

**IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS
PRETORIA**

CASE NUMBER: FAIS 01993/11-12/WC 3

In the matter between:-

ANDREW GRAHAM STUNDEN

Complainant

and

NICOLAAS LEON VAN DER WALT

t/a

INVESTMENT & INSURANCE BROKERS

Respondent

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

A. THE PARTIES

[1] Complainant is Andrew Graham Stunden, an adult male, residing in Knysna in the Western Cape Province.

[2] Respondent is Nicolaas Leon van der Walt (Van der Walt) an adult male, trading as a sole proprietor under the name Investment and Insurance Brokers (IIB). Van der Walt is an authorised financial services provider in terms of the FAIS Act, with FSP licence number 7765, carrying on business at 57 Waterfront drive, Knysna. He is also the Key individual of IIB. At all times material hereto, Respondent personally rendered financial services to the complainant.

B. BACKGROUND

- [3] Complainant placed his motor and household contents cover with insurer, Santam in 1999 following advice provided by Respondent.
- [4] In June 2004, Complainant moved into a new house and again sought Respondent's assistance in aligning his policy with his new circumstances.
- [5] At the time, Complainant informed Respondent that his home had burglar bars only on the ground floor windows and that a linked alarm would be installed in the following week.
- [6] Respondent appears to have accepted this explanation and noted only the burglar bars so that Complainant could have immediate theft cover. When Complainant confirmed installation of the alarm, this too was noted on the policy.
- [7] Respondent and Complainant met annually to adjust the sums insured and other changes to the policy.
- [8] In July 2009 the insurer issued a notice to all brokers (including Respondent) informing them that with effect from 1st September 2009 , "*the security measures in Knysna area (the whole of Knysna) will be burglar bars and security gates, holiday homes still require linked alarm.*" [sic]¹
- [9] According to the notice, Santam had experience high claims rate and urged brokers to inform their clients that an alarm needed to be fitted in their respective homes.

¹ Email from Heather Thomas to Respondent dated 13 July 2009.

[10] The complainant suffered a burglary at his home on 5 June 2010. At the time only the ground floor windows were protected by burglar bars. In addition, the house was protected by an alarm linked to an armed response. According to the insurer, the burglars gained entry through a top floor window (unprotected by burglar bars) using a long ladder. Whilst their entry triggered the alarm, the armed response arrived after the burglars had escaped. Complainant submits that the presence of the alarm minimised his losses.

[11] When the claim was submitted to Santam, it was rejected on the grounds that the complainant had not complied with the minimum security requirement of burglar bars on ALL windows.

[12] Aggrieved, the complainant lodged a complaint at the Ombudsman for Short Term Insurance (OSTI) with Respondent's assistance. The basis of that complaint was that since Complainant had both burglar proofing and an alarm, the claim should not have been rejected because only one of the security measures had failed. In other words, despite the fact that the burglars had gained entry through the unprotected windows upstairs, the alarm had nevertheless triggered the armed response to mitigate what would have been a huge loss.

[13] Throughout OSTI's investigation, the complainant and indeed the respondent maintained that the insurer's requirements for Knysna were either burglar proofing OR a linked alarm. The complainant alleged that this was grounded on the understanding he gained from the respondent.

[14] OSTI dismissed the complaint and upheld the rejection on the basis that the policy schedule clearly stipulated that the security requirements in terms of the household section of the policy was that:

“burglar bars be fitted to all windows including louvers that can be opened, security gates fitted to all exterior and sliding doors and a linked alarm system is installed in a private residence which is connected to a 24 hour control room of security firm”

[15] OSTI subsequently forwarded the complaint to this Office.

C. COMPLAINT

[16] In his complaint to this Office, Complainant alleges that he was told that he needed either burglar bars or a linked alarm system. He showed Respondent burglar bars on the downstairs windows and doors and supplied him with proof that a linked alarm had been installed. He is of the view that if the insurer required burglar bars on all windows and a linked burglar alarm system, then Respondent should have advised him to fit burglar bars upstairs. Alternatively, Respondent should have advised the insurer that there are no burglar bars upstairs. He feels that the respondent did not advise him appropriately and should therefore be held responsible for the rejection of his claim.

D. RELIEF SOUGHT

[17] Complainant seeks payment of the amount of R54 118.00 from Respondent on the basis that had Respondent appropriately advised him as the FAIS Act

demands, he would not have been in the position he finds himself in. Complainant holds Respondent responsible for his loss.

E. RESPONDENT'S RESPONSE

[18] The complaint was referred to Respondent in terms of the Rules on Proceedings of the Office, where he was granted him an opportunity to resolve the matter directly with his client.

[19] The complaint was not resolved and respondent instead filed his response to the complaint on 17 October 2011. He supplemented his response on two further occasions.

[20] The gist of the respondent's version is as follows:

- a. He met with Complainant at his new premises in June 2004 to establish the security measures at the premises. During this meeting, Complainant confirmed that he had burglar bars installed but Respondent cannot recall the details of the burglar bars.
- b. He states that since Complainant was the owner of an alarm response company dealing with insurance companies, he assumed that he understood what the requirement entailed. At that stage, Complainant indicated that a linked alarm would be installed and indeed confirmation would be furnished. Respondent himself appears not to have understood the minimum requirements pertaining to security, so it is not clear what he

is referring to when he states he assumed Complainant understood what the requirement entailed.

- c. Annually a renewal document was sent to the complainant with a request to inform Respondent of any changes to his schedule.
- d. Regarding the rejection, Respondent maintains throughout his correspondence that the insurance company and OSTI were incorrect in their decisions. He states:

“To no avail- they repeatedly referred to the policy schedule and was NOT INTERESTED in the fact that the security requirement for this area is ONLY ONE OF THE OPTIONS - -- Either burglar bars OR linked alarm AND NOT BOTH!!” [sic] [Respondent’s emphasis]

- e. Respondent is adamant that by having both burglar bars and a linked alarm Complainant’s security was actually enhanced and that the insurer unjustly penalised the complainant when one of the security measures failed whilst the other worked.
- f. With regard to the Santam revised security measures in the Knysna area, Respondent initially states that burglar bars were the minimum request but that a linked alarm was preferred. In later correspondence to this Office he states that the minimum requirement in the area was burglar bars and security gate OR linked alarm.
- g. Respondent attached to his response as proof of his version, a page from the complainant’s policy schedule which deals with security measures.

Inexplicably, the following paragraph is circled by the Respondent with the word “alarm” handwritten next to it:

“Conditions Please note: Theft or burglary cover is subject to the following requirements. Refer to policy wording for terms and specific conditions.

Burglar bars fitted to all windows including louvres that can be opened.

Security gates fitted to all exterior and sliding doors.”

[21] In later correspondence to this Office, Respondent alleges that he is being framed for Complainant’s omission and the insurance company’s disregard of the alarm which, while not required, did in fact work.

[22] He also alleges that the advice was pre-FAIS and that the complainant had six years to peruse his policy document and rectify the error. The Code requires that providers make factually correct presentations without any ambiguity. Whilst not encouraging irresponsible behaviour on the part of clients, it is difficult to see how a provider’s breach of the Code, (by furnishing incorrect information, repeatedly so) could exonerate Respondent. It could be equally said that Respondent had at least six opportunities (during annual renewals) to appreciate what the correct requirements for the minimum security were and he failed acquaint himself with these, woefully so.

[23] Finally he is of the view that this Office, like OSTI had not understood that the issue was that the insurer had ignored one of the minimum security requirements.

[24] In summation, Respondent believes he acted correctly at all times.

F. DETERMINATION AND REASONS

[25] The issue to be decided is whether the Respondent's conduct amounted to a contravention of the FAIS Act and the General Code of Conduct for Financial Services Providers (the Code), and if so whether caused the financial prejudice suffered by the complainant;

[26] An examination of the policy wording reveals that the minimum requirement on the policy was indeed burglar bars on all windows. When one has regard to the Santam Knysna Office's notice of July 2009, the conclusion is inescapable that Respondent failed to grasp the requirements. Clearly, Complainant was not in compliance with the minimum security requirements of the policy.

[27] Respondent's version is also laced with contradictions. He vacillates between three views; one that the linked alarm was a minimum requirement on the policy – two, that the alarm was a preferred security measure but not a minimum requirement – and three, that the alarm was an alternative to the burglar bars and security gates.

[28] He blames Complainant asserting that he being the owner of a security company and/or having had 6 years to peruse the policy documents, he should have known what was expected. He then erratically changes his mind saying that the policy was correct all along and that the insurer was incorrect in its application of the policy. Respondent also repeatedly points to the schedule referred to in paragraph [20] (g) above as documentary proof of this assertion.

[29] I cannot agree with Respondent's assertion that Complainant should have known what was expected. Complainant relied on Respondent's expertise to establish the security requirements. Accepting the respondent's argument would undermine the protection afforded by the law to consumers. Respondent had at the very least six years to understand the insurer's requirements. He did not care. On his own version, he still does not appear to understand that the insurer required that burglar bars be installed on both levels of the house. Indeed, it is an anomaly that providers as professionals, who simply cannot care about their responsibilities under the Code should resort to blaming the very clients they are meant to advise. This submission should fail.

[30] Disturbingly, Respondent also repeatedly refers to the fact that Complainant had both burglar bars and a linked alarm at the time of loss. This is frankly half the truth. What the policy expects is that there be burglar bars and/or security gates fitted to ALL openings. This would include the upstairs floor as well. So in fact, the security measures were not fully complied with.

[31] The complainant's version is that he communicated to the respondent that he had only installed burglar bars on the ground floor. This is not disputed by the respondent. He merely says that he cannot recall the details of this disclosure.

[32] What seems to be common cause is that Respondent did not specifically inform the complainant that burglar bars were required on his upstairs windows. In my view, what this reveals is a fundamental misunderstanding of the policy requirements in respect of minimum security measures.

[33] Clause 2 of the Code is unequivocal,

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. [Emphasis added]

[34] When Complainant informed Respondent that he only had burglar bars on the ground floor, respondent should have immediately informed Complainant that this would not be sufficient. As a financial services provider recommending this product, he is expected to know and understand the insurer's requirements prior such recommendation to members of the public. Without this knowledge and understanding, he cannot discharge his duty to as envisaged in Part II clause 2 of the Code and cannot act in his client's interest. Respondent failed on both counts.

[35] Even if Respondent in June 2004 was genuinely under the impression that either burglar bars/security gates or a linked alarm would suffice, when Santam later confirmed the requirements and specifically sent him the notice in July 2009, he should have communicated this to the complainant. Complainant would then have had the opportunity to rectify the situation or at the very least sought alternative cover if he so wished.

[36] Even if one accepts Respondent's view that at the time of the change in address, the respondent's conduct did not fall under this Office's purview, the Respondent cannot escape the application of the Code at the annual policy review dates nor can he escape its application in July 2009 when Santam revised the material terms.

[37] Providers have an obligation to disclose material changes to the policy to the client. There was at the very least a duty on him to bring to the Santam notice to Complainant's attention and notice. On his own version Respondent failed to do so.

[38] In terms of Clause 7 of the Code,

'(1) Subject to the provisions of this Code, a provider...must-

(a) provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision;

...

(c) in particular, at the earliest reasonable opportunity, provide, where applicable, full and appropriate information of the following:

(vii) concise details of any special terms or conditions, exclusions of liability...restrictions or circumstances in which benefits will not be provided;' (own italics)

[39] There was clearly a duty on the Respondent to have disclosed to the complainant that Santam had confirmed the minimum security measures on his policy to be burglar bars on all windows and openings, irrespective of the level. At this stage, whatever confusion Respondent had must have been cleared and the correct information regarding the security requirements should have been disclosed to

complainant. The respondent should have explained to the complainant that it was a condition of the policy that all opening windows and all external doors of the insured property be equipped with burglar bars and security gates. This would have allowed the complainant to decide whether he was willing to accept the condition or find alternative cover.

[40] I have no hesitation in finding that the Respondent failed to do so and in turn did not put the complainant in a position to make an informed decision.

[41] Furthermore, Respondent failed to act with due skill, care and diligence, in the interests of his client and hold forth, the integrity of the financial services industry.

G. CAUSATION

[42] The complainant clearly relied on Respondent to properly advise him. If one removes Respondent's poor and unlawful conduct and replace it with the lawful conduct, Respondent would have complied with his duty. I have no hesitation in finding that it is Respondent's failure to disclose the material changes introduced by Santam that led to Complainant's failure to comply with the requirements, hence the loss complained of.

H. QUANTUM

[43] According to the insurer, had the minimum security requirement been fulfilled they would have accepted the claim. The insurer confirmed to this Office that had they upheld the claim, the settlement amount would have been R46 764,00.

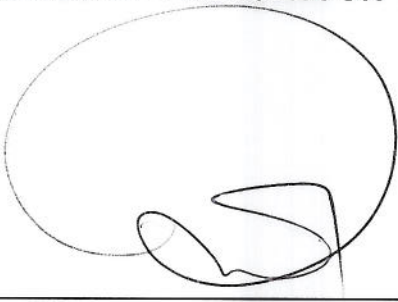
Respondent has raised no dispute regarding the quantum claimed by Complainant.

I. ORDER

[44] In the premises, the following order is made

- a. The complaint is upheld;
- b. The Respondent is hereby ordered to pay to complainant the amount of R46,764.00.
- c. Interest at the rate of 15.5% per annum, seven (7) days from date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 12th DAY OF SEPTEMBER 2013



**NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS**

