

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 06001/14-15/ KZN 3

In the matter between:

MASIMDUMISE GABRIEL BHENGU

Complainant

and

OUTSURANCE INSURANCE COMPANY LIMITED

Respondent

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

A. INTRODUCTION

- [1] This complaint centres on a failure by the financial services provider; Outsurance Insurance Company Limited ('Outsurance'), to ensure that the complainant was properly informed and appropriately insured.
- [2] It is alleged by complainant that respondent failed to properly advise and disclose the applicable exclusions.
- [3] As a result of respondent's conduct, complainant's Apple laptop computer was not insured. The only way to cover the laptop computer was to include it under the separate 'Out-and-About cover'.

- [4] The exclusion formed the basis of respondent's rejection of complainant's claim of an Apple laptop computer, which had been irreparably damaged by 'liquid.'¹

B. THE PARTIES

- [5] Complainant is Mr Masimdumise Gabriel Bhengu, an adult male whose contact details are on file in this Office.

- [6] Respondent is Outsurance Insurance Company Limited, (hereinafter referred to as Outsurance) a company duly registered in accordance with the laws of South Africa, with its registered business address being 1241 Embankment Road, Zwartkop, Extension 7, Centurion, Gauteng. Respondent is an authorised Financial Services Provider (FSP No. 896).

- [7] At the outset, it must be mentioned that Outsurance is a direct insurer. This type of insurer contacts clients directly, without the use of intermediaries.

- [8] The General Code of Conduct for Authorised Financial Services Providers and Representatives, (the Code) contains specific provisions that are aimed at direct marketers.

C. THE COMPLAINT

- [9] The complaint is as follows:

9.1. Complainant had a 'Personal Contents Cover' insurance policy with

¹ According to a technical report by 'apples 4 apples'; the 'Machine has malfunctioned as a result of liquid damage. Due to the nature and severity of the damage, we do not recommend repair, as it would be uneconomical'

respondent.

9.2. Intended to cover complainant's household contents, the policy incepted as a result of a telephone call from respondent to complainant.

9.3. Complainant had recently applied for a homeowner's policy to provide cover for the building as a result of having successfully applied for a home loan. Respondent's telephone call was a follow up thereon. The transcript of the call opens as follows:

*'....to welcome you to Outsurance for your home insurance, the building.....you are currently with us on your building, right, just the structure of the building.....what we would like to do is **obviously ensure that you are fully covered comprehensively.....'** (My emphasis)*

9.4. A set of scripted questions followed. The result being that complainant's household contents were included into or on the existing policy.

9.5. The insurance schedule was sent to complainant in a letter dated the 31st May 2013. The effective date being the 1st June 2013.

9.6. On the 2nd March 2015, after having submitted a claim for damages to his Apple, Macbook laptop computer, complainant was on advised by respondent that his claim had been rejected.

9.7. The basis of the rejection, as conveyed in the conversation, follows:

'Your Macbook was not specified. Anything over R1500 needs to be specified and also if it is damaged in the house it needs to be (pause)

electronics are not covered. So it must be furniture and it must be items forming part of the furniture, not your electronics. Your electronics that you can take out of the house you need to specify under Out and About’.

9.8 Respondent followed this up with a letter of confirmation on the same day.

The basis of the rejection as conveyed in this letter follows:

‘NO COVER

The item(s) for which you submitted a claim was not placed on cover with us. You therefore did not enjoy cover for this incident.

CAUSE OF DAMAGE / LOSS NOT INSURED

The cause of the loss or damage to the item for which you submitted a claim is not covered in terms of the facility. Please refer to your facility for the causes of loss or damages for which we do not provide cover.’

9.9 In response thereto complainant turned to this Office. Complainant’s principal point is that his household contents were covered to the value of R250 000. He claimed he had not been advised that any item over R1500 had to be specifically listed.

9.10 Complainant believes that Outsurance should pay him out; alternatively provide him with another laptop.

D. RESPONDENT’S VERSION

[10] With the matter remaining unresolved pursuant to this office’s rule 6(b) letter, which had been addressed to respondent on the 19th December 2014, a notice in terms of section 27 (4) of the FAIS Act was sent to respondent on 7th April 2015.

[11] Aside from both formally advising respondent that the matter had been accepted for investigation and requiring the submission of respondent's statements along with all documentation supporting its compliance with Act and Code, the notice drew respondent's attention to the following:-

11.1 The representative's actions of merely stating that 'cell phones and portable computer equipment are not covered under accidental breakage' - towards the end of the conversation- cannot be regarded as having provided appropriate advice to complainant;

11.2 Respondent failed to address the issue of whether or not the complainant was appropriately advised as to how such items could be covered.

11.3 It was this office's view that respondent had failed to act with due skill, care and diligence, and in the interests of complainant;

11.4 Respondent had failed to give advice to complainant as to how the excluded items should be listed to receive the necessary cover;

[12] It is also relevant that the section 27 (4) notice was itself preceded by correspondence on the 2nd March 2015. Not only did this letter deal with respondent's failure to address the issue of what information was solicited from complainant at the point of sale, but more pointedly, the letter put to respondent that:

'The fact that "Cell phones and portable computer equipment are only covered if they are noted under specified Out- and about cover on your schedule" was never addressed with the client, not once during the call.'

[13] The essence of respondent's reply to the rule 6(b) notice and subsequent section 27 (4) notice follows:

13.1 'OUTsurance has a peril based Facility. This means that we only cover the named perils in the Facility and we indicate exclusions that will or might apply to the named perils in the Facility. Any peril, not named in the Facility, will be excluded from cover';

13.2 The claim was rejected on the basis that there was no cover. The complainant had not taken out the Out and About Cover, and that electronics were not covered under Contents for accidental damage;

13.3 Under Contents cover, more specifically the accidental breakage cover section provision thereof; cover is provided for accidental breakage of television sets, mirrors or glass forming part of the furniture. There is no cover for accidental damage to any other items;

13.4 'Cell phones and portable computer equipment are only covered if they are noted under specified OUT-and-about cover on your schedule';

13.5 'During the sales conversation the complainant was advised that cell phones and portable computer equipment will not be covered under accidental breakage;'

13.6 The adviser also explained to the complainant that items removed from the house must be noted under OUT and About cover; this being the all risks cover;

13.7 'During the conversation the complainant mentioned that he owns a

number of watches and therefore this was used as a point of reference when Out-and-About cover was explained. At no point did the complainant mention that he has cell phones or laptops, to enable the advisor to advise him accordingly. Despite the fact that the complainant and the advisor discussed his watches and the fact that he must take Out-and About cover to cover them, the complainant did not opt for this cover to ensure that those items (his watches) are covered;’

E. ISSUES TO BE DETERMINED

[14] The key questions to be answered are:

14.1 Whether, in rendering the financial service respondent, as required by the Code, in particular, section 15 (2) (a) of the code, made:

‘enquiries to establish whether the financial product or products concerned will be appropriate, regard being had to the client’s risk profile and financial needs, and circumstances.’

14.2 In so doing and as required by Section 3 (1) (a) code, whether the:

(a) *‘representations made and information provided to a client by the provider –*

(i) must be factually correct;

(ii) must be provided in plain language, avoid uncertainty or confusion and not be misleading;

(iii) must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually

established or reasonably assumed level of knowledge of the client;

(iv) must be provided timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction;'

14.3 In line with the facts of this case, whether the requirements of section 15 (3) (j), of the code were complied with. Section 15 (3) (j) provides that, prior to the conclusion of any transaction, the direct marketer must provide the client with the following information:

' Concise details of any special terms and conditions, exclusions, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided;'

[15] Overarching all the aforementioned provisions is the section 2 of the General Code. The section is aimed at all providers when they provide financial services to clients and it reads: 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'*.

F. DETERMINATION

[16] In initiating contact, one of respondent's opening phrases was that it would like to *'obviously ensure that you are fully covered comprehensively.....'* (my emphasis)

- [17] As prescribed by section 15 (2) (a) of the Code, this first requires that enquiries be made to match the appropriateness of the financial product to the client's risk profile and financial needs and circumstances.
- [18] The section is peremptory and does not allow discretion on the part of the provider providing the client with financial services. A related section for providers other than direct marketers is section 8 (1) of the code.
- [19] To render appropriate advice, one must first know the client; understand their client and their needs and circumstances. To this end, relevant personal information must be gathered from the client. Only then is a provider in a position to make an appropriate recommendation.
- [20] Without first taking the trouble to know the client, one is unable to recommend appropriate product/s to the client.
- [21] I note further that without knowing their client, one is not able to meet the demands of section 3(1) (a) (iii) of the Code. The section specifically requires that; *'representations made and information provided to a client by the provider*
*'must be adequate and appropriate in the circumstances of the particular financial service, taking into account the **factually established or reasonably assumed level of knowledge of the client;**'* (my emphasis)
- [22] In the matter at hand the sales process was scripted. In other words respondent's representative followed a predetermined list of questions to which for the most part complainant was only required to give limited answers.
- [23] The recorded conversation between complainant and respondent's

representative reveals very little by way of an attempt to actually solicit, detailed information from the client which would enable respondent to comply with sections 15 (2) (a) and 3(1) (a) (iii) of the Code.

[24] This was particularly pertinent in that complainant was applying for household contents insurance for the first time. On his version he was unaware of the risks posed by a failure to specifically list particular items.

[25] Complainant's understanding, on his version, was that all household contents were covered under the overall insured value.

[26] I mention that complainant was asked to provide the total replacement value of all the contents of the address, excluding all jewellery, watches and gold coins. To emphasise this, respondent's representative asked what it would cost to replace everything, assuming that is, it was all stolen in a burglary. The representative then went on to state that we insure you for a total sum for everything.

[27] The complainant was then asked to value the previously excluded items, namely the jewellery, watches and gold coins. The only proviso here being the items exceeding R75 000 in value needed to be specifically listed.

[28] With nothing exceeding R75 000, not a single item was required to be listed.

[29] The complainant was then told that he is only covered for accidental breakage of the TV and any glass forming part of the furniture, but for all other items one can add additional accidental breakage cover up to R10 000.

[30] As an example of such items respondent can be heard making mention of

microwave ovens, dvd players, hi-fi and '*things like that.*' Complainant is asked about the most expensive item of electronic equipment in the home to which he answers that it is the blue ray player, valued at R2000.

[31] The result being that complainant's household contents were added to the existing policy. However, yet again, aside from mention of the blue-ray player, no specific list of items is required.

[32] Bearing in mind that complainant had never before applied for household insurance cover; and was responding to a cold call from respondent, the lack of probative questions on the part of respondent is a concern.

[33] The fundamental issue to consider when dealing with direct marketing is that respondent is both in control of the conversation, and one would expect, more than familiar with the risks of an item being excluded due to it not being mentioned or listed by complainant. This is not something within complainant's sphere of knowledge or expertise.

[34] The duty therefore rests on respondent as the expert to appropriately inform and assist complainant in this regard. Accordingly I would have expected respondents' questions to elicit full and complete details of the insured items in order to avoid such risks as the one that confronted complainant. No probative questions were asked; the emphasis instead was on the globular, overall insured value of complainant's assets.

[35] Yet the respondent argues that; '*...At no point did the complainant mention that he has cell phones or laptops, to enable the advisor to advise him accordingly.....*'

[36] Aside from the fact that the onus rests on respondent to make necessary enquiries, this response ignores the simple fact that cell phones and to a lesser degree, tablets, computers or even laptop computers are commonly found in households. I have little doubt respondent must have been aware of this fact and should have been on the alert for an eventuality such as this one.

[37] At no stage during the conversation is it made clear to complainant that cell phones and portable computer equipment are only ever covered if they are noted under specified Out-and-about cover. The bulk of the conversation centred on the globular amount and specifics such as furniture, jewellery, sound system and glass items.

[38] In respondent's letter of 19th January 2015, it is stated under '*Accidental breakage cover*' that:

'Cell phones and portable computer equipment are only covered if they are noted under specified OUT-and-About cover on your schedule.'

[39] Similarly under '*WHAT IS COVERED under Out-and About cover*', this same letter states that:

'Cell phones and electronic items are only covered if they are noted under Specified Out-and-About on your schedule.'

[40] Therein lies a failure to comply with section 15 (3) (j) of the General Code. This requires that the direct marketer, prior to the conclusion of any transaction, provide the client with the following information:

'Concise details of any special terms and conditions, exclusions, waiting

periods,.....restrictions or circumstances in which benefits will not be provided'

[41] On the contrary complainant was advised that:

'All your contents including jewellery, watches and gold coins are only covered when they are inside the home at this address. Out and About cover needs to be taken for items to be covered when taken out of the house.'

[42] Whilst respondent goes on to list items² that are not covered under household contents; laptop computers are not amongst the list.

[43] That, as argued by respondent; *'the complainant was advised that cell phones and portable computer equipment will not be covered under accidental breakage;'* and that items removed from the house must be noted under OUT and About cover; does not address the key concerns.

[44] The concerns are:

44.1 As addressed to respondent on the 2nd March 2015.

'The fact that "Cell phones and portable computer equipment are only covered if they are noted under specified Out- and about cover on your schedule" was never addressed with the client, not once during the call.'

44.2 Complainant was never advised that Out-and-About Cover also included cover for accidental breakage.

[45] Without this information, there is no way it can be said that; 'representations

² *'unregistered off-road, two, three and four wheel motorcycles.....'*

made and information provided to a client by the provider' were

'...adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client'³.

[46] Having listened to the recorded conversation and having read respondent's answers -as provided to this Office- I have no hesitation in concluding that complainant was neither placed in a position to make an informed decision as required by section 3 (iv) of the General Code nor given the appropriate advice. Both the recorded transcript and the respondent's letters to this Office demonstrate the confusing manner in which respondent communicated with complainant. Bearing in mind, complainant's circumstances, respondent's conduct amounts to a dereliction of duty.

[47] This effectively amounts to a failure on the part of the respondent to; *'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;'*

[48] Accordingly, in light of all of the above I find in favour of the complainant.

G. QUANTUM

[49] Complainant has provided a document headed 'TECHNICAL REPORT & QUOTATION' on a Macbook Air 11 inch with serial number: CO2FV11BDDQX. This, from an entity trading as 'apples 4 apples' in Clark Road, Durban.

³ Section 3 (1) (iii) of the General Code

[50] The report indicates that; *'due to the nature and severity of the damage, we do not recommend repair, as it would be uneconomical. There is a high possibility of latent defects. We recommend replacement.'*

[51] In making enquiries with a Mr Daseegan Reddy, the author of the report; this Office was advised that complainant's machine was a 2010. 1.4GHz, core 2 duo machine with 2 gig of ram.

[52] Mr Reddy further advised that with complainant's machine being out of production they had quoted on the 2014, equivalent machine. This being a *'Macbook Air 11" Intel Dual-Core i5 1.3ghz/4GB/128GB flash/Intel HD 5000: R12 300'*

[53] Complainant's policy document under a section headed 'Claims' and Our Responsibilities' indicates the following:

'We have the choice to settle your claim in any of the following ways:

- *paying out cash to you*
- *repairing the damage at a repairer of our choice*
- *replacing the item at a supplier of our choice*
- *any combination of the above.....*

[54] The policy schedule indicates an excess of R560 as being applicable to the contents. This effectively reduces the quoted figure of R12 300 to R11 740.

[55] Complainant requested that respondent either pay him out; alternatively purchase a laptop and supply it to him.

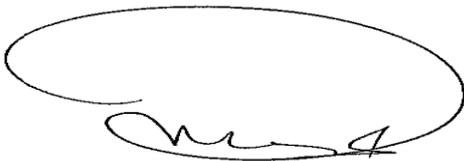
[56] Having considered the above, I believe that it is fair and equitable that I make the following order.

H. ORDER

[57] In the premises, the following order is made:

1. The complaint is upheld;
2. Respondent is hereby ordered, to within seven (7) days from date of this order replace the laptop using a supplier of its choice; failing which, pay to complainant the amount of R11 740.
3. Interest at the rate of 9 %, per annum, seven (7) days from date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 1st DAY OF MARCH 2016.



NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS