

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NO: FOC 2480/ 07-08/ KZN 3

In the matter between:

RUNGATRANS CC

Complainant

And

COUNTERPOINT TRADING 328 CC

T/A POLICY PROVIDER

First Respondent

FUSION PROPERTIES 268 CC

T/A BROKERS CHOICE

Second Respondent

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

THE PARTIES

[1] The Complainant is Rungatrans CC, a close corporation duly registered in terms of the Close Corporations Act of 1984, and having its principal place of business at 1430 Sarnia Road, Hillary, Kwa-Zulu Natal. The Complainant in these proceedings is represented by Lisa Anne Reddi

(‘Reddi’), a member, and an authorised representative of the Complainant.

[2] The First Respondent is Counterpoint Trading 328 CC, trading as Policy Provider, a close corporation duly registered in terms of the Close Corporations Act of 1984, having its principal place of business at 1-3 Jubilee Grove, 2nd Floor Autocity, Umhlanga Ridge, Kwa-Zulu Natal. The First Respondent is an authorised financial services provider (FSP no: 16492) in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (“FAIS Act”). The First respondent is represented in these proceedings by its Managing Director, Mr Sean Botha, (‘Botha’).

[3] The Second Respondent is Fusion Properties 268 CC trading as Brokers Choice, a close corporation duly registered in terms of the Close Corporations Act of 1984, having its principal place of business at 1-3 Jubilee Grove, 2nd Floor Autocity, Umhlanga Ridge, Kwa-Zulu Natal. The Second Respondent is an authorised financial services provider (FSP no: 23563). Botha is representing both the first and second Respondents.

THE COMPLAINT

[4] In March 2007, Adrian Gengan, a representative of the Second Respondent approached the Complainant offering Second Respondent’s

services as Complainant's broker. As the Complainant was at the time not entirely satisfied with the service rendered by its existing broker, Reddi agreed that Second Respondent be the Complainant's broker. Gengan prepared a quotation for insurance of the Complainant's vehicles and presented it to Reddi during April 2007. Reddi was assisted by Mr. Runganadhan Munsamy also a member of Complainant at the time. On or about the 20th of April 2007, the Complainant accepted the quotation and submitted the signed application forms for the insurance to Gengan. At the same time, Gengan asked the Complainant to choose a preferred debit order date from the options of 1st, 7th or 15th of each month. It is not in dispute that the 15th of the month was chosen as the preferred debit date as most of the Complainant's income came into its account around the 7th of every month.¹

[5] On 24 April 2007, Gengan put in place commercial insurance for two heavy commercial vehicles with trailers for the Complainants' transport business. The insurance was placed with Wheels Underwriting Managers with the risk carrier being Constantia Insurance. On 4 May 2007, the Complainant received the policy schedule.

[6] On 10 May 2007, one of the insured vehicles (a horse and trailer combination) met with an accident. It is not in dispute that the vehicle's

¹ Email dated 6 December 2007 from Lisa Anne Reddi to the Short term Insurance Ombudsman. The Complainant had initially lodged a complaint with the Ombudsman for Short Term Insurance but subsequently withdrew that complaint.

tyre burst while it was on its way to the Western Cape. The driver lost control and the vehicle overturned. Reddi then contacted Gengan who agreed to assist her in lodging the claim. On the same date, the Second Respondent confirmed in writing that the insurers had been made aware of the claim.² However, on 21 June 2007, the Complainant was informed by Second Respondent that its policy had been cancelled but that it had subsequently reinstated the policy. In a letter of same date from Second Respondent to the Complainant, Gengan states the following:

“Please be advised that your Motor Policy has been reinstated on cover effective immediately. The premium issue will be sorted out by tomorrow between Policy Provider, Wheels Underwriters and myself.”

[7] However, on 28 June 2007 the Complainant was advised by Wheels that as it had not received premiums the policy had been cancelled from inception. The Complainant then wrote to the First Respondent requesting an explanation. On 29 June 2007, the First Respondent wrote to the Complainant and confirmed that the policy had indeed been cancelled with effect from inception (24/4/2007) due to the fact that Wheels had not received a premium within the first 15 days of inception. In order to rectify this, the First Respondent collected the outstanding premiums from the Complainant’s bank account on 15th June 2007 and instructed its finance department to reinstate the Complainant’s policy. However, the First Respondent was subsequently advised by Wheels to cancel the Complainant’s policy as Wheels did not accept instructions to

² Letter from Second Respondent to Complainant dated 20 May 2007.

reinstate cancelled policies. The First Respondent then undertook to refund the collected premiums.

[8] The Complainant was not satisfied with the First Respondent's explanation and decided to lodge a complaint with this office seeking redress against both Respondents.³ The Complainant alleged that it was the Respondents' duty to collect the premiums on time and that they had neglected to do so, which resulted in the policy being cancelled and the claim being subsequently rejected.

THE RELIEF SOUGHT

[9] The Complainant seeks an order against the Respondents compelling them to pay the costs of repairing the damaged vehicles which according to the Complainant amounts to R477 425.30 (Four hundred and seventy seven thousand, four hundred and twenty five Rands and thirty cents). The amount is made up as follows:⁴

- [9.1] R399 022.95 for the cost of repairing truck (Vat inclusive);
- [9.2] R61 449.41 for the cost of repairing the trailer (Vat inclusive);
and
- [9.3] R16 952.94 for towing fees (Vat inclusive).

INVESTIGATION BY THIS OFFICE

³ The Complainant had initially lodged a complaint with the Ombudsman for Short Term Insurance but subsequently withdrew that complaint.

⁴ Email from Reddi dated 28 May 2008.

- [10] Upon receipt of the complaint, this Office forwarded same to the both First and Second Respondents for their response.
- [11] On 28 January 2008 Botha filed a joint response, on behalf of both First and Second Respondents. According to Botha, First Respondent's business month ends on the 20th of each month. As the Complainant's policy was incepted on 24 April 2007 (i.e. after First Respondent's month end), its system did not generate a premium. The accident occurred on 10th May 2007, at which time a premium had still not been collected from the Complainant. The First Respondent then generated its May 2007 month end, which collected the pro rated premium for April 2007, as well as the whole premium for May and June 2007 via debit order on the 15th June 2007, as the 15th was the date the Complainant had elected.
- [12] Botha states that the reason for Policy Provider not collecting and paying the premium to the insurer was due to pre-programmed premium collection dates. The premium collection facility is "purely a systems driven program". Botha further states that this was an "unforeseen/unknown factor" and that this system driven program is recognised by many other insurers and collection agents where premiums are held in trust. Finally Botha averred that First and Second Respondents have used this same system with other insurers and have had no issues such as this previously.

- [13] Botha attached to the response the following documentation:
- [13.1] Complainant's schedule;
 - [13.2] Excess structure and wording;
 - [13.3] Letter from Wheels advising of cancellation;
 - [13.4] Letter from the Complainant advising on receipt of policy;
 - [13.5] Letter from First Respondent to the Complainant explaining why premiums had not been paid;
 - [13.6] Summary of mandate between Constantia Insurance Company Limited and Counterpoint Trading 328 CC trading as Policy Provider;
 - [13.7] Copy of proposal form & debit order information completed by the Complainant;
 - [13.8] Statement of debit; and
 - [13.9] Proof of premium payment.
- [14] This Office then wrote to Wheels and requested clarification regarding the process of collection of premiums.
- [15] According to Wheels, in the case of the Respondents' book, the First Respondent is responsible for collecting the premiums and for paying such premiums to Wheels. Where the policy is incepted after the

Respondent's close-off, a pro rata premium must be collected and paid over to Wheels within 15 days.

[16] According to Wheels' records, in the case of the Complainant, no pro rata premium for April 2007 was provided to it either by debit order or cheque. Furthermore, no premium was debited from Complainant's account on the 15th of the following month even though a debit order authorisation had been signed by the Complainant. By this time the policy was already classified as "not taken up" by Wheels as no payment had been received. As stated above, Wheels states that in terms of the agreement between it and First Respondent, it is the duty of the First Respondent to collect premiums from clients and pay them over to Wheels.

DETERMINATION AND REASONS

[17] The issues for determination are whether the First and Second Respondents' actions amount to a contravention of the FAIS Act and whether that contravention resulted in the Complainant's financial loss; and quantum.

Did the Respondents' conduct amount to a contravention of the FAIS Act?

- [18] In terms of Section 2 of the General Code of Conduct for Authorised Financial Services Providers and Representatives (“the General Code”), it is a general duty of an authorised financial services provider that he/she 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.*”(My emphasis)
- [19] The General Code further provides in section 7 (1)(c)(iv) that a provider must provide full and appropriate information of *inter alia* the nature and extent of monetary obligations assumed by the client, directly or indirectly in favour of the product supplier, **including the manner of payment or discharge thereof**, the frequency thereof and the consequences of non-compliance.
- [20] An examination of the documents submitted by the Respondents reveals no evidence that the Complainant was informed in advance of the possible problems with processing payments after the 20th of the month. There is also no evidence on record that the First or Second Respondent made any effort to secure payment of the premiums within the first 15 days from date of inception to ensure that the policy was fully effective.

No explanation was furnished as to why First Respondent could not generate a premium for 15th May 2007.

[21] In my view, by not informing the Complainants of their difficulty in processing payment and by not making alternative arrangements to collect the premium, the Respondents have failed to act with the care and diligence required of financial services providers, and as such failed to discharge the provisions of section 2 of the General Code. This is further exacerbated by the fact that the first deduction from Complainant's account was only made on 15th June 2007 – approximately 52 days after the policy inception.⁵

[22] The First Respondent does not deny that it had the responsibility to firstly, debit the Complainant's bank account and secondly, pay the premium over to the insurer. Instead in its defence it argues that the non-collection was due to an unforeseen factor which was systems driven.

[23] I am not persuaded by Botha's submission that this was an "unforeseen or unknown" fact. It is not unlikely that the Second Respondent would bring in new business for the First Respondent after the 20th of each month and would naturally have to put in place systems which provide for this inevitable eventuality. According to the Complainant's policy schedule issued by the First Respondent, premiums are due in advance.

⁵ Email from Botha dated 29 May 2008.

Therefore the pro rata premium for April 2007 should have been collected on the inception date and paid over to Wheels by no later than 15th May 2007. Not only did the First Respondent fail to collect and pay over the pro rata premium timeously, First Respondent also failed to pay over the May and June premium to Wheels timeously. Instead the First Respondent collected all three arrear premiums only on 15th June 2007, as mentioned above, some 52 days after inception, by which time, it was too late.

[24] Clearly it was their negligence in not processing the payment timeously or making alternate arrangements to collect the premium which resulted in the Complainants' policy being cancelled. Similarly, it was First Respondent's negligence that this systems problem was never communicated to Complainant so as to arrange alternatives for payment of premiums. This negligence has also contravened the provisions of section 11 of the General Code.

[25] Section 11 provides that a provider must *"at all times have and effectively employ the resources, procedures and appropriate technological systems that can reasonably be expected to eliminate as far as reasonably possible, the risk that clients, product suppliers and other providers or representatives will suffer financial loss through theft, fraud,*

*other dishonest acts, **poor administration**, negligence, professional misconduct or culpable omissions.” (My emphasis)*

[26] The First Respondent failed to put in place such procedures to guard against what must be a common occurrence i.e. new business after the 20th of the month. Both Respondents should have systems in place for the timeous collection of pro rata premiums from new clients who take cover after the Respondent’s month end. Had that been the case, the premium would have been collected timeously and the policy would not have lapsed as a consequence of non payment of premiums.

[27] In light of the above, I am persuaded to find in favour of the Complainant. Both First and Second Respondent failed to render financial services in terms of the FAIS Act.

QUANTUM

[28] The Complainant has forwarded to this office documentation in support of the the following:⁶

[28.1] R399 022.95 for the cost of repairing truck (Vat inclusive);

[28.2] R61 449.41 for the cost of repairing the trailer (Vat inclusive);
and

[28.3] R16 952.94 for towing fees (Vat inclusive).

⁶ Email from Reddi dated 28 May 2008. The Complainant submitted invoices from the panelbeaters which repaired the truck and trailer in support of its claim.

[29] Total amount claimed by the Complainant is R477 425.30.

[30] According to Wheels, had the claim been honoured, they would have paid out as follows:

<u>Horse</u>	
Agreed cost: ⁷	R 384 025.07
Less Inner Excess ⁸	R 9 600.63
Less Excess for Night Driving ⁹	R 28 801.88
Less Excess for Single Vehicle Accident ¹⁰	<u>R 28 801.88</u>
	<u>R 316 820.68</u>
<u>Trailer</u>	
Agreed cost:	R 54 003.25
Less Inner Excess	R 2 500.00
Less Excess for Night Driving	R 4 050.24
Less Excess for Single Vehicle Accident	<u>R 4 050.24</u>
	<u>R 43 402.77</u>
Total payable for Repairs	<u>R 360 223.45</u>

[31] In addition, Wheels states that it would have covered the towing fees of R16 952.94.¹¹ In total Wheels would have paid R377 176.39. The Complainant does not dispute the excesses payable.¹²

⁷ According to Wheels, this is the cost which was accepted by their assessors. Email dated 23 June 2008.

⁸ As per the policy excess schedule.

⁹ The excess schedule provides that where an accident occurs on a public road between 2300hrs and 0400hrs, an additional excess of 7.5% of the claim is payable.

¹⁰ The excess schedule provides that where an accident occurs without any other vehicle being involved an additional excess of 7.5% of the claim is payable.

¹¹ Email from Wheels dated 24 June 2008. In terms of the policy schedule, Wheels would cover the reasonable costs up to 5% of the vehicle's sum insured for inter alia the recovery, protection and removal of the vehicle.

¹² The Complainant initially disputed the excess applicable to night driving, alleging that the accident had occurred between 04h30 and 05h00. However, the Complainant was unable to present us with evidence of this.

[32] In computing the Complainant's loss, regard must also be had to the fact that in order for the Complainant's claim to have been honoured, Wheels should have received the pro rata premium for April 2007 as well as the premium for May 2007. Those premiums therefore fall to be deducted from the amount which Wheels would have paid.

[33] In the circumstances, the Complainant's loss is computed as follows:

Total payable for Horse	R 316 820.68
Total payable for Trailer	R 43 402.77
Towing fees	<u>R 16 952.94</u>
Total	<u>R 377 176.39</u>
Pro rata premium April 2007	R 2 370.07
Premium for May 2007	<u>R 12 755.77</u>
Less Total premiums payable	<u>R 15 125.84</u>
Total Loss	<u>R 362 050.55</u>

ORDER:

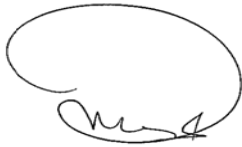
[34] I make the following order:

[34.1] First and Second Respondents are held jointly and severally liable, the one paying the other to be absolved, to compensate the Complainant for its loss in the amount of **R362 050.55** within 14 days of the date of this order;

[34.2] The Respondents are to pay interest on the aforesaid sum at the rate of 15.5 per cent per annum from the date after 14 days of the date of this order to the date of payment.

[34.3] The Respondents are to pay, jointly and severally, the one paying the other to be absolved, the case fee of R1 000.00 to this Office.

DATED AT PRETORIA ON THIS THE 2ND DAY OF JULY 2008



NOLUNTU N BAM
DEPUTY OMBUD FOR FINANCIAL SERVICES PROVIDERS