IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 03057/18-19/ NW 6

In the matter between

Daniel Steenkamp	**First complainant**
Larissa Steenkamp	**Second complaint**

and

Colonial 1952 (Pty) Ltd	**Respondent**

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

A. INTRODUCTION

[1] During 2017, the complainants approached the respondent with a request that the respondent assist the complainants secure medical aid cover. At the time, the second complainant was pregnant and though her and the first complainant had a medical insurance policy, the complainants were concerned that the cover would be inadequate for their child. The complainants were looking for more comprehensive cover than their medical aid insurance policy offered. The respondent advised the complainants that in

order for their unborn child to receive cover from date of birth, that either one or both of them would themselves have to be members on the medical aid policy. The complainants were provided with a number of quotations from various medical aid schemes. Ultimately, the complainant's selected an option offered by Discovery and opted for only the second complainant to join the medical aid scheme as the main member. The cover commenced on 1 August 2017 and on 16 September 2017 the complainant's son (baby Steenkamp) was born.

[2] During baby Steenkamp's 14-week immunization visit, the nurse who attended to him advised the complainants that the sutures on is head did not seem to be healing as they should. The nurse advised that this would be assessed again on his next visit and mentioned to the complainants that if the manner in which the sutures were healing did not improve, that baby Steenkamp may have to undergo 'scans'. During the next visit, the nurse noted that the sutures had not healed in the expected way and referred the complainants to a doctor for an assessment. The doctor who assessed baby Steenkamp shared the nurse's concerns and requested that baby Steenkamp undergo a CT scan. Baby Steenkamp was seen by a doctor on 18 January 2018 and the doctor also noticed some irregularities with his skull and advised that he would be required to undergo a CT scan.

[3] The CT scan was done on 6 February 2018 and baby Steenkamp was diagnosed with a medical condition known as Craniosynostosis. Craniosynostosis is a birth defect in which the bones in a baby's skull join together too early. This happens before the baby's brain is fully formed and as the baby's brain grows, the skull can become more misshapen. If left

untreated, Craniosynostosis can lead to serious complications, including head deformity, possibly severe and permanent, and increased pressure on the brain. The doctor advised that to treat the diagnoses, baby Steenkamp would have to undergo surgery.

[4] The doctor sent a request to Discovery to authorise the surgery but Discovery rejected the request and voided baby Steenkamp's cover from the date on which he became a member of the scheme. Discovery claimed that the complainants failed to disclose material information regarding baby Steenkamp's health before he joined the medical aid scheme. The information was uncovered during an investigation into whether baby Steenkamp had any pre-existing medical conditions before he became a member of the scheme. The complainants appealed the decision, with the respondent's assistance, but were unsuccessful. Given the urgency of the surgery, the complainants borrowed the money required for the surgery and made monthly payments of other costs related to the medical treatment.

[5] The complainants allege that the respondent failed to properly advise them when they sought help with the medical aid cover and that if they had been properly advised with respect to the time afforded to them to add baby Steenkamp to the medical aid plan without underwriting, that they would not have suffered the loss they did. The respondent denies these allegations, and in each of the responses provided to this Office, claims that the complainants failed to act on the advice given to them. According to the respondent, the complainants were advised that baby Steenkamp should be added to the policy within 90-days of birth and that contributions for the cover may be backdated depending on when

baby Steenkamp would be added to the plan. The complainants deny this and claim that the respondent advised them that baby Steenkamp would be covered immediately.

[6] Amongst the documents collected during the investigation of the complaint is an email the advisor sent to the complainant on 14 July 2017 in which she informed the complainants that '*Malan sal wel dadelik dekking geniet ek het dit so bevestig*'. In this email, the advisor did not refer to any conditions that would have to be met in order to baby Steenkamp to enjoy immediate cover.

[7] The complainants tried to resolve the matter with the respondent but the parties were deadlocked on who bore responsibility of the loss and the complainants approached this office for assistance.

[8] On receipt of the complaint, this Office made several attempts to resolve the complaint between the parties but was unable to do so. The respondent maintained that that it was not to blame for the complainant's loss and that the blame lay at the complainant's feet because the complainants did not timeously act on information provided to them on the cover which would have ensured that baby Steenkamp would enjoy cover from date of birth.

[9] Having investigated the complaint, this Office was of the view that the respondent failed to discharge a number of duties placed on it by the General Code of Conduct for Authorised Financial Services Providers (the General Code) and that it had failed or was unable to show that it had discharged these duties. This Office found that the failure to discharge the duties led to Discovery's decision to reject the request for authorisation which in turn

compelled the complainants to cover the costs themselves. This Office recommended that the respondent pay to the complainants the costs incurred for the surgery and subsequent medical treatment plus interest on this amount. The recommendation is attached for ease of reference.

[10] The respondent was afforded ten (10) days to respond to the recommendation and in response advised that it did not accept the recommendation. The respondent elected instead to address this Office on the allegations and findings set out in the recommendation.

[11] This determination is issued after due consideration to the response received from the respondent.

B. THE PARTIES

[12] The first complainant is Mr Daniel Steenkamp, an adult male whose full particulars are on file with this Office. Second complainant is Mrs Larissa Steenkamp, an adult female whose full particulars are on file with this Office. First and second complainant are married to each other.

[13] The respondent is Colonial 1952 (Pty) Ltd, a private company duly incorporated in terms of South African law, with registration number 2013/117353/07. The first respondent is an authorised financial services provider (FSP) (licence number 45457) with its principal place of business noted in the Regulator's records as Colonial Office Block G, Beethoven Street, Wellness Corporate Park, Ifafi, 216. The licence has been active since 9 September 2014.

C. RESPONDENT'S REPLY TO THE RECOMMENDATION

[14] The respondent's response to the recommendation is quite lengthy. Yet, and despite the respondent's undertaking that it will deal with the key points in the matter, the respondent has effectively not adequately addressed this Office on the pertinent issues of the complainant. Amongst others, the response does not adequately deal with the legal issues which arise from the complaint despite these having been clearly articulated in the recommendation.

[15] In its response, the respondent starts by noting the displeasure this Office has expressed in respect of the inconsistencies apparent in the responses received from it over the course of the investigation. The respondent however does not then address this Office on the inconsistencies. This is despite the fact that this Office detailed the inconsistencies in the recommendation and that in paragraph 45 of the recommendation, the respondent is advised of the adverse effect that the inconsistencies have on its defence. The respondent simply states that it would like to take the opportunity to 'apologise that this is how you have perceived our responses.' It is unclear whether the respondent has elected not to address the Office on the glaring inconsistencies because it does not consider them to be pivotal to the complaint or because it disagrees with the finding that its responses are inconsistent with each other. The respondent has also still not submitted key documents to this Office despite repeated requests that it does so and despite acknowledging that this Office has expressed displeasure over this.

D. ISSUES FOR DETERMINATION

[16] In the recommendation, this Office drew the respondent's attention to the questions it must consider in order to determine whether or not it is in fact liable for the complainant's loss or if it discharged the duties placed on it by the General Code.

[17] These questions are:

(1) whether the complainants are to blame for the loss because:

(a) they opted to have baby Steenkamp added to the plan effective February 2018 and not January 2018 when the option to change the date was presented to them; and/or

(b) they did not disclose to Discovery that they had received medical advice regarding baby Steenkamp's cranial sutures before the date on which he entered the plan.

(2) whether the respondent advised the complainants of the '90-day rule' in the manner envisaged by the General Code and if not, whether this is what caused the complainant's loss.

[18] Given the facts of this complaint, the question of liability, which must be answered with reference to how the respondent rendered the financial service to the complainants, must be answered also with reference to whether the complainants acted in accordance with the principles of good faith. In terms of the General Code, the complainants were required to place before the respondent all the material facts related to baby Steenkamp's health in order to enable the respondent to provide them with accurate and suitable financial advice.

The respondent claims that the complainants did not do this. According to the respondent, the complainants were not forthcoming about the true status of baby Steenkamp's health.

E. NON-DISCLOSURE OF MATERIAL INFORMATION

[19] The respondent avers that the complainants knew during the immunisation visit in December 2017 that baby Steenkamp would have to 'undergo scans'. The respondent claims that the complainants however did not disclose this to the broker when the application form was completed. The respondent claims that because the first complainant had already undergone a similar process when she applied to join the medical scheme, that this proves that the complainants were aware that they were required to disclose information about baby Steenkamp's health to the insurer. In advancing this argument, the respondent overlooks the fact that the application form was only submitted to Discovery in January 2018 after the first complainant enquired why the contributions had not been adjusted. In that email in which the first complainant enquired why the premiums had not been adjusted, she also informed the advisor that baby Steenkamp 'will have to undergo scans'. As such, even if we accept that the complainants knew in December 2017 that baby Steenkamp will have to undergo scans and failed to disclose this, any negligent or deliberate non-disclosure in December is inconsequential since the disclosure was made on 8 January 2018, before the forms were submitted to Discovery in January 2018.

[20] At no time prior to the inception of the policy did the complainants interreact or liaise directly with the insurer. The complainants relied entirely on the respondent to relay any information they disclosed, which was relevant to their application to join the medical scheme, to Discovery. That was the nature of the relationship between the complainants

and the respondent. As such, the complainants rightly disclosed the information to the party on whom they relied to assist them with the application before the application form was sent to Discovery. Yet, the respondent did not notify the complainants that the application form should be amended to reflect the concerns about baby Steenkamp's health and did not therefore discharge the duty placed on it by section 7(d) of the General Code.

[21] Section 7(d) of the General Code states that:

'*Subject to the provisions of this Code, a provider other than a direct marketer must –*

fully inform a client in regard to the completion or submission of any transaction requirement –

(i) that all material facts must be accurately and properly disclosed, and that the accuracy and completeness of all answers, statements or other information provided by or on behalf of the client, are the client's own responsibility;

(ii) that if the provider completes or submits any transaction requirement on behalf of the client, the client should be satisfied as to the accuracy and completeness of the details;

(iii) of the possible consequences of the misrepresentation or non-disclosure of a material fact or the inclusion of incorrect information; and

(iv) that the client must on request be supplied with a copy or written or printed record of any transaction requirement within a reasonable time.'

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[22] To deflect from the responsibility it bore once the first complainant sent the email advising that baby Steenkamp would have to undergo scans, the respondent avers that the change in circumstances occurred on 18 January 2018. This is the date on which the immunisation nurse referred baby Steenkamp to a doctor in order for the doctor to assess baby Steenkamp's condition and to formally diagnose the concerns she had. The respondent claims that the complainants did not give it an opportunity to advise them based on the change of circumstances which the respondent claims occurred on 18 January 2018.

[23] To support its averments, the respondent relies on the fact that Discovery indicated that its investigations into a possible non-disclosure of material information revealed that the change in circumstances occurred on 18 January 2018. The respondent however does not consider that factually, the position as at 8 January 2018 and 18 January 2018 was substantially the same in that no diagnosis had been made but the immunisation nurse had, on account of concerns she noted on the 8th, indicated that baby Steenkamp may have to undergo scans. The immunisation nurse has stated definitely that she is not qualified to make any diagnosis but that when she notes any concerns, she may refer a child to a doctor for assessment. According to the immunisation nurse, the doctor is the one who may make a diagnosis.

[24] In essence, the information provided to the respondent on 8 January 2018 was the same as the information on which the nurse relied when she referred baby Steenkamp to a doctor for assessment. It is not correct then for the respondent to claim that the complainants did not afford it the opportunity to properly advise them.

[25] Despite its arguments, the fact remains that the respondent submitted the application form to Discovery as is knowing that material information which had been disclosed to it was not disclosed in the application form. The application form could and should have been amended and the information could have been disclosed in response to Question 8.17. Question8.17 asked, 'have any of your dependents received or not yet received, medical advice or treatment for symptoms not yet diagnosed by a medical professional in the last 12 months before this application?' The advisor failed to inform the complainants that the disclosure should be made to Discovery in response to Discovery's query in January 2018 and to advise the complainants that the response must be dated and signed by the first complainant as the main member.

[26] I am of the view that in its submissions, the respondent seems not to properly appreciate the role that it played when the application was made and the duties it was required to discharge when rendering the financial service to the complainants. The facts are that the complainants disclosed to the respondent that baby Steenkamp may have to undergo scans and the respondent did not act on the disclosure. It was put to the respondent that it did not act on the disclosure because to do so, it would first have had to disclose to the complainants that the application form had still not been sent to Discovery and to admit that the cover had not commenced on 1 January 2018 because of this. The respondent claims that when the application form was sent to Discovery on 10 January 2018, it answered some of the questions as to whether baby Steenkamp had any pre-existing conditions in the affirmative because of the email received from the complainants on 8 January 2021.

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[27] However, it is quite obvious when one reads the application form and the questions that were answered in the affirmative that this was simply not true. The questions to which 'yes' responses were provided relate to 'Tumours and Growths', 'Heart and Circulation conditions' and 'Gynaecological and obstetrics conditions'. There is no evidence that baby Steenkamp presented with any symptoms related to any of the above conditions. Logically, I cannot see that the application form was intended to be a reflection of the information received from the complainants on 8 January 2018. The reasonable inference in my view is that the advisor made a mistake and this much was admitted by the respondent in earlier responses.

[28] The respondent claims that the broker did not make an error and only changed the responses to the questions because the complainants assured her that baby Steenkamp did not suffer from any pre-existing conditions must accordingly be rejected. Not only because it is improbable that the complainants would have answered 'yes' to any of the questions to which such a response was provided on the application form, but the respondent only contacted the complainants via email five days after the application form was sent to Discovery to advise them that further information had been requested by Discovery in respect of the questions that appear in 8.1, 8.2 and 8.3 of the application form.

[29] It cannot be then that the complainants would have provided assurance on this before the application form was sent when the request for further information was brought to their attention after a response was already provided to Discovery. If the complainants had already assured the respondent, before the application form was sent to Discovery on 10

January 2018 that 'there was no reason for concern' why would the respondent have then also sent an email on 15 January 2018 putting the same information to the complainants? If the respondent intended to be sure about the complainants' response to the request for further information, why was any earlier discussion not referenced in the email of 15 January 2018? The respondents' version is in my view not credible at all.

[30] The respondent's responses are contradictory. The respondent claims on the one hand that the complainants failed to disclose material information before baby Steenkamp joined the scheme as a member and on the other that the advisor took the disclosure into account when it submitted the application form to Discovery in January 2018.

[31] The issue is that the respondent knew that the circumstances had changed before the form was sent to Discovery. When Discovery received the form, it addressed correspondence to the first complainant, through the broker, calling for further information on the supposed pre-existing conditions disclosed in the application form. There is no evidence that the respondent forwarded the correspondence to the complainants to give them an opportunity to consider and respond thereto. Though the respondent claims that its response to the enquiry was based on an assurance it had received from the complainants that baby Steenkamp did not have any pre-existing medical conditions, the respondent does not state when this assurance was supposedly given and does not offer any proof of this. It appears rather that the respondent simply responded on the complainants' behalf without prior input from or consultation with the complainants.

[32] Not only did the respondent fail to take into account the disclosure made to it regarding baby Steenkamp's health but it failed to draw the complainant's attention to the letter addressed to the first complainant. That the respondent was authorised as the complainants' liaison did not mean that the respondent was authorised to represent the complainants without first deferring to them for a response.

[33] I am of the view that the respondent did not put the letter to the complainants because the advisor made an error when completing the application form and to correct the error, the respondent would have had to admit that baby Steenkamp was still not a member of the scheme because of an error it had made. Therefore, despite the respondent's submissions, the findings in paragraphs 35, 36, 37 and 38 of the recommendation must stand.

F. INCONSISTENCIES IN THE RESPONDENT'S RESPONSES

[34] The inconsistency on whether or not the complainants had disclosed material information relating to baby Steenkamp's health, is not the only one. Another inconsistent statement is why the complainants were sent the form to add a beneficiary and not the form to add a new born baby to the plan when the complainants informed them that they would like to add baby Steenkamp to the plan. The respondent claims that the advisor sent the 'add a beneficiary form' instead of the form to add a new-born baby because the complainants did not have the means to pay the backdated premiums.

G. FINDINGS

[35] On reading the respondent's response to the recommendation, it became pertinently clear that the respondent intended to avoid liability at all costs. The respondent has not been

shy to put untruthful and/or unsubstantiated statements before this Office. The respondent has also persisted in altering its responses overtime in a bid to refute the allegations before it rather than putting the facts and the relevant documentary proof before this Office to enable it to properly adjudicate this matter.

[36] To deny liability for the loss, the respondent's response (to the recommendation) hinges on the claims that the complainants failed to disclose material information about baby Steenkamp's health before he became a member of the scheme and that even if the application form had been sent to Discovery during December 2017 that the effect would have been the same because the cover would not have commenced on 1 January 2018. However given the time that lapsed from when the application form was completed to when it was submitted, it is evident that the latter claim is intended solely to detract from the fact that the respondent did not timeously action the complainant's instructions after the application form was completed. The form completed in December 2017 and only submitted to Discovery on 10 January 2018.

[37] In respect of the latter claim, the respondent sets out a timeline postulating what it claims would have happened after the application form was sent to Discovery. The timeline seems to have been compiled without any input from Discovery. The respondent claims that from its timeline, it is apparent that '*it would have been way too late for Discovery to deduct the adjusted premium on the 1st of January 2018*'. I cannot find any merit in the respondent's submissions.

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[38] For one, even if Discovery had been able to only process the application between 27 and 29 December 2017, this does not mean that Discovery would not have been able to collect the contributions in time to allow cover to commence on 1 January 2018. In fact, Discovery advised this Office that when it received the request to amend the start date from 1 January to 1 February 2018, cover had already commenced. The respondent's submissions about the apparent unavoidable delays given when the application Form was completed are also not confirmed by Discovery. To successfully claim that it would have been inconsequential to process the application during December 2017 because Discovery was working with 'skeleton staff', as do all insurers 'during the festive season', necessary support from Discovery of the claim should at least have been submitted to this Office.

[39] Even if I accept the respondent's claims about when cover would have commenced even if the application form had been sent to Discovery in December and that the complainants failed to disclose material information, there is still the issue of whether the respondent provided the complainants with suitable advice. The complainants clearly articulated that their complaint was about the respondent's alleged failure to provide them with correct and/or adequate information.

[40] The complainants do not deny that they had some knowledge of the '90-day rule' but what they claim they were advised by the respondent about the 90-day rule is quite different from what the rule is in practice. When asked for proof to show what was explained to the complainants regarding the 90-day rule and to prove that, in accordance with section 8(2) of the General Code, the advisor took time to ensure that the complainants understood the advice, the respondent was unable to or refused to do this. The respondent referred to

information and documents that were not helpful at all to its defence. Yet, the respondent maintains that the advice provided to the complainants was adequate and appropriate and that the complainants had all the information they needed to make an informed decision. The evidence however does not prove that the respondent provided the complainants with accurate information regarding the 90-day rule.

[41] The respondent claims that the decision to amend the date, when baby Steenkamp was set to join the medical aid scheme from 1 January 2018 to 1 February 2018, was a 'calculated risk'. However apart from the claims that the complainants could not afford to pay double premiums, the respondent did not indicate what other reasons there were to give the complainants the option to amend the date on which baby Steenkamp would join the medical aid scheme. The respondent also did not provide any documentary proof that when it presented the option to amend the date to the complainants that it explained to the complainants what the effect of amending the start date would be. There is therefore no proof that the complainants were placed in a position to make an informed decision before they chose to amend the start date to 1 February 2018 despite the respondent's claims that the risk 'was calculated'.

[42] In light of the aforegoing, the findings in paragraph 45 and 46 of the recommendation must stand.

H. CAUSATION

[43] It is trite that liability cannot ensue unless it is found that the respondent was both the factual and legal cause of the complainants' loss.

[44] From the respondent's responses, it is clear that it is of the view that it is neither the factual nor the legal cause of the complainants' loss. The respondent attributes the complainants' loss to their own actions. The respondent claims that the complainants failed (1) to disclose material information, (2) to act on information given to them and (3) that the complainants freely acted on information that was provided to them. In all of this, the respondent distances itself from the advice it gave or failed to give to the complainants and which advice preceded the complainants' actions or decisions.

[45] In *International Shipping Co (Pty) Ltd v Bentley*[1], the court held that:

"The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question".

[46] As was explained by the court in *Minister of Finance & others v Gore NO*[2], "*[A]pplication of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experiences".*

[47] Or, as was pointed out in a similar vein by Nugent JA in *Minister of Safety and Security v Van Duivenboden*[3]*:*

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1 1990 1 SA 680 (A) [700 E-G]

2 Minister of Finance v Gore NO 2007 (1) SA 111 (SCA) para 33.

3 Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) para 25.

"A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics[4]*".*

[48] The complainants were wholly dependent on the respondent and refused to make any decisions regarding the cover unless with prior confirmation from the respondent. Even though the complainants were provided with the application form to add a new born baby to the scheme when the first complainant was discharged from the hospital, they still enquired from their advisor whether this was the correct form and, on the process to add baby Steenkamp to the plan. In response, the advisor did not take the opportunity to inform the complainants of the time within which the form was to be returned to it. Now the respondent points to the fact that on the form to add a new-born baby, there is mention of the fact that the form must be completed within 90-days of the baby's birth without considering how the information differs from what was disclosed to the complainants and whether the information may have been confusing to the complainants.

[49] The complainants were advised in writing, long before they received the form, that baby Steenkamp would enjoy cover immediately. The advisor claimed that she 'confirmed it that way'. I cannot see that there was any cause for the complainants to believe differently especially because no other information had been provided to them since by their advisor that would have caused them to doubt the veracity of their advisor's advice. The General

[4] Crafford v South African National Roads Agency Limited (215/2012) [2013] ZASCA 8 para 7

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Code is clear on the duties that must have been discharged when the financial service was rendered to the complainants. The respondent cannot skirt liability by relying on what was and was not disclosed on the form if the information was not then brought to the complainants' attention.

[50] At the end of the day, the complainant's approached the respondent to receive advice on ensuring that their son would enjoy immediate cover from a medical aid scheme from the date of his birth. The complainants were advised that one or both of them would have to be a member of the chosen scheme, were provided with information regarding the contributions that would be payable to the medical aid scheme and later with respect to the first complainant's cover given that she was already pregnant when she applied to be a member of the scheme. Nothing indicates that the complainants acted contrary to any advice provided to them by the respondent. Instead, their lack of urgency with regards to providing the necessary documents and completed application form are to me evidence of their total reliance on information they received from the respondent which they believed to be credible. The complainants acted within the prescripts of the information they received from the respondent.

[51] In my view, the complainants acted as any ordinary person would have, by trusting information they received from a representative of an authorised financial services provider. I cannot find any evidence that there was a break in the *causal nexus* between the complainants receiving and acting on the advice from the respondent and their loss. The actions are to me all connected and for this reason, I cannot see how the respondent can escape liability.

[52] I find therefore that the respondent is the factual and legal cause of the complainants' loss.

[53] In light of the fact that the respondent did not accept the recommendation, it is necessary to substitute the determination made in the recommendation on when interest on the amount due to the complainants must be made. Interest runs from date of receipt of the complaint.

I. THE ORDER

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

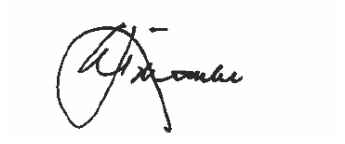
1. The complaint is upheld.

2. The respondent is ordered to pay the complainants the amount of R200 710,59.

3. Interest on this amount at a rate of 7% per annum from the date of receipt of the complaint, 21 August 2018, to date of final payment, both dates included.

4. Any party aggrieved by this decision is entitled to apply for its reconsideration by the Financial Services Tribunal in terms of section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 8th DAY OF OCTOBER OF 2021



ADV NONKU TSHOMBE
OMBUD FOR FINANCIAL SERVICES PROVIDERS