IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS PRETORIA

CASE NUMBER: FOC 867/06-07/GP (3)

In the matter between:-

DINO MARTIN ZACKEY

T/A COLOUR CITY PAINT & HARDWARE **Complainant**

and

CDI BROKERS CC **1st Respondent**

QUICKSURE COMMERCIAL (PTY) LTD **2nd Respondent**

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

A. PARTIES

[1] The Complainant is Mr Dino Martin Zackey a businessman trading as Colour City Paint & Hardware ('Zackey') with place of business at 9, Anderson Street, Ferreirasdorp, Johannesburg, 2001.

[2] The First Respondent is CDI Brokers CC ('CDI'), a close corporation duly registered as such and an authorised financial services provider, of 1, Rubenstein Street, Verwoerd Park, Alberton, 1453. It is represented by Mr Wayne Simpson.

[3] The Second Respondent is Quicksure Commercial (Pty) Ltd (Quicksure) a company duly registered as such and an authorised financial services provider with principal place of business at Quicksure House, Cnr Prince George and Kingsway Avenue, Brakpan, 1541.

B. BACKGROUND

[4] On 24th January 2008 I handed down a determination in terms of which I made an order in the following terms:

> 1. *First and Second Respondents are held jointly and severally liable for such amount of his loss as may be proved by the complainant as a result of the damage by water flooding in complainant's shop on 3rd and 8th April, 2005 the one paying the other to be absolved.*
>
> 2. *Should there be any dispute as to the amount payable pursuant to this determination, any party may seek a supplementary determination from the Ombud on this issue.*
>
> 3. *Both First and Second Respondents are ordered to pay case fees of this Office in an amount of R1 000.00 each.*

[5] The factual background, findings and the reasons thereof were all comprehensively set out in that determination. I do not, therefore, deem it necessary to rehash the factual background as it is set out in the main determination. For present purposes though, I refer to the determination of the 24th January 2008 as "the main determination".

[6] As it appears clearly from the second paragraph of the order, the parties were invited to approach this Office should a dispute ensue concerning the amount payable pursuant to the main determination.

[7] On the facts of the complaint, I ruled that the respondents were jointly and severally liable for the loss incurred by the complainant. However, as there was no sufficient evidence establishing the extent of the complainant's loss, I deemed it prudent to order the parties to hold a meeting with a view to reaching an equitable settlement. In particular, I ordered that in the event of the parties being unable to settle the quantum, the aggrieved party was entitled to approach this Office for a supplementary determination on the issue of quantum.

[8] I pause to mention that the order I made in the main determination was in accordance with the provisions of section 28(1)(b)(ii). I deem it necessary to reproduce the provisions of section 28(1)(b)(iii) here:

> ***"28. Determinations by Ombud***

(1) The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5)(c) has not been accepted by all parties concerned, make a final determination, which may include –

(a) .....

(b) the upholding of the complaint, wholly or partially, in which case -

(i) the complainant may be awarded an amount as fair compensation for any financial prejudice or damage suffered;

(ii) ***a direction may be issued that the authorised financial services provider, representative or other party concerned take such steps in relation to the complaint as the Ombud deems appropriate and just."***

(my own emphasis)

[9] As already mentioned, paragraph 2 of my order in the main determination was a directive to the complainant and the respondents to settle the outstanding issue of appropriate compensation to which the complainant was entitled. For the sake of convenience, I refer to paragraph 2 of the order of 24th January 2008 as set out in the main determination as "the directive".

[10] The complainant and the respondents held a series of meetings aimed at finding mutual agreement on the appropriate amount of compensation payable to the complainant. The respondents made an offer to make good on the complainant's loss by compensating him in the amount of R50 000 as a full and final settlement. I pause to note that in the main determination, I specifically noted the paucity of information that substantiated the complainant's claim of R488 000. The complainant was unable to furnish any evidence indicating how he arrived at the globular figure of R488 000. In fact, there was no information concerning the value of the goods at the time of the flood to the premises. That necessitated that an independent assessor be approached. The authenticity of invoices submitted by the complainant which purported to be proof of how the complainant arrived at the amount of his claim, were questioned and vigorously challenged by the respondents. In any event, these invoices offered no assistance as to the value of the damaged goods.

[11] On the other hand, the respondents were able to demonstrate how they arrived at the amount of R50 000, and submitted evidence substantiating how this amount was just and equitable payment in the circumstances.

[12] In light of the weighty evidence advanced by the respondents, it appeared that the amount of R50 000 was reasonable. It is trite that when awarding compensation, the complainant must be placed in the position he would have been had the loss not occurred. In particular, the Act requires the Ombud to determine the appropriate compensation by paying due regard to what is just and equitable in the circumstances.

[13] In the present matter, the complainant was confronted with the report of loss adjusters who determined that his loss amounted to R50 000. Significantly, the complainant relented on his initial claim of R488 000, in part due to the challenge on the authenticity of the hand written invoices he had submitted. On his own volition, he accepted the amount of R50 000 as full and final settlement of his claim.

[14] I had occasion to examine both the assessors' reports and the invoices submitted by the complainant. After a thorough consideration of these submissions, I was left in no doubt that the complainant's claim was highly inflated.

[15] As already stated, the complainant accepted the offer of settlement on his own accord. There was never any indication that he was compelled to accept the offer. In any case, the offer made to the complainant was still subject to the scrutiny of this Office. That settlement would not merely be rubber stamped. The FAIS Act makes it clear that once a reasonable offer of settlement has been made, the Ombud may seek reasons from the complainant who is unwilling to accept such a reasonable offer. In those circumstances, the Act allows the Ombud to dismiss the complaint if the complainant is unreasonable in his/her conduct. In that regard, it is worth mentioning the provisions of rule 7 of the Rules on Proceedings of the Office of the Office of the Ombud for Authorised Financial Services Providers and their Representatives. The relevant portions of rule 7 proceed as follows:

(a) *.....*

(b) *The Ombud may dismiss a complaint without referral to any other party if on the facts provided by the complainant it appears to the Ombud that –*

(i) *the complaint does not have any reasonable prospect of success;*

(ii) *the respondent has made an offer which is fair and reasonable and which is still open for acceptance by the complainant;*

(iii) *the matter has previously been considered by the Ombud.*

[16] Once the respondents had made the offer to the complainant, which appeared to be fair and reasonable, the complainant accepted the offer of settlement and the matter was accordingly resolved.

[17] Subsequent to the process as described in the preceding paragraphs, the complainant made several unsubstantiated and baseless attacks which sought to impugn the integrity of the process. The complainant began flooding this Office with a flurry of correspondence in which he renounced the settlement agreement.

[18] The crux of the complainant's application for a supplementary determination is set out in paragraph 6 of an undated letter he sent to this Office. It proceeds as follows:

> "Unfortunately besides all the above I was left on my own to try and achieve a quantum settlement with these sharks, whom I believe that no reasonable resettlement was ever offered from them. I, one person without even any ombudsman present had no choice but to accept their one and final demand, arising from a meeting at their offices with some 10 representatives. This I believe constitutes nothing more than STRONG ARM tactics, causing DURESS on my person, and I believe not representing anything as prescribed by your determination. (sic)

[19] Needless to say, the above characterisation is devoid of any substance and is factually inaccurate.

[20] The provisions of section 28(1)(b) of the Act allow the Ombud to order compensation that is fair and equitable. It further allows the Ombud to make any order which the court may make. I am satisfied that on the evidence before me, the amount of R50 000 was fair and equitable.

[21] In the circumstances, I hold that the complainant's allegations of duress have no merit. The allegations appear to be a latter day attempt to have the complaint reopened. The complainant is well aware that he could not proffer any evidence indicating the value of the damaged goods, nor could he

substantiate his claim of R488 000. He also could not produce invoices from suppliers backing up his claim. All he could produce were his own hand-written invoices, the authenticity of which could not be independently verified.

[22] It is worth giving some explanation for the dismissal of the complainant's application for a supplementary determination as set out in the letter sent by this Office and dated the 18th October 2011. In this regard, it should be noted that the Order of the 24th January 2008 specifically allowed parties to apply for a supplementary determination only in the event a dispute arose as to quantum. I have already mentioned that the complainant agreed to the settlement amount of R50 000 as a fair and equitable compensation. Generally, the defence of duress is perfectly legitimate in contractual matters. However, on the facts of the present matter, I am not persuaded that the complainant has laid legitimate basis setting out the existence of duress. I am unable to find that any undue pressure or duress was brought to bear on the complainant before he accepted the settlement. The fact is simply that the complainant was unable to sustain his claim of R488 000 by way of facts. He merely made bare assertions that he had incurred losses amounting to R488 000. In the absence of evidence or facts, it is disingenuous for the complainant to turn around and proclaim duress.

[23] Accordingly, I find that the settlement agreement between complainant and the respondents is fair and equitable. In the circumstances, the complainant was fairly and adequately compensated in the amount of R50 000.

[24] Subsequently, the complainant appears to have raised a complaint with the Office of the Public Protector. I must at once deal with the legislative requirements empowering this Office to investigate and determine complaints.

[25] Section 39 of the FAIS Act allows anyone who is aggrieved with the decision of the Ombud to lodge an appeal with the Board of Appeal of the Financial Services Board. There are internal rules on proceedings which govern the prosecution of appeals. Among others, the party desiring of appealing the decision of the Ombud is required to apply for leave to appeal from the Ombud.

[26] The reading of the FAIS Act makes it clear that the Ombud exercises a quasi-judicial function as she is expected to be independent and to give reasons for decisions. The benchmark against which to determine the correctness of the Ombud's decisions is the FAIS Act.

[27] The Ombud's Office is a specialist tribunal staffed by professionals who possess skills in financial services law. It follows then, that the complainant's appeal to the Office of the Public Protector was completely misdirected. The Public Protector does not enjoy any jurisdiction over the decisions of the Ombud on technical matters. Surely, even a cursory acquaintance with the FAIS Act should make it clear that the legislature would not have set up an appeal structure in the form of the Board of Appeal if it contemplated that there would be interference with the Ombud's functions.

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

Applicant's application for supplementary determination is dismissed;

DATED AT PRETORIA ON THIS THE 7th DAY OF NOVEMBER 2012.

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NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS