

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

CASE NUMBER: FAIS 04761/11-12/FS 3

In the matter between:

EMILE DE BEER

Complainant

and

SAPCOR BROKING SOLUTIONS (Pty) Ltd

First Respondent

SAPCOR (Pty) Ltd

Second Respondent

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

A. THE PARTIES

[1] Complainant is Emile De Beer a businessman who conducts a farming business which is registered in the name of Monotsa Trust trading as Rosebank Boerdery in the district of Harrismith, Free State province.

[2] Respondent is Sapcor Broking Solutions (Pty) Ltd a company duly registered according to the company laws of the Republic of South Africa and which forms

part of the Sapcor Group with offices at Office 5 Woodhill Park, 948 Saint Bernard Drive, Garsfontein. I will say more about the Respondent later in this determination. The word Respondent must be read to mean Respondents.

B. THE COMPLAINT

[3] This matter was initially referred to the office of the Ombud for short term insurance, (OSTI). The latter, after considering the facts decided that the complaint fell within the jurisdiction of this office and referred the complaint here.

[4] Briefly, the complaint involves the alleged failure of a financial services provider to provide short term cover the Complainant. The latter was a client of a broker named Dotcom Trading 374 (Pty) Ltd which traded as Optimum at 58 Vowe Street Harrismith. Optimum was licensed in terms of the Act under FSP No 16462 and was authorised to provide financial services under category 1. The key individual was Coenderaad Johannes Koegelenberg (Koegelenberg).

[5] Koegelenberg had acted as Complainant's advisor for short term insurance over a period of time. A policy was put in place for Complainant's farm, Rosebank, by Optimum with Hollard Insurance.

[6] On the advice of Koegelenberg, during a routine revision of the cover, Complainant was advised to add to his policy cover against fire damage for a game fence on the farm. Complainant agreed with this and instructed Optimum, through Koegelenberg, to endorse the policy by adding cover for the game fencing.

- [7] Soon after this a fire broke out on the farm Rosebank and the game fencing was damaged. Complainant filed a claim with the insurer for an amount of R85 500- 00. Hollard Insurance rejected the claim on the basis that, according to their records, there was no cover for game fencing in the policy. It turned out that Optimum had failed or neglected to have the endorsement processed with the result that there was no cover in respect of the damaged game fence.
- [8] Complainant holds Optimum liable for his loss stating that the latter was under a duty, both contractually and in terms of the Act, to carry out its mandate in the interests of the client.

C. THE RESPONDENT

- [9] Due to the response to the complaint, I am compelled to deal with the question of the respondent. The insurance policy in question, number COM 1682/M (the policy), notes that the “administrator” is Sapcor Broking Solutions (Pty) Ltd. The “broker” is described as “Optimum Financial Services Group”.
- [10] As from the 1st of March 2010 Sapcor Holding Investments (Pty) Ltd purchased the entire business of Optimum as a going concern, including the fixed assets. The “Sapcor Group” is controlled by Dolf Lombard, Gill Lombard and the Dolf Lombard Family Trust. The group comprises some twelve registered companies mostly providing financial services to members of the public. Included in this group is Sapcor Holding Investments (Pty) Ltd which acts as the holding company of about

12 subsidiary or sister companies. Amongst these sister companies are Sapcor Financial Solutions (Pty) Ltd, Sapcor (Pty) Ltd, Sapcor Broking Solutions (Pty) Ltd and Sapcor Harrismith (Pty) Ltd. These sister companies have all been mentioned in the papers before this office.

- [11] In their response to the complaint the compliance officer “for the Sapcor group of companies” Mr Johan Du Plooy attempted to avoid responsibility by laying blame on Optimum and hiding behind the confusing Sapcor group of different companies. It is of note that Sapcor (Pty) Ltd is a licensed FSP and has an FSP no 13127. In truth all of these companies fall under the control of the holding company and the people mentioned above.

D. THE ISSUE

- [12] It is not in dispute that Complainant suffered loss as a result of fire damage to his game fence. Nor is it in dispute that the insurer, Hollard Insurance, rejected the claim as there was no cover at the time of the fire.
- [13] The parties equally do not dispute that Koegelenberg, as the financial services provider, was instructed to provide cover for damage to the game fence.
- [14] The crisp issue here is to determine whose conduct was it that caused the failure to procure the cover and who is responsible for the consequences of that conduct.

E. CHRONOLOGY OF MATERIAL EVENTS

In order to determine this issue the following chronology of events is helpful:

- [15] On the 1st March 2010 Complainant took out a short term commercial policy in respect of his farm. The FSP was Optimum represented by Koegelenberg.
- [16] On two occasions, namely the 27th January 2011 and 11th May 2011, Koegelenberg visited the Complainant in order to carry out a revision of the cover provided by the policy. On the second visit Koegelenberg pointed out to Complainant that the policy did not cover damage or loss to game fencing surrounding the farm. It was then agreed that cover for the game fence in respect of fire damage be added to the policy. To this end the schedule to the policy was amended, in manuscript, to include the game fence. A copy of the policy was provided to this office and it is clearly indicated that cover for the game fence is to be provided.
- [17] On the 31st August 2011 a fire on Complainant's farm destroyed part of the game fence. An assessor was called out and the damage was quantified at R85 500 – 00.
- [18] On the 2nd September 2011, Complainant filed a claim with the insurer through the offices of optimum.

[19] On the 25th September 2011, Mr Phillip Pieters from Sapcor Harrismith (Pty) Ltd informed Complainant the claim was rejected because the paperwork to effect changes to the policy was never submitted and therefore there was no cover in respect of the game fence. Pieters informed Complainant that the “office of Koegelenberg” did not submit the endorsements to the insurer. Quite clearly, Sapcor were already distancing themselves from any responsibility and were blaming Koegelenberg.

[20] Pieters offered to approach the insurer to pay compensation in the form of “an ex-gratia” payment. This was done and Hollard, on the 3rd October 2011, rejected such request.

F. RELATIONSHIP BETWEEN SAPCOR AND KOEGELENBERG

The following sequence of events is important in determining the relationship between Koegelenberg and Sapcor. It appears from both parties’ response to the complaint that one blames the other.

[21] On the 11th January 2010 Sapcor Holding Investments (Pty) Ltd and Dotcom Trading 374 (Pty) Ltd entered into a written agreement of sale. Sapcor Holding Investments (Pty) Ltd (as purchaser) was represented by Adolph H Lombard and Dotcom (as seller) was represented by Koegelenberg. For purposes of this determination the following were, *inter alia*, the material terms of the agreement:

a) Paragraph 3 of the agreement provides as follows:

“3.1 The seller sells to the purchaser who purchases the Seller’s Sale Object with effect from the Effective Date.

3.2 The risk and benefit attaching to the Sale Object will be deemed to have passed to the purchaser on the Effective Date, notwithstanding the fact that this agreement may have been signed after the Effective date.”

The contract provides the following definitions:

“Sale Object” means *“collectively the Client Base and Client Information”*.

“Client Base” means *“the right to the income generated from the Sellers and comprises the Brokerage Rights and the Contracts.”*

“Effective Date” means *“01 March 2010”* (emphasis mine).

b) The purchase price was agreed at “R 3 221 052 – 00.

c) The seller agreed to deliver all documentation relating to the business to the purchaser on the effective date.

d) Paragraph 8.1.4 of the agreement provides for the following warranty:

“The Seller warrants that it knows of no claim or litigation pending against the Seller and hereby indemnifies the Purchaser against any such claims actions, damages (including consequential damages) or any other liability either directly or indirectly arising out of any intentional or negligent act or omission of the seller, if and when they arise.”

e) Paragraphs 9.2 and 9.3 provide as follows:

“9.2 The Seller and the Purchaser shall jointly nominate staff for the incorporation and the Purchaser shall provide appropriate equitable employment contracts to those persons concerned.

9.3 Coenderaad Johannes Koegelenberg will remain as an employee for a minimum period of two years and the employment contract shall include the necessary reasonable restraints should the employment terminate for whatever reason.” (Emphasis mine)

f) Of importance is a clause that deals with “employees”; paragraph 19 provides as follows:

“The contracts of employment between the Seller and all transferred employees shall be transferred by the seller to the buyer with effect from the Effective Date and

All rights and obligations between the Seller and each of the transferred employees at the effective date will continue in force as if they were the rights and obligations between the Buyer and each transferred employee and anything done before the transfer by or in relation to the Seller will be considered to have been done by or in relation to the buyer and

The transfer of employment will not interrupt the continuity of employment of any transferred employee and that employment will continue with the buyers as if with the seller.”

g) The contract was also subject to the following “suspensive condition”:

“The Purchaser and Coenderaad Johannes Koegelenberg successfully enter into a written employment contract”

[22] On the 1st March 2010 and at Harrismith Sapcor Holding Investments (Pty) Ltd and Coenderaad Johannes Koegelenberg entered into a written agreement of employment. The term of employment was from the 1st March 2010 to 28th February 2012. The job description was “*Managing Director*”. The contract stipulates that it will terminate after two years on the 28th February 2012.

[23] On the 26th May 2011 Sapcor accepted Koegelengerg’s resignation. This was in writing and it was recorded that Koegelenberg will terminate his employment on the 25th June 2011.

G. DISCUSSION ON CHRONOLOGY OF EVENTS

[24] As at the 1st March 2010 Optimum was sold as a going concern to Sapcor. From that date, Koegelenberg was an employee of Sapcor.

[25] On the 11th May 2011 when Complainant gave instructions to amend or endorse the policy, Koegelenberg was an employee of Sapcor. The risk of fire damage occurred after the effective date of the above sale agreement, on the 31st August 2011, and after Koegelenberg resigned and left. These facts are not disputed by the parties.

[26] It therefore follows that any omission to have the policy updated was caused by Sapcor and not by Koegelenberg in his personal capacity or by Optimum. The omission was caused by an employee of Sapcor.

H. THE DISPUTE OF FACT

[27] Koegelenberg's version is that he did visit Complainant on the 11th May 2011 and accepted instructions to include cover for the game fence. When he returned to the office he handed the instructions to an administrative clerk, Mrs Theresa Horn, with instructions to load the requested cover for the game fence. Koegelenberg later confirmed with Horn if the endorsement was done, the latter replied in the affirmative.

[28] Koegelenberg is adamant that it was not his omission but that of Mrs Horn who was also an employee of Sapcor at that time. He confirms that he ceased being an employee of Sapcor on the 25th June 2011. The fire on the farm happened after this. Koegelenberg was unable to provide this office with the contents of the file and other records as he no longer had access to the files.

[29] I now turn to the Respondent's version which came in a response from Johan Du Plooy. The version can be summarised as follows:

- a) Koegelenberg was employed by Sapcor Holding Investment (Pty) Ltd; this company is not registered as a licensed financial services provider and does not have an FSP number. This company does not render

financial services and does not employ representatives. Accordingly Koegelenberg could not have rendered advice on behalf of Sapcor.

- b) The contract of employment between Sapcor and Koegelenberg does not provide for the latter to act as a representative.
- c) The policy notes that Dotcom is the broker and Sapcor Broking Solutions (Pty) Ltd as the “administrator”. The point being made is that Koegelenberg was not employed by Sapcor Broking Solutions.
- d) The Administrator, Theresa Horn, was registered on Dotcom and not Sapcor. She nevertheless denies that she made an omission.
- e) Du Plooy then concludes as follows:

“In the light of this evidence we therefore would like to ask you to reconsider your position on this claim as we feel that Sapcor cannot be held liable for the claim as the representative was never employed or mandated as representative.”

I. FINDING OF FACT

[30] At the outset I must point out that I accept Koegelenberg’s version and I reject, for reasons that follow, Du Plooy’s version.

[31] This complaint is not about the advice provided by Koegelenberg to Complainant. By all accounts Koegelenberg conducted himself as a financial services provider and gave his client sound advice to take out cover for his game fence. The complaint is not about Koegelenberg’s advice as a representative of Sapcor. The

complaint is about the consequences of an administrative oversight that took place in Sapcor's offices.

[32] Having given the advice to take cover for the game fence, it is improbable that Koegelenberg will then neglect to convey the request for cover to the insurer. I accept his version that he handed the matter to an administrative clerk, Mrs Horn. It is not in dispute that Koegelenberg left Sapcor on the 25th June 2011; Sapcor had taken over Complainant's account on the 1st March 2010 and since the 25th June 2011 Koegelenberg was not able to follow-up on this endorsement.

[33] As for Du Plooy's version; I am unimpressed in that he :

- a) Failed to respond fully;
- b) Relied on a defence that was patently unsustainable;
- c) Failed to address this office on the legal effect of Sapcor's purchase of Dotcom as a going concern; and
- d) Failed to take any responsibility by unfairly trying to blame Koegelenberg, who nevertheless was, at that time, an employee of Sapcor.

[34] A letter was sent to Du Plooy requesting documents which the Act and the General Code, (the Code) require a licensed FSP to keep. In particular Sapcor was requested to provide details of any systems in place which can be used to avoid risk of clients suffering harm from negligence; section 11 of the Code. This office also requested documents in terms of section 3 and section 9 of the Code. There

was no response to this request. The only reasonable conclusion to be drawn is that, in breach of the Code, Sapcor did not keep a proper record.

[35] The fact that Koegelenberg was employed by Sapcor Holding Investments (Pty) Ltd and not by Sapcor Broking Solutions (Pty) Ltd is of no assistance to Sapcor. It is not in dispute that Koegelenberg's duties as an employee included, inter alia, the rendering of financial services to members of the public. The core business of Optimum was the rendering of financial services and it was this business that Sapcor purchased.

[36] Optimum was purchased as a going concern and in terms of the agreement of sale took over a number of employees; this included Mrs Horn and Koegelenberg. It is not in dispute that as from the 1st March 2010 Sapcor took responsibility for the acts and omissions of their employees.

[37] Sapcor, through Du Plooy, should have referred to the contract of sale and addressed this office on the legal implications thereof. In particular they should have addressed this office on the terms of the sale as set out above. They deliberately neglected to do so.

[38] Du Plooy is extremely vague about Mrs Horn. He admits she was employed as an administrator but merely states that Mrs Horn "does not recall" receiving instructions from Koegelenberg. There is no direct evidence from Mrs Horn. Accordingly Du Plooy does not present any credible factual basis for disputing

Koegelenberg's version. It is ironic that even if Koegelenberg was guilty of an omission, and I do not make such a finding, he was nevertheless an employee of Sapcor and, as with Mrs Horn, would have been acting within the course and scope of his employment with Sapcor.

J. CONCLUSION

[39] On the evidence before me, Complainant's claim was rejected due to the fact the request to extend cover to include the game fence was not conveyed to the insurer. I also find that this was due to an omission or neglect on the part of an employee of Sapcor. The actual identity of the employee is not material. What is material is that such employee would have committed an act of omission or neglect within the course and scope of their employment with Sapcor. The latter must then be responsible for the consequences.

[40] Sapcor failed to act with due care skill and diligence as contemplated in section 2 of the Code.

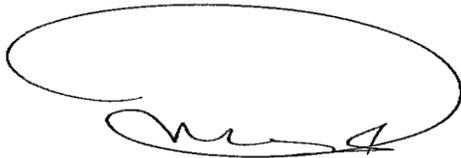
[41] Sapcor does not dispute that a claims assessor was called out to the farm and assessed the damage to the game fence at R85 500 – 00. This is the amount that Sapcor will have to pay Complainant.

K. THE ORDER

[42] Accordingly the following order is made:

1. The complaint is upheld;
2. Sapcor Broking Solutions (Pty) Ltd and Sapcor (Pty) Ltd are ordered to pay the complainant, jointly and severally the one paying the other to be absolved, the amount of R85 500 – 00;
3. Interest on the said amount at the rate of 9% per annum from 25th September 2011 to date of payment.

DATED AT PRETORIA THIS THE 8th DAY OF DECEMBER 2015.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS