IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA **CASE NO: FOC 3177/08-09/GP(3)**

In the matter between:

ZAMA TRANSPORT C C **Complainant**

and

ACSENNA BROKERS C C **Respondent**

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

A. THE PARTIES

[1] Complainant is Zama Transport CC, a close corporation duly incorporated in terms of South African laws, with its principal place of business situated

at Plot 153, Dreamlands, Vereeniging, Gauteng Province. Complainant is represented by its authorised representative, Templeton, Vusumzi Zama.

[2] Respondent is Acsenna Brokers CC, a close corporation duly incorporated in terms of South African laws, with its principal place of business situated at 132 General Hertzog Drive, Drie Reviere, Gauteng Province. Respondent is an authorised financial services provider in terms of the FAIS Act, with license number 5961. Respondent is represented by its key individual and authorised representative, Annette Janse van Rensburg.

B. THE COMPLAINT

[3] In July 2008 complainant's truck was hijacked on the Meyerton/Vereeniging highway while transporting a load of steel coils belonging to Mittal South Africa to Steel Rode in Alrode. The driver of the truck as well as the truck were taken to Katlehong where the truck was abandoned and the driver left stranded, while the hijackers absconded with the trailer and the cargo valued at R229167.42

[4] Complainant dully instituted a claim through his brokers, by notifying respondent of the loss on the same day and completing all documentation pertaining to the claim on 30th July 2008. It later received a letter from respondent rejecting the claim due to the complainant having contravened

sub clause 20(i) of the terms and conditions of the policy. The clause warrants that no cover is provided whilst vehicle is stopped, unless it is contained within a security compound and the driver crew/security guard is present at all times.

[5] Complainant does not dispute that at the time of the hijacking, the vehicle had been stationary on the side of the Meyerton/Vereeniging Highway, but points outs that this was to enable the driver to fasten the chains holding the steel coils. The chains had loosened during the trip, and the driver's actions were precautionary.

[6] Complainant was covered in terms of a 'Goods in Transit Carriers Liability Policy' provided by Senate Transit Underwriters. The policy covers the insured in situations where the insured is found to be legally liable to compensate the owners of the goods for loss/damage to these goods whilst in the custody of the insured. The steel coils that the complainant was transporting belonged to Mittal South Africa

RELIEF SOUGHT

[7] Complainant has asked this Office to compel respondent to make good the damage it suffered due to the insurers rejecting its claim in the amount of

R229167.42. The basis for complainant's claim is fully set out in the paragraphs below.

C. REFERRAL OF COMPLAINT TO RESPONDENTS

[8] In response to a letter sent by this Office, respondent forwarded a letter dated 19th February 2009, in which it admitted that the claim was initially rejected due to late notification. It however, pointed out that the late notification was as a result of a misunderstanding by its representative, one Mr Francois Mulder. The relevant parts of the letter read:

"Francois understood the Senate wording as follows: The claim documentation must be in position of the broker within 7 days after the event. We can send it through Senate as soon as we have all the outstanding information.

"Senate repudiated the claim the first time due to late notification. We requested that they reconsider the claim. They reconsidered the claim and came to the conclusion to reject the claim due to the fact that the client: stopped at an authorised point witch (sic) were unguarded."

[9] On 18 March 2009, a further letter was received from respondent. The gist of the letter can be summarised as follows:-

[9.1] In order for the complainant to succeed in this claim, it has a duty to prove that its claim against the insurer would have succeeded;

[9.2] It is clear that the complainant has merely alleged that its vehicle was hijacked without providing any proof of the actual loss that it has suffered;

[9.3] The insured had to prove that when the hi-jacking occurred it would have been covered by the Policy;

[9.4] Respondent further claimed it was unable to prepare a proper response to complainant's claim in the absence of a thorough investigation by this office into all the essential components of the claim.

[9.5] Respondent also re-iterated that even if the claim was lodged timeously, the probability is that the claim would have been rejected by the insurer due to the complainant's clear breach of sub-clause 20 (1) of the policy.

[10] This Office however wrote to the insurers seeking clarity on the matter. A letter was received from a John Fairhurst, (Fairhurst) a general manager at Senate confirming that the claim was rejected due to late notification.

Fairhurst however, also alluded to the fact that, even if Senate were to review the decision it had made, there was a further flaw to the claim which he believed had a material impact upon the incident. He referred to the driver's statement and pointed to the fact that the driver had stopped the vehicle to on the R59 freeway. He was however cautious to point that he had limited information in relation to that fact.

[11] This Office once again wrote to Senate seeking reasons for the rejection of the claim. The Managing Director of Senate Clint Janssen, (Janssen) responded to the letter. In his letter of 5th March 2009, he wrote:

(i) The claim was first reported to them at 16:35 on 7th August 2008 a full twelve days after the loss occurred on 25th July 2008.

(ii) The policy carries a strict 7 day claim notification for hijacking losses. He further added that clause 19 of the policy provided:

"WARRANTED ALL CLAIMS/LOSSES (OTHER THAN HIJACKING) TO BE ADVISED TO THE INSURER WITHIN 30 (THIRTY) DAYS OF THE OCCURRENCE GIVING RISE TO THE CLAIM/LOSS BUT HIJACKING CLAIMS/LOSSES TO BE ADVISED TO INSURERS WITHIN 7 (SEVEN) DAYS OF THE HIJACKING TAKING PLACE. FAILURE TO NOTIFY THE INSURER IN WRITING WITHIN THE ABOVE TIME PERIOD WILL RESULT IN ANY INDEMNIFICATION FOR SUCH CLAIMS/LOSSES BEING FORFEITED BY THE INSURED."

(iii) He further stated that the claim was declined as per their letter to the respondents dated 8 August 2008 and further added: ' In John Fairhurst's subsequent letter dated 20 August 2008, he merely refers to sub clause 20 (i) as a possible secondary problem with the claim. **However, the reason for the declinature of the claim remains due to the late notification.** (my emphasis)

(iv) Janssen further noted the reason for the strict 7 day claim notification period is as follows:

Being the largest market in South Africa for this type of insurance cover (we cover in excess of 3,000 transport companies) over the last twelve years we have needed to develop a network of hijacking investigators & informants, focussed on recovery of hijacked loads. However this is only effective if we are alerted within a reasonable time of the incident. As such we have needed to encourage prompt notification, by way of the maximum seven day notification period as a condition of cover, which is emphasised in large bold font in the policy document so as to specifically draw the reader's attention. I add that this has become the industry norm & the same such criteria exist in all such commercial trucking transit insurance policies.

[12] The respondent was invited to submit comment to this office in the light of Janssen's letter, with specific reference to his confirmation that the late notification was the primary reason for the rejection of the claim. Replying

through its professional indemnity attorneys, respondent once again denied that its actions were the cause of the complainant's loss. It remained adamant that sub clause 20(i) would have in any event resulted in the claim being rejected.

D. DERTERMINATION AND REASONS

[13] **The following are to be decided:**

[13.1] Did respondent in any way violate the provisions of the FAIS Act, whilst rendering financial services to complainant:

[13.2] If the answer is in the affirmative, did such violation cause complainant the damage complained of?

[13.3] The quantum of damages

[14] **Did the respondent violate the provisions of the FAIS Act whilst rendering financial services to complainant?**

What the law states:

In the definition section contained in section 1 of the FAIS Act, financial service is defined as:

a) The furnishing of advice; or

b) Furnishing of advice and rendering of any intermediary service ; or

c) The rendering of intermediary services.

Intermediary service is defined as, subject to subsection 3 (b) any act other than the furnishing of advice, performed by any person for or on behalf of a client or product supplier-

(a) The result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier or

(b) With a view to –

(i) buying, selling or otherwise dealing (whether on a discretionary or nondiscretionary basis), managing administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested.

(ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product.

(iii) receiving, submitting or processing the claims of a client against a product supplier.

Section 3 (b) contains the negative definition of intermediary service. It states what does not constitute an intermediary service. It is in my view not necessary to even canvass the provisions of section 3 (b) as the conduct that is the subject matter of this complaint was about processing a claim of a client, bringing the conduct squarely within the definition of a financial service.

[15] Part II, section 2 of the Code makes provision for the general duty of a provider when rendering financial services to clients to do so at all times honestly, fairly, with due skill, **care and diligence** and in the interests of the clients and integrity of the financial services industry.

Section 3 (1) (d) of the Code provides that when a provider renders a financial service, such services must be executed **as soon as reasonably possible and with due regard to the interests** of the client which must be accorded appropriate priority over any interests of the provider.

[16] In respondent's letter of 19 February 2009, Francis Dick writes that complainant was attended to by Francois Mulder, Senate's representative. Complainant first lodged the claim on the 25th July 2008. The paper work was completed on the 30th July 2008. Then he goes on to state that Francois understood the wording of the policy to mean that the claim documentation must be in the broker's possession within 7 days after the event. Another critical point made in the letter is that Senate first rejected the claim due to late notification. When Senate was asked to reconsider the claim, they rejected it once again, this time, raising that complainant's conduct in any event was not in compliance with sub clause 20 (i).

[17] In all the letters sent by respondent to this office, it has consistently raised the defence that the claim would not have succeeded due to complainant's

alleged violation of the conditions of the policy. In Janssen's letter of 5th March 2009, he states:-

'***In John Fairhurst's subsequent letter dated 20 August 2008, he merely refers to sub clause 20 (i) as a possible secondary problem with the claim. However, the reason for the declinature of the claim remains due to the late submission***.'

In my view, it would be speculative to venture into an exercise to establish whether complainant's reason for stopping the truck on the highway would have caused its claim to fail. It is clear from Janssen's letter that the claim was rejected on the basis of late submission which respondent is refusing to take responsibility for. In the circumstances, this defence will not avail the respondent.

[18] Senate Insurers specialises in insuring commercial trucking. This is a peculiar risk which the insurance company underwrites. The motivation for the early notification of any incident is very clear and is consistent with the risk that is insured. The respondent as a provider selling this type of policy is expected to understand the risk insured and the peculiar requirements. In particular, one would expect that the provider would be aware of the early notification requirement so as to draw their client's attention to it. On the respondent's own version it was not aware of early notification requirement nor indeed was it aware of the terms of the contract it was marketing. On respondent's own version, it admits to notifying the insurer

12 days later and its reason for such late notification is that it misunderstood the requirements of the contract. On its own version, respondent was negligent. Respondent's conduct therefore violated the provisions of the FAIS Act whilst rendering financial services to complainant.

[19] In so far as the defence raised by respondent that the claim would have been rejected anyway due to the violation of sub clause 20 (i), the defence has to fail for the following reasons:

(i) It is an undisputed fact that the claim was rejected by Senate only due to late notification.

(ii) That the claim would nevertheless have been rejected by Senate in terms of sub clause 20 (i) of the contract, amounts to speculation.

(iii) In any event it can equally be argued that the in the circumstances the complainant was not in breach of the sub clause. Upon a proper interpretation of the contract it cannot be said that any stopping anywhere will amount to loss of indemnity. On the facts of this case, the complainant's driver made a necessary stop during the course of transporting goods. The vehicle was not parked as contemplated in clause 20 (i).

[20] I deem it necessary to comment on the opportunistic nature of the respondent's conduct. When it received the letter of the 8 August 2008 which rejected the claim for late submission, it never sent the letter to complainant. When Senate responded on 20 August 2008, it (respondent) had no problem sending that letter to complainant because it saw the mention of sub clause 20 (i) as justification of its delay in submitting the claim. This type of conduct is unfortunate and is inconsistent with the duty to act in the client's interest in terms of the Code of Conduct.

[21] **Did respondent's conduct cause complainant the damage complained of?**

[22] Senate have made it clear that the rejection of the claim is based on the late submission. This makes respondent's conduct the cause of the damage.

[23] Quantum of the damage

[24] The claim lodged was for the amount of R229 167.42.
With help from Senate, this Office has confirmed that the following reasonable adjustments in line with the policy terms and conditions would have been made:-
Load value including Vat = R229, 67-42

Excess (25% for hijacking) = (R57, 291-86)

Total **= R171, 875-56**

The amount of **R171 875.56** would have been paid to complainant.

Order

[25] The complaint is upheld.

[25.1] Respondent is hereby ordered to pay complaint the sum of R171 875.56 within seven days from date of this order;

[25.2] Interest on the said amount to be calculated from a date seven days from date of this order

[25.3] Respondent is to pay case fees to this office in the amount of R1000.

DATED AT PRETORIA ON THIS THE 13th DAY OF JULY 2010

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS