IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 01699/17-18/ LP 3

In the matter between

PETRUS HERMANUS WESSELS **Complainant**

and

UMC BROKERS (PTY) LTD **First Respondent**

MARK FRESWICK **Second Respondent**

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

A. INTRODUCTION

[1] On 29 May 2017 the complainant lodged a complaint against the first and second respondent. The complainant's cause of action is based on an alleged breach of the insurance contract had concluded with an insurance company with the assistance of the first respondent.

B. THE PARTIES

[2] Complainant is Mr Petrus Hermanus Wessels, an adult male whose full details are on record with this Office.

[3] The first respondent is UMC Brokers (Pty) Ltd, a private company duly incorporated in terms of South African law, with registration number 2014/145879/07. The first respondent is an authorised financial services provider (FSP) with licence number

45664, with its principal place of business noted in the Regulator's records as 3 Rolina Avenue, Florida Glen 1729. The licence has been active since 7 April 2015.

[4] Second respondent is Mark Freswick (Mr Freswick), an adult male FSP and the key individual of UMC Brokers (Pty) Ltd. At all times material hereto, Mr Freswick acted as a representative for UMC Brokers (Pty) Ltd.

[5] Reference in this determination to 'respondent' or 'respondents' should be read to be a reference to both respondents. Where necessary, I specify which respondent is being referred to.

C. THE COMPLAINT

[6] During September 2015, the complainant purchased a golden wildebeest for a sum of R570 000. Following the purchase, the complainant was referred to the respondent, by a fellow wildlife farmer who was also a long standing client of the respondent, so the complainant could insure the wildebeest. On the advice of the respondent, complainant applied for a wildlife insurance policy with New National Assurance Company Ltd[1] (New National), which policy was underwritten by Savannah Marine CC[2] (Savannah Marine). Complainant's application was accepted by the insurer and incepted on 7 September 2015. The wildebeest was insured for R570 000 at a premium of R1 950. The period of insurance was recorded in the contract as being from 7 September 2015 to 31 August 2016.

[7] On 2 November 2016, the complainant informed the respondent that he noted that while he did not sign a new policy to renew the period of insurance, he noticed that the insurer was still deducting the premiums for the cover. The complainant enquired from the respondent whether the cover was still in place and if it was, if the cover was still

[1] An authorised financial services provider with FSP number 2603.

[2] An authorised financial services provider with FSP number 16936.

subject to the terms to which he had agreed prior to inception of the policy. On 3 November 2016, the respondent confirmed that the cover was still in place and attached a copy of the policy schedule to prove this. The respondent also asked the complainant to peruse the policy schedule and to ensure that he was happy with the terms and conditions of the cover as set out in the policy schedule. The policy schedule recorded that the policy had been renewed with effect from 1 September 2016 and that it was set to expire on 31 August 2017.

[8] In January 2017 however, Savannah Marine advised the respondent that the insurer, New National, had not renewed its wildlife facility to underwrite wildlife policies and that all existing policies, including the complainant's policy, would expire on 31 March 2017. At the time this decision was taken by New National, Savannah Marine was one of two underwriters contracted to New National to underwrite its wildlife facilities. The other underwriter was Risk Guard Alliance (Pty) Ltd[3] (Risk Guard). New National resolved to keep only one of the underwriters and on this basis terminated its relationship with Savannah Marine. On 15 March 2017, the respondent informed the complainant, over the phone, that his policy would be transferred.

[9] On 17 March 2017, the complainant sent the respondent an email in which he recorded that during the telephonic discussion of 15 March 2017, the second respondent had informed him that his policy would be moved to another insurer. The complainant asked the respondent to confirm whether this proposed insurer, in the event of a claim, would pay out the amount for which the animal was insured with New National. The complainant followed this question with a statement that 'otherwise we need to cancel'.

[10] The respondent responded to complainant's email on 20 March 2017 and advised the complaint that the maximum market related value for which the animal would be insured with the 'new insurer' was R80 000 to R100 000. The respondent then asked

[3] An authorised financial services provider with FSP number 31404.

the complainant if he wished to cancel the policy. There was no response to this question received from the complainant but on 22 March 2017, the respondent sent the complainant an email advising the complainant that his policy had been cancelled. The respondent attached to this email a copy of the policy schedule endorsed with the words 'cancelled' throughout.

D. RESPONDENT'S VERSION

[11] On receipt of the complaint, this Office, in accordance with Rule 6(c) of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers (the Rules), referred the complaint to the respondent to enable the respondent to respond fully thereto.

[12] The complaint was sent to the respondent under cover of a letter dated 23 June 2017 in which the respondent was advised that it had six (6) weeks within which to either resolve the complaint with the complainant or to respond thereto.

[13] On 3 August 2017, this Office received the respondent's response in which response the respondent set out a timeline of the events that the respondent alleged took place from when it was notified that New National had terminated its relationship with Savannah Marine to when this communique was brought to the complainant's attention. The respondent also alleged that the policy had been cancelled on account of the email received from the complainant on 17 March 2017 in which the respondent states it was instructed to cancel the complainant's policy if the new underwriter, Risk Guard Alliance (Risk Guard), could not cover the complainant's animal on the same terms as Savannah Marine.

[14] The respondent claims that the alleged instruction from the complainant to cancel his policy, meant that the complainant no longer required the insurance. The respondent further alleged that in its view, the complainant relied on the clause in the contract of insurance which required that the insurer provide him with 30 days written notice, in

order to relieve himself of the effect of 'his own failure'. The respondent alleges that the complainant failed to act 'positively and timeously' and that the time it would have otherwise taken to seek alternative cover would not have been enough. The respondent concluded by saying that it was not the one that that failed the complainant but that the complainant had failed himself.

E. INVESTIGATION OF THE COMPLAINT

[15] Following receipt of the respondent's response, the case manager who assessed the complaint dismissed it on the grounds that there were no reasonable prospects of the matter succeeding. The complainant and respondent were informed that the matter had been dismissed and on leaning of the dismissal, the complainant expressed his dissatisfaction with this and requested this Office to review the decision. In keeping with the procedure observed by this Office prior to the enactment of the Financial Sector Regulation Act[4] (FSR Act), the complaint, together with the submissions received from the complainant in support of his request for a reconsideration of his complaint, were referred to an adjudicator for review.

[16] This Office informed the respondent of the request from the complainant to have the decision to dismiss his complaint reviewed and also afforded the respondent the right to address the submissions made by complainant in support of the request. In its reply, the respondent repeated its previous response and also alleged that the complainant, on learning that the policy had been cancelled following the respondent's email of 22 March 2017, had ample opportunity to consider the quote from Risk Guard which opportunity he failed to exercise. Having considered the submissions from the complainant and respondent, this Office found that the respondent had not adequately addressed the complainant's allegations and acquiesced to the complainant's request

[4] Act 9 of 2017.

to review the matter and re-opened the file. The complainant and respondent were informed of this.

[17] After re-opening the file, this Office notified the respondent that the matter had been accepted for formal investigation and advised the respondent of the reasons why. The respondent was also afforded another opportunity to fully respond to the complainant's allegations. The respondent however maintained its stance that the complainant was without cover when the animal died because he had instructed the respondent to cancel the policy and the respondent refuted that it was liable for the loss suffered by the complainant.

F. ISSUES

[18] From the respondent's responses, it is evident that there are two main defences on which the respondent relies to refute the complainant's allegations albeit unclear whether these defences are raised in the alternative or not. The first defence is that the complainant's email of 17 March 2017 constituted a valid instruction from him to cancel the policy. The second defence is that the complainant had enough time to consider the quote from Risk Guard and to confirm whether or not he was willing to accept same failing which the complainant, of his own choosing, would have had no cover. These are the issues that fall to be decided by this Office.

G. DETERMINATION

Did the complainant have enough time to consider the quote from Risk Guard?

[19] The timeline of the events that transpired before the complainant's policy was cancelled must be considered in order to be able to answer this question. The timeline, discussed earlier in this determination, reveals that the respondent had three months within which to firstly, advise the complainant of the impending cancellation of the contract by the insurer and to source alternative cover for the complainant. In essence, the respondent alleges that the two days afforded to the complainant to decide whether

not he was prepared to accept the terms of his contract to be prescribed by Risk Guard, were sufficient. The second respondent makes this argument notwithstanding the fact that he had said nothing to the complainant about the need to conclude a new contract of insurance for over two months of him knowing this.

[20] Not once, from the time the second respondent knew that the complainant's policy would be cancelled by Savannah Marine on 31 March 2017 did the respondent meet with the complainant even though the respondent acted as the complainant's financial services provider and in spite of the duties he therefore owed the complainant. The respondent was required, at all times, to act in the interests of his client, which section 3(d) of the Code states *'must be accorded appropriate priority over any interests of the provider'*.

[21] I have seen nothing from any of the responses submitted by the respondent that suggest that the time it took to inform the complainant of the 'move' from Savannah Marine was justified. The respondent knew, in January 2017, that the contracts underwritten by Savannah Marine would be cancelled by 31 March 2017 yet, it was not until February 2017 that there were discussions about 'transferring' these clients to Risk Guard. The respondent is silent on what steps he took, before the discussions of the transfer started, to source alternative cover for the complainant yet maintains that it should not be held liable for the complainant's loss. The respondent simply claims that 'when the move was imminent, UMC Brokers tried to help the client switch to another insurer' but has not submitted any evidence to support these claims.

[22] In my view, the respondent wants this Office to accept that it is justified for it to have seemingly failed to move with the urgency required when it learnt that the policy would be cancelled and to have suddenly developed this urgency when there were about 16 days left before the cancellation of the policy. I cannot see how this accords with the principle of treating customers fairly and cannot therefore accept it.

[23] The respondent also claims that the complainant showed no further interest regarding the policy, but I find this to be untrue given that the respondent knew when it communicated with the complainant in March that the matter had become urgent but the complainant had not. A fact occasioned by the fact that the complainant had still not been provided with the full details pertaining to the decision taken by New National and the consequences that this decision had. As far as the complainant knew, his animal was covered, the policy was still in place and the recommendations from the broker to move to another insurer would not affect this. In the absence of clear communication from the broker explaining the true nature of the situation, and apprising the complainant of the urgency, what would have driven the complainant to act with any of the urgency the respondent has retrospectively called for?

[24] In my view, the second respondent did not appreciate that his responsibility lay with the complainant and that he was compelled to act with honesty, due skill, care and diligence. This is evident from (1) the time that lapsed before the complainant was informed of the impending 'move' of his policy, (2) the fact that the complainant was seemingly not advised that the termination of the relationship between New National and Savannah Marine would result in the complainant's policy being cancelled and (3) the fact the respondent took no steps to try and source cover from any other insurer but acted as though it was compulsory for the complainants' policy to remain with New National and be subject to the terms prescribed by Risk Guard, whatever those terms were.

Did the complainant's email of 17 March 2017 constitute a valid instruction from him to cancel the policy?

[25] It is common cause that in the three months afforded to the respondent to attend to the above, the complainant was advised of the impending cancellation only a few weeks before the policy would actually be cancelled. In the responses to why this was

not done sooner, the respondent has repeatedly referred to meetings held with New National, Savannah Marine and Risk Guard which meetings were apparently intended to facilitate a transfer of clients from Savannah Marine to Risk Guard.

[26] The issue with this however is that firstly, it is unclear why the respondent did not advise the complainant that New National had terminated its relationship with Savannah Marine and what the consequences of this would be as soon as he was informed of this and while participating in these meetings. There was nothing that prevented the respondent from providing the complainant with frequent updates and progress reports as the discussions unfolded.

[27] In addition, it does not seem that the second respondent was waiting for quotations to be received from Risk Guard before informing the complainant of the impending cancelation since he did not have this information when he called the complainant on 15 March 2017 and since it took the complainant requesting details of the amount for which his animal would be covered by Risk Guard before the respondent obtained this information from Risk Guard. Even if it is true, as the second respondent has alleged, that he had previously requested these details from Risk Guard and that he only had to follow up with Risk Guard after he received the complainant's email asking about the cover, that is of no consequence since the facts remain that he did not have the information when he contacted the complainant and that he still waited in excess of two months to inform the complainant of the need to seek alternative cover.

[28] In any event there is nothing to show that during these meetings between the respondent, New National, Savannah Marine and Risk Guard, there were pointed discussions relating to the individual policies held by the respondent's clients, including the complainant. There is no evidence which shows that the complainant's individual needs were discussed during these meetings so as to allow the respondent to consider whether it was appropriate for the complainant's cover to be replaced with the cover

they intended to be provided by Risk Guard. A factor which should have been paramount to the respondent given that his participation during these meetings was, as I understand it, in his capacity as a representative of his clients who included the complainant. As such, even if New National had decided to work with Risk Guard as its underwriter of choice, this did not divest the respondent of the responsibility to ensure that the recommended cover from Risk Guard would be appropriate to the needs and circumstances of the complainant.

[29] In my view, the respondent failed to do this because he failed to appreciate that what had been proposed by New National was not a transfer of the complainant's policy from one underwriter to the next, as repeatedly described by the respondent, but that what the insurer in fact intended to do was cancel the existing policies. This is evident from how Risk Guard, as with any underwriter, and as the respondent rightly stated, has its own underwriting criteria and how it would assess each case on its own merits. Risk Guard was never going to simply step into the shoes of Savannah Marine and take over the policy as it was at the time but was going to apply its own terms and conditions. This could not have qualified as a transfer and the respondent was thus required to observe the duty prescribed by section 8(1) (c) of the Code of Conduct for Authorised Financial Services Providers and Representatives (the Code).

[30] According to section 8(1) of the Code:

A provider, other than a direct marketer is required, prior to providing a client with advice –

(a) to take reasonable steps to seek from the client, appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;

(b) conduct an analysis for purposes of the advice, based on the information obtained;

(c) identify the financial product or products that will be appropriate to the client's risk profile and financial needs subject to the limitations imposed on the provider under the Act [FAIS Act 37 of 2002] or any contractual arrangement.

[31] It is not in dispute that the respondent had in his possession all the information needed to provide the complainant with appropriate advice but it does not seem that that the respondent conducted an analysis of this information or that, subsequent to such analysis, identified the product offered by Risk Guard to be the most suitable for the client.

[32] This is evident from how it was not until the complainant asked on 17 March 2017 how much Risk Guard was prepared to insure the animal for, that the respondent enquired of this from Risk Guard or if we accept that the information had been previously requested from Risk Guard that the complainant ensured that such information was in fact received. In addition, it seems that on receiving the response from Risk Guard that the respondent simply forwarded the detail to the complainant with no context on how the figure had been assessed and without any of the other information section 7 of the Code demands be provided to a client and which the complainant needed in order to make an informed decision.

[33] Just because the complainant had specifically asked about the amount for which the animal would be covered does not mean that this is the only information that should have been provided to him. Section 7(1) (c) of the Code is clear on this. Section 7(1) of the Code requires that providers other than direct marketers must, at the earliest reasonable opportunity provide, where applicable, full and appropriate information of, *inter alia*, concise details of any special and terms or conditions, exclusions of liability, excesses and restrictions or circumstances in which benefits would not be paid. The respondent simply informed the complainant that the maximum market related value for which the animal would be insured by Risk Guard was R80 000 – R100 000.

[34] Since in his email of 17 March 2017 the complainant began by stating that *'I am referring to a call I received on Wednesday regarding my insurance that you guys wants to move to another insurer?'*, the importance of the information that should have been provided to him cannot be understated.

[35] It is also alarming that the second respondent, in his response of 20 March 2017, did not clarify to the complainant that he was not going to move to a new insurer but that the underwriter would change and that this is why a new contract would have to be concluded. This was important because the complainant, in his email of 17 March, stated that he wants to confirm *'that my insurance will pay out the amount that is insured',* referring to the insurer he understood his cover would be moved to*, 'Otherwise we need to cancel the insurance'*. The latter part of the email is what the respondent says was the instruction from complainant to cancel the cover he had which was underwritten by Savannah Marine.

[36] In my view, the complainant was clearly referring to the recommendation that he be moved to a new insurer and there was nothing in his email that suggested that he was referring to the policy that was already in place. It is alarming then that the respondent thought that the complainant had asked that the policy underwritten by Savannah Marine be cancelled even though at that stage the complainant understood that the policy was set to expire on 31 August 2017 and had not expressed any dissatisfaction with the policy that would warrant a cancellation from him. In addition, given the subject matter of the email, I cannot see how the respondent would have read that the statement regarding a cancellation related to the complainant's existing policy when the email itself had been about a recommendation to move to a new insurer. The statements from the complainant in the email were in relation to the same subject, being what the complainant understood to be a recommendation that he move to a new insurer. Why then the respondent would think it apt to separate the statements

and to attribute different meanings to them so as then read that the latter statement related to the complainant's existing policy is unclear to me.

[37] In my view this interpretation by the respondent was flawed. If anything, the complainant's statement clearly expressed that he was not prepared to accept any replacement unless the insured amount would be the same as that offered in the policy underwritten by Savannah Marine. If this was not possible, for reasons such as the value of the insured animal decreasing, it was for the respondent, in his duty to act in the best interests of the complainant, to inform the complainant of this.

[38] Risk Guard was only prepared to insure the complainant's animal for a market value of R80 000 – R100 000 and was free to prescribe any other terms and conditions to which the policy would be subject. An instruction not to enter into a contract underwritten by Risk Guard could thus never have been correctly construed as constituting a cancellation of the contract underwritten by Savannah Marine. It for this reason that I find that this argument by the respondent must fail.

[39] In light of the preceding paragraphs, I am of the view, then that the second defense from the respondent must also fail. In my view, the respondent has said nothing that aids its case and that should denounce the liability which the complainant states must be imputed on it.

[40] Therefore, for the reasons set out in this determination, I find that the respondent is in breach of the following provisions of the Code; sections 2, 3(1) (a) (ii), 3(1)(a)(iii), 3(1)(a)(iv), 3(1)(d), 7(1) (a), 7(1)(c)(vii), 8(1), 8(2) and 9.

H. CAUSATION

[41] It is evident that the respondent is factually liable for the loss suffered by complainant because the respondent rendered a financial service to the complainant and in doing so failed to discharge the duties imposed on it by the FAIS Act and the Code. Liability

can however follow only if it can be shown that that the failure also legally led to the loss.

[42] In order to establish legal causation, the question that needs to be asked is whether the complainant, in the absence of the respondent's actions would have suffered the loss complained of.

Parties to the contract of insurance

[43] Prior to its cancellation, the contract of insurance had been concluded between the complainant, as the insured, and New National as the insurer. Savannah Marine in its role as underwriter was responsible for assessing the risk New National had by accepting the complainant's application for cover and also determined the cover to be extended to the complainant, the premium paid by the complainant and prescribed all other terms and conditions to which the cover was subject. In addition, had a claim arisen during the subsistence of the policy, the assessment of the claim and the decision whether or not to admit the claim would have fallen on Savannah Marine.

[44] The relationship between the complainant, the insurer and Savannah Marine is important because of the effect that the termination of the relationship between the insurer and Savannah Marine would have had on the complainant. When New National decided to end its relationship with Savannah Marine, because of the implications of this decision, the policies underwritten by Savannah Marine were going to be cancelled. Since clause 12 of the contract of insurance between the complainant and New National required New National to give the complainant 30 days written notice if it intended to cancel the contract of insurance, no intended cancellation by New National, whether explicit or implied, would have been valid if such notice was not given to the complainant. Clause 12 of the policy schedule reads as follows:

'*This insurance may be cancelled or withdrawn at any time by or on behalf of the insurer by giving the insured 30 days written notice of such cancellation or withdrawal. In the event of such notice, the insured will be entitled to a pro-rata refund of the premium calculated from the effective date of the cancellation.'*

[45] The respondent was informed verbally that the complainant's policy would be cancelled as of 1 April 2017, and at no time, even up to March 2017, did New National, or Savannah Marine on behalf of New National, provide the respondent with written notice of the intended cancellation. This means that the insurer would have been required still, in April 2017, to collect the premium due from the complainant and that the complainant would have retained the right to claim from the policy when the incident in question arose. Even if written notice was given to the complainant during the week of 15 March, the policy would have remained valid on the date on which the animal died since the incident would have arisen during the mandated notice period. The complainant would have therefore retained the right to have the claim assessed in accordance with the terms and conditions of the policy. The respondent's actions however intervened.

[46] In the absence of the instruction from the respondent that the policy be cancelled, the complainant would have legally retained the cover. The respondent however seemingly did not appreciate this and rather than call for written confirmation of the intention to cancel the policy he was seemingly prepared to accept whatever cover, New National offered even if this did not accord with the needs and circumstances of the complainant. In my view, the respondent acted negligently and the damage to the complainant was foreseeable.

[47] The Supreme Court of Appeal, in *Yende v Passenger Rail Agency of South Africa*[5] held that:

[5] [2015] ZASCA 49 (27 March 2015) at para 11.

'…negligence in our law cannot be determined in the abstract, without reference to the foreseeable consequences it produces, for it is only consequences that are foreseeable against which the reasonable person should take precautions'.

[48] In my view, the second respondent knew what the consequences of cancelling the complainant's policy would be but he did so anyway on the back of an unjustifiably incorrect interpretation of the email received from the complainant and without confirmation from complainant on whether in fact this is what he wanted. I am therefore satisfied that the respondent legally caused the loss suffered by the complainant and that the respondent compensate the complainant for such loss.

I. QUANTUM

[49] During the subsistence of the policy, the responsibility to assess any claims and to determine the amount to be paid to the complainant in settlement of any valid claims lay with the underwriter, Savannah Marine. To that end, this Office approached Savannah Marine and enquired form it how much it would have paid to the complainant in settlement of the claim had such claim arisen during the subsistence of the policy. Savannah Marine advised that the amount that would have been paid to the complainant, after deducting the policy excess, would have been R456 000, including VAT at 14%.

J. THE ORDER

[50] In the instance, I make the following order:

1. The complaint is upheld.
2. The respondents are ordered, to pay to the complainant, the one paying the other to be absolved, the amount of R456 000.
3. Interest on this amount at a rate of 10% per annum from the date of determination to date of final payment.

DATED AT PRETORIA ON THIS THE 21st DAY OF NOVEMBER 2018.

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NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS