION

[16] In the interests of resolving the complaint, the 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 because the complaint had not been resolved, the Office had the intention to investigate the matter. The notice further afforded the respondent the opportunity to resolve the matter with the complainant.

[17] The aforesaid was followed by a recommendation in accordance with Section 27 (5), where the Office once again raised possible contraventions of the General Code of Conduct for

[1] Translated to mean "Life stock 10 Horses R200 000 each"

Authorised Financial Services Providers (the Code). The respondent was asked to either provide documentation showing compliance with the identified sections, or alternatively, seek to resolve the matter with the complainant. The respondent however chose to provide the same documentation as per his original response, stating that it would be sufficient.

F. DETERMINATION

Law of agency

[18] In the matter of *Huguenot College v Octofin Korttermyn Versekerings Konsultante (Pty) Ltd*[2] the court confirmed that the relationship between a broker and his client is governed by the normal rules of agency. The agreement is one of mandate, where the broker is mandated to obtain insurance cover for a prospective insured. The insurance broker is therefore under a duty of care towards the prospective insured to fulfill his duties with reasonable care, skill and diligence. The court also referred to this relationship between the broker and his client as a fiduciary one, where the broker is required act in good faith towards his client.

[19] It was also held in the matter of *Lenaerts v JSN Motors (Pty) Ltd & Another*[3] that the duty of care is one of the *naturalia* of an intermediary insurance agreement. Potgier AJ said[4]:

'I consider that 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

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2 Case no 17084/2010, High Court of South Africa, Western Cape Division at paragraph 31

3 2001 (4) SA 1100 (W)

4 At 1109H-J

parcel of the broker's general duty to use reasonable care to see that the insured is covered.'

[20] Yekiso NJ also noted in the *Huguenot* matter[5] that the primary obligation of an insurance broker is to take reasonable steps to ensure that his client is properly covered by insurance. The learned judge concluded in this matter that the broker failed to properly value and determine the replacement building cost of an historic building. The values as determined and recommended by the broker was substantially lower than the actual replacement building cost, which resulted in significant losses to the client when a fire destroyed the building. The judge also concluded that the broker failed to inform his client that he was completely out of his depth in venturing into this area of expertise, which lied at the heart of the breaches on the part of the broker.

Code of Conduct

[21] The Code of Conduct in terms of sections 8 (1) (a) to (c) requires an FSP to obtain all relevant and available information from the prospective client to conduct an analysis and ensure that a recommendation is made that is appropriate for the client's needs and circumstances. That the complainant is a self-employed horse breeder was not only information that was readily available, but relevant and material in determining the appropriate cover. Had the respondent properly considered this information, he would have realized that what was suitable for the complainant's needs was a mortality policy, as opposed to a normal short term insurance policy covering only insured perils like fire. The complainant was none the wiser as to the implications of this failure on the part of the respondent.

[5] Supra, at paragraph 32

[22] More importantly, if the respondent was unable to recommend a suitable product, he should have informed the complainant accordingly and pointed him in the direction of a broker or insurer that could assist. The respondent was out of his depth and 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.

[23] Section 9 of the Code, read in conjunction with section 3 (2) requires that a provider must maintain and keep 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.

[24] The respondent has failed to provide the Office with documentation showing compliance with section 9 of the Code. The aforesaid documentation are relevant in determining whether the provider has complied with the provisions of the Code and discharged his duty of care towards the client.

[25] There is no question that a contractual relationship to render financial advice existed between the complainant and the respondent. 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.

G. CAUSATION

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

[27] The actions of the respondent amount to a breach of the Code and consequently, a breach of the respondent's duty to appropriately advise the complainant. See in this regard the finding in the matter of *J & G Financial Services Assurance Brokers (Pty) Ltd & O v Dr Robert Ludolf Prigge*[6]:

'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.

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.'

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

[29] That, as Corbett CJ[7] 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*[8]"

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

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

8 See footnote 19 *supra*

[30] The learned judge added that:

"*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[9]."

[31] By the respondent's own admission, it had assessed the short term insurance needs of the complainant. The issue here is that the respondent failed to understand the complainant's core business and needs. Therefore, by proceeding with the normal short term cover quotation despite there being no option that satisfied the complainant's needs, the respondent acted negligently. The damage suffered by the complainant was not only foreseeable, but inevitable.

[32] I am therefore satisfied that the respondent legally caused the loss suffered by the complainant and that the respondent be held liable to compensate the complainant for such loss.

H. QUANTUM

[33] The insurer, Santam, confirmed that in the event that there was a policy that would have indemnified the complainant, an amount of R200 000 would have been payable subject to a 10% excess. As a result, the amount in consideration is R180 000.

[9] ACS Financial Management supra,

I. THE ORDER

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

1. The complaint is upheld.

2. The respondent is ordered to pay the complainant, jointly and severally, the one paying the other to be absolved, the amount of R180 000.

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

[35] Should any party be aggrieved with the decision, leave to appeal the decision is granted in terms of section 28 (5) (b) (i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 29th DAY OF MARCH 2019.

NARESH S TULSIE
OMBUD FOR FINANCIAL SERVICES PROVIDERS