

IN THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

CASE NO 04916/14-15 EC 3

In the matter between:

SIBANISO PHOSHERA

APPELLANT

And

MUA INSURANCE ACCEPTANCES.

FIRST RESPONDENT

KPC BROKERS CC

SECOND RESPONDENT

AUTO & GENERAL (PTY) LTD

THIRD RESPONDENT

JUDGMENT

INTRODUCTION

[1] This appeal is against the determination of the FAIS Ombud's determination which dismissed the claim and complaint of Mr. Sibaniso Phoshera ("Mr. Phoshera") against the First, Second and Third Respondents ("the Respondents"). The Ombud's determination was issued on 11 May, 2016 and leave to appeal against it was granted on 6 December, 2016.

[2] In this appeal the facts are largely not in dispute. The grounds of appeal are based on what Mr. Phoshera views as the Ombud's error and misdirection in the application of the law to the facts of this case. The factual context is thus pertinent.

FACTUAL BACKGROUND

[3] Mr. Phoshera had insured his motor vehicle with Compass Insurance (Pty) (Ltd) (Compass), on 25 October, 2012. The First Respondent, MUA Insurance Acceptances ("MUA") were the policy underwriting managers and the Second Respondent, KPC Brokers CC ("KPC"), the brokers.

[4] When he took out the insurance policy with Compass, although for personal reasons his intention was not ever to contract with Auto & General or any of its subsidiaries, Mr. Phoshera did not at any time give expression to that intention.

[5] Almost two years later, on 10 August, 2014, Mr. Phoshera had a motor vehicle accident and lodged a claim with his broker, KPC. The vehicle was declared a write-off and after assessment, the claim was declined, notwithstanding that all due premiums had been paid up. The repudiation of the claim Mr. Phoshera later learned by letter, was because the rear tyres of his vehicle were worn out. It was in that letter Mr. Phoshera submitted, that he heard for the first time that Auto & General, who he had not contracted with, and whom he had intentionally avoided, was the insurer he was told to liaise with in regard to the repudiation of his claim. Auto & General he said, was not ever mentioned in any previous communications with him.

[6] He was equally concerned when the repudiation letter required him to address his complaints regarding the rejection of his claim with a certain Telesure Investment Holdings ("Telesure"), whom he had also not contracted with.

[7] Telesure informed him that after independently reviewing the merits of his claim they agreed with the decision of Auto & General which in their view was contractually sound.

[8] Upon his own investigation as to Telesure's identity and role, Mr. Phoshera had learned that the latter owned and operated Auto & General. At all relevant times, he contended, he was not aware that his policy had been transferred, sold and or ceded to Auto & General and his premiums debited for the latter's benefit as the new insurer.

COMMON CAUSE FACTS

[9] It is common cause among all parties, including Mr. Phoshera that,

- The terms and conditions of the policy contract under Auto & General remained identical to those under Compass;
- At all relevant times, Mr. Phoshera was content with the identity of Compass, MUA and KPC;
- KPC was Mr. Phoshera's broker and therefore his agent
- In terms of the Compass/MUA Binder Agreement, MUA acted as the agent of Compass. When the policy contract was transferred, or ceded through the Auto & General/MUA Binder Agreement, MUA still served as Mr. Phoshera's agent and
- Mr. Phoshera's claim was repudiated on the basis that his vehicle did not comply with the required terms and conditions of the prescribed roadworthiness of the National Road Traffic Act.¹

¹ Act 93 of 1996 ("the NRT Act")

THE APPELLANT'S CONTENTIONS

[10] It was Mr. Phoshera's contention that his policy contract with MUA made no provision for the policy to be ceded or transferred to any third party without his consent or knowledge. Besides, in terms of Clause 2 of the policy contract MUA and KPC had a duty to give him notice of any changes effected to the policy.

[11] His further argument was that the Law of Insurance, including the relevant case law regarding the identity of the insurer and the right to choose one's own insurer support his contentions.

[12] It is trite he argues, that the identity of the contracting parties and consensus over the choice of the insurer are prerequisites of an insurance policy contract. The case law he submits, is in line with section 106 (4) of the National Credit Act of 2005 ("the NCA"), which protects the consumer's right to waive the substitution of an existing policy of the consumer's choice with any one proposed.²

[13] The failure of the insurer in the above regard has thus rendered the policy contract null and void from the beginning, upon its transfer without his knowledge and consent Mr. Phoshera argues. For that reason, he further contends, all its clauses are equally void. The Ombud thus erred by considering and adjudicating further on any of the aspects of the void insurance contract.

² Robert Bhekukwenza Hlela and Others v. Taxi Securitization PTY (LTD) Case No:515/2013 p.17&21. ("Bhekukwenza Hlela") (Reportable)

[14] Based on these contentions, Mr. Phoshera submits that Clause 2 of the MUA Executive Policy which stipulates the duties of the Underwriting Manager and the Broker, have been breached. The breach was in respect of the failure to notify him of the transfer, cession or sale of the insurance policy contract to AUTO & GENERAL without his consent or knowledge.

[15] The breach was also in regard to the notion that the policy contract made no provision for that sale, transfer or cession of the policy to a third party without his consent or knowledge.

[16] Based on the above breaches where all the respondents acted in concert with each other and with the common purpose of benefitting commercially from the policy, they must be held liable jointly and severally.

[17] The Ombud, Mr. Phoshera further concludes, therefore erred in her dismissal of his claim and this Appeal Board should set the dismissal aside.

THE FIRST AND THIRD RESPONDENTS' CONTENTIONS

[18] Viewing what Mr. Phoshera terms a transfer or cession of the policy as a termination, the actions of MUA and Auto & General did not lead to the termination of the policy contract with Compass. That contract, following the termination of the binder agreement between Compass and MUA had been unilaterally terminated by Compass as permitted by Rule 73 of the PPR.

[19] Following that unilateral termination Auto & General identified MUA as the new underwriter and notice to that effect, together with the notice of termination of the initial policy contract was given to KPC as Mr. Phoshera's agent by MUA, Compass and Auto & General in terms of Rule 7.3(b)(ii) of the PPR. MUA it is argued, was therefore statutorily and contractually compliant, having given notice of the appointment of the new underwriter the termination of the initial policy contract to Mr. Phoshera's agent and therefore to him.

[20] Thus, the contention goes, there was a belief that a valid contract existed between a Mr. Phoshera and Auto & General. And based on the terms and conditions of that valid contract, Auto & General repudiated the policy claim. After all, the applicable terms and conditions of this policy were identical to those of the policy initially underwritten by Compass.

[21] Besides, MUA and Auto & General further argue, in addition to the fact that the terms and conditions of the policy remained unchanged, MUA, with whom Mr. Phoshera was familiar, also continued to administer the new policy. For that reason, it is contended, MUA, and not Auto & General repudiated the policy claim. The latter had mandated the former in terms of the binder agreement that existed between them whose terms and conditions were identical to what Mr. Phoshera had also been familiar with. It is here contended that Auto & General therefore played no role in the repudiation of the claim.

[22] All that was actually done it is further contended, Auto & General merely reviewed MUA's repudiation of the contract considering that they were the administrators of the policy. It is also contended that even if the Appeal Board finds that there is no

valid contract between Mr. Phoshera and Auto & General, the causal link for the damage incurred had not been established. For that reason, MUA and Auto & General cannot jointly and severally be liable for any loss suffered.

[23] MUA and Auto & General however raise two points *in limine*. They argue first, that the Ombud should in the first place not have determined the matter as the application for leave to appeal was out of time, and non-compliant with the requisite 30-day notice³ and the Ombud having had no discretion to grant condonation for the late noting of the appeal.⁴

Second, they raise the non-joinder of Auto & General in the initial matter before the FAIS Ombud. There, Auto & General had been cited for the first time when the appeal was noted. Thus Auto & General was not part of the determination of the FAIS Ombud and should therefore not be part of this appeal.

[24] Further, there is the non-joinder of Compass Insurance (“Compass”) in the matter as a whole. The FAIS Ombud in her determination made findings of non-compliance with statutory duties of underwriters. However, neither Auto & General, who is the underwriter in the new policy contract nor its agent Compass, had been parties in the proceedings before the FAIS Ombud. In the application for leave to appeal itself, Auto & General had not even received the papers. Claiming loss or damages, whether individually or severally, for a breach against parties, who are properly not before this Appeal Board would therefore be wholly prejudicial to them. For that reason, it is argued, this appeal is fatally flawed.

³ See section 26 (2) of the Financial Services Board Act, 97 of 1990 (“the FSB Act”).

⁴ See Section 28 (5) of the FAIS Act and Rule 12 (b).

[25] Mr. Phoshera contended in oral argument that from his side there is no submission whether written or oral, in opposition to the condonation contentions made by the respondents. He had applied for condonation before the Ombud. That application had been considered and granted. In this appeal and as far as he is concerned, the condonation question is not an issue at all argues Mr. Phoshera.

[26] As for KPC, although no argument was made in their heads of argument they addressed the condonation question squarely in their written and oral submissions, opposing it equally strongly.

[27] The responding parties therefore all opposed the condonation of Mr. Phoshera's late filing, arguing strongly that this appeal should not be heard. However none of them have submitted any cross-appeal against that decision by the Ombuds, a matter briefly mentioned in KPC's oral submissions and which will be considered in due course.

It is important first to outline the rest of KPC's contentions before this Panel.

THE SECOND RESPONDENT'S SUBMISSIONS

[28] Because KPC was Mr. Phoshera's broker when he took out the policy, as his agent he could not be party to any transfer or cession of the policy which as claimed, was unlawful. KPC could therefore not be liable for any loss which might result from that transfer or cession, arguing that on that score, the appeal should be dismissed.

[29] What is considered a cession KPC argues, can best be defined as a combined cession and delegation and a substitution of sorts. The cession would entail one stepping

into the shoes of the other acquiring all rights and that can take place without the consent of the debtor.

It is only where what are inherited are obligations where one party steps into the shoes of another, that it would require the consent of the debtor.

[30] Further, contends KPC the assignment of Mr. Phoshera's' policy contract does not render it *null and void ab initio*. Because he could still have enforced his claim against MUA and KPC as the original parties, he could still hold Compass as his agent liable for the loss he claims he suffered. It therefore follows that he was still insured by Auto & General and did not suffer loss as he claims.

[31] In addition, as was common cause, Mr. Phoshera's claim, was repudiated due to his non-compliance with the policy contract requirement of roadworthiness, a term of the contract he had accepted when he took out the original policy and which also remained the same in the supposedly ceded contract.⁵

[32] Logically therefore, the claim against the policy could not be met based on the condition of the motor vehicle. Thus Auto & General and or Compass could not be held liable for any loss claimed against them. On that basis too submits KPC, the appeal must be dismissed.

[33] Further, that KPC failed to disclose to Mr. Phoshera of the change of underwriter, a fact conceded, does not make them liable for damages.

⁵ Contained in NRT Act of 2008 – Specific Conditions 3 of Section 6 of the policy contract.

At all relevant times, Auto & General was the insurer, accepted the premiums so that even should this Appeal Board find that Mr. Phoshera had suffered any damages, whether contractual or delictual, liability could not lie with KPC.

[34] Besides, they contend, their failure towards Mr. Phoshera was not that they failed to inform him of the termination of the policy contract. Their failure to inform was in relation merely to the change of underwriter where the terms and conditions of the policy remained the same. The policy therefore remained intact. For that reason too, this appeal must be dismissed.

THE POINTS *IN LIMINE*

[35] This appeal is filled with procedural anomalies. First, there is the question of condonation for the late filing of the application for leave to appeal which had been granted by the Ombuds, the late joinder of Auto & General subsequent to the Ombud's determination, the non-joinder of Compass as respondent and what now appears to be the non-filing of a cross-appeal by all respondents in respect of the condonation which they argue had been granted unprocedurally. While the first two issues have been raised by all the respondents as points *in limine*, the latter was briefly mentioned by KPC in their oral submissions before the Panel.

We address these issues in turn as preliminary issues.

THE CONDONATION AND CROSS-APPEAL

[36] Mr. Phoshera understandably had not raised the condonation question as an issue in his appeal, in view of the fact that the Ombud had decided the question in his favour. For him the question was indeed not an issue. before this Panel. The Ombud had granted it and his appeal is now being heard. It was therefore incumbent upon the respondents who had opposed the late filing of the notice of appeal before the Ombud and in their interest to ensure that the question is properly raised and addressed here.

Indeed all the respondents raised the condonation question as an issue, addressing it fully in their respective arguments.

[37] In essence they argued that the Ombud is a creature of statute and all the powers and authority of the office derive from the relevant legislation. With regard to the power and authority to grant condonation for the late filing of an application for leave to appeal, the Ombud therefore has no discretion to exercise. Thus, if an applicant for leave to appeal is non-compliant with the statutory time-limits it must fail. For that reason, the condonation granted by the Ombud is a nullity.

[38] An application for leave to appeal the Ombud's determination must be submitted within 30 days of becoming aware of the notice of the determination [6]In this matter, the Ombud had made a determination on 11 May, 2016. Mr. Phoshera applied for leave to appeal that determination on or about 29 August, 2016 which leave was granted on 6 December, 2016. The application was therefore out of time for more than three months.

[39] All the written submissions in response to Mr. Phoshera's appeal raised, addressed and strongly opposed and argued against the issue of his non-compliance with the statutory time limits and the Ombud's unlawful exercise of a discretion, granting leave outside of the strict statutory requirements when she did not have the necessary statutory discretion. However, although all respondents opposed the Ombud's exercise of discretion to grant leave and in fact grant the leave despite the lateness of the notice, none of them filed an application for leave to appeal the Ombud's action and decision.

[40] What compounds the issue is that Mr. Phoshera, as already indicated, plainly submitted that for him the condonation question is no issue. He has been granted condonation by the Ombud, he contended. Therefore, as far as it concerns him, he is properly before the Appeal Board. He therefore did not address the condonation issue at all.

[41] Indeed, challenging the Ombud's condonation for the first time before the Appeal Board as an argument to be considered by the Appeal Board outside of a formal cross-appeal which complies with the relevant statutory requirements amounts to approaching the Appeal Board directly asking it to consider without complying with the necessary statutory requirements of an application for leave to appeal and or in circumstances where the FAIS Act⁶ makes no provision therefore at all. For that reason alone, any argument against the condonation granted by the Ombud cannot be entertained by this Appeal Board and must be dismissed.

On the assumption that Mr. Phoshera's appeal is properly before this Board he may not, in our view be denied access to have his case heard simply because the respondents have been remiss, failing to cross-appeal by filing for leave to appeal against the condonation

⁶ Act 37 of 2002.

granted by the Ombud. For the above reasons, Mr. Phoshera's appeal must be entertained.

THE NON- JOINDER OF COMPASS

[43] Although Compass was Mr. Phoshera's original insurer and MUA the underwriters, in the context of Mr. Phoshera's claim that he gave no consent to what he terms the cession of the policy by Compass to Auto & General without his consent thereby causing him financial loss, he still failed to join Compass in these proceedings.

[44] Mr. Phoshera gives no indication why he makes no claim against Compass in these proceedings. Although it would have been most convenient for all parties and for him in particular if Compass as his original insurer had been joined. That he had failed to do so by no means necessarily renders the claims he might have against the rest of the respondents ineffective should this Appeal Panel uphold the appeal. The matter will therefore proceed with the current respondents only.

VALIDITY OF THE POLICY CONTRACTS

[45] It is necessary to repeat here, the essence of Mr. Phoshera's contentions. Because the original policy contract with Compass was ceded or transferred without his consent, he argues, the cession was rendered void and therefore invalid. He argues further that the Ombud erred when she proceeded to adjudicate the case, invoking the clauses of the very invalid contract. He also contends that the invalidity of the cession left him without a

cover against all risk, causing him the loss he now claims from the respondents, jointly and severally.

[46] Although in terms of common practice in the insurance industry, as respondents submitted, the unilateral termination of binder agreements are permitted under *Rule 7.3 of the Policy Protection Rules ("PPR")*, promulgated in terms of the *Short Term Insurance Act, Act 53 of 1998 ("the STI Act")*. That unilateral termination could indeed not automatically have resulted into the new MUA/Auto & General binder agreement and thus the operation of a policy contract between Mr. Phoshera and Auto & General without his knowledge. It is also for that reason that in terms of Rule 7.3(b)(ii) of the PPR Mr. Phoshera was entitled to be provided with proper notice of the change of underwriter.

It was also commonly understood among the respondents that giving due notice was important so that the insured's interests could be properly served.

[47] Thus what Mr. Phoshera termed the cession of the policy contract between Compass and himself was therefore actually the termination of that policy contract together with the subsequent binder agreement between him, Compass and MUA. And in compliance with Rule 7.3 of the PPR a new policy contract between Mr. Phoshera and Auto & General, together with a new binder agreement between himself, Auto & General and MUA had to be entered into except that the latter set of agreements were entered into without his consent and or knowledge, notwithstanding that consent is a basic requirement of any contract⁷, including any insurance policy contract. As is common cause among the parties, although KPC was Mr. Phoshera's broker and therefore his agent, they failed to inform him of the termination and creation of these policy contracts

⁷ See mini dissertation by Mbhele T.V.(2015) on "The South African Law of Contract" as Influenced by the National Credit Act of 2005: an Evaluation" : Harvard University, (USA).

and the related binder agreements respectively in terms of the legislatively required *Notice of Change of Underwriter*.⁸

[48] The question that arises however is whether the termination of the original policy contract between Mr. Phoshera and Compass, the binder agreement between him, Compass and MUA and the creation of the new policy contract between him and Auto & General together with the binder agreement between him, Auto & General and MUA were rendered invalid having been concluded without his consent.

[49] In terms of the approach we take in this matter reflected in paragraph [47] above, the original policy contract between Compass and Mr. Phoshera was entered into with his consent. That policy contract was therefore valid. The subsequent Compass/MUA binder agreement was therefore also valid.

[50] In terms of *Rule 7.3(b)(ii)* of the PPR the termination and the creation of these binder agreements required proper notice of the change of underwriter so that Mr. Phoshera would be aware of the identity of the other contractual parties. And that is a critical term of any policy contract. Indeed, as the Ombud in her determination opined, the purpose and importance of the notice to Mr. Phoshera was,

"...not simply [to] notify the policy holder of the change of insurer as it were but provide the policy holder with relevant [and] sufficient details to enable him/her to exercise his/her right either to accept or refuse the proposed change of the insurer, and not to simply confront the appellant with a fait accompli as it were."

⁸ In terms of Rule 7.3 of the PPR.

[54] That indeed suggests more than just the need for knowledge of the change of insurer and or underwriter. *Bhekukwenza Hlela*⁹ strengthens the notion that when a new binder agreement is entered into it is critical that the insured be appropriately notified so as to grant her/him the opportunity to exercise the choice to stay, alter and or opt out of the policy contract.

Indeed, that right to choose in the context of the conclusion of a policy contract amounts to consent in line with *Section 106 (4) of the National Credit Insurance Act of 2005* and *Section 48A of the STI Act* read with the General Code of the Financial Services Providers.¹⁰

[55] In terms of the policy agreement with Compass,

"MUA is the agent and representative of Compass, appointed to communicate and deal with brokers and policyholders and will act as contact point for the submission of your claims or for any changes of policy details, confirmation of a policy or claim information and in any other related matters. "(Own emphasis).

The policy contract further states,

"...the broker is the person acting on your behalf to administer and maintain the policies, communicate and be the contact point between MUA and you, for the submission of your claims or for any changes to the policy details, confirmation of a policy or claim information and in other related matters." (Own emphasis).

⁹ SCA Case number 515/2013.

¹⁰ Promulgated in terms of Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS ACT).

[56] In Mr. Phoshera's policy contract MUA as representative of Compass and KPC as broker and his agent therefore had more than one role, depending on the function performed at a particular point and in a particular set of circumstances. MUA's role as agent and representative of the insurer may be only to communicate with brokers and policy holders. In other circumstances it could be to act as the contact point in relation to the submission of claims or in relation to any changes to the policy, among others. Therefore with regard to the new binder agreement which would bring about changes in the policy details, MUA's role and function were indeed confined to acting as the contact point between him and Compass when introducing Auto & General as a new party in a new binder agreement. Nowhere is the authority to make decisions assigned to MUA.

[57] Similarly, KPC's role as Mr. Phoshera's broker is in the terms of the policy contract, to be the contact point between him and MUA in relation to any changes to be made to the policy details. Here too, nowhere is the decision to make those changes assigned to KPC.

[58] In our view, the practice in the industry which seems to derive from an interpretation of Rule 7.3 of the PPR, permitting for unilateral decision-making with regard to the terms, including changes made regarding the parties to this policy contract without as much as informing the Mr. Phoshera, cannot stand.¹¹ As already mentioned, it is out of sync with other applicable legislation. It is particularly untenable in a legal dispensation such as ours where a supreme constitution in its Bill of Rights and Responsibilities guarantees and protects fundamental human rights and freedoms which include the right to freedom of association¹², the right of access to information¹³ and the right to be treated with human dignity.¹⁴

¹¹ See the National Credit Act and Bhekukwenza.

¹² Section 18 of the Constitution of 1996.

[59] In this matter there is no allegation of a breach of the terminated policy contract as a basis for the unilateral termination of the related binder agreement. There was no basis provided for the termination of the binder agreement at all except that a unilateral termination was common practice in the insurance industry. In our view of this matter, there was therefore an obligation on Compass and MUA to provide Mr. Phoshera with the information and the opportunity to make the choice of Auto & General as the new underwriter. Failure in that regard renders the insurance policy on which is based the subsequent Compass/Auto & General binder agreement together with the related binder agreement invalid and of no force and effect.

To say Mr. Phoshera expressed no objection when earlier he had claimed against the policy contract where by then the policy had already been underwritten by Auto & General, is not sufficient. The factual circumstances of that non-objection are not known. In our view that non-objection cannot in the circumstances of the present matter be determined.

[60] The question that arises is whether the invalidity of the MUA / Auto & General binder agreement indeed consequently left Mr. Phoshera exposed and without a policy cover to pay for the damages he had incurred on his motor vehicle as a result of the accident, making that the basis for holding the respondents contractually and delictually liable for his loss, jointly and severally.

¹³ Section 11 of the Constitution.

¹⁴ Section 11 of the Constitution.

WHETHER THE APPLICANT WAS LEFT WITHOUT COVER

[61] Before approaching Compass for cover, according to Mr. Phoshera he had done research into the reputation of insurers and underwriting manager and was satisfied with the service history of both Compass and MUA. Thus when he took out the insurance policy contract with Compass, with KPC as his broker and MUA as underwriter, he had no objection to any of the parties and or questioned any of its terms and conditions because the policy contract was concluded with his full knowledge and consent. He was therefore, for the purposes of this case fully part of the decision regarding the choice of insurer and underwriter. As already indicated, it follows that the MUA/Compass binder agreement remains valid.

As also indicated, the unilateral termination of that policy contract which took place without his consent and unilaterally terminated the MUA/Compass binder agreement was invalid for lack of his consent. Similarly, the subsequent MUA/Auto & General binder agreement which followed and was concluded without Mr. Phoshera's consent was also invalid and of no force and effect.

[62] That leaves the policy contract between Mr. Phoshera and Compass concluded with his full consent and the subsequent MUA/Compass binder agreement intact. Therefore, the terms and conditions of the policy contract between Compass and Mr. Phoshera are therefore also still fully in force and therefore applicable.

[63] However, a critical term of that contract, is the Specific Condition 3 contained in Section 6 of the policy contract ("Condition 3") which states,

"If the insured vehicle or any part of it does not comply with or in any way meet any of the required conditions for roadworthiness as set out in the National Road Traffic Act (or any law that replaces it, or any provincial or local laws which apply to your motor vehicle), then all benefits (payouts) from any claim you may make under your policy will fall away and the insurer will have no legal liability to you or any other party in respect of any claim under the motor section of your policy."

It was on the basis of this clause that Mr. Phoshera's claim under the new policy contract, which was carried over from the initial Compass policy contract and in terms of the MUA/Auto & General binder agreement was repudiated. The reason for that rejection was that the tyres of his motor vehicle at the time of the accident had been worn out and had therefore not met the necessary requirements for roadworthiness, where the roadworthiness of the tyres were material to the cause of the loss. That indeed was common cause, a fact which Mr. Phoshera does not dispute.

[64] Mr. Phosheras argued that the Ombud having found that the MUA/Auto & General binder agreement which had been concluded without his knowledge and consent was unlawful however continued to adjudicate the matter on the same unlawful terms and conditions to determine that the repudiation of his claim was justified. That, in our view is not correct.

He also contends that when the lack of his consent invalidated what he termed the "ceded" policy, he was left without cover against all risk. Besides, he simultaneously contends, the repudiation of his claim which was unlawful, makes Auto & General liable for damages contractually and delictually.

[65] This Appeal Panel has concluded that the original policy contract on which was based the MUA/Compass binder agreement, concluded with Mr. Phoshera's full consent was unlawfully terminated without his consent. That unlawful termination therefore leaves the legally compliant policy contract intact. It therefore remains valid.

[66] Having so decided, the policy therefore continues to cover Mr. Phoshera against all risk subject to its terms and conditions. Mr. Phoshera is therefore not left without cover of all risk. As already indicated however, those terms and conditions, including Condition 3 which are part of the valid and applicable policy contract, continue to apply. Thus, Mr. Phoshera is not left without cover against the risks he has been insured against. He may proceed to claim against the initial policy contract with Compass.

The remaining question however, is whether his claim against Compass can stand muster against Condition 3 of his original policy contract.

[67] Mr. Phoshera dismissed as mere speculation the contention that because the terms and conditions of the original policy contract remained identical to those in the new policy on which was based the MUA/Auto & General binder agreement, even if his claim would have been considered by Compass in terms of the original policy contract it would be subjected to the same Condition 3 and the outcome would be no different.

[68] However, this Panel gives consideration to the fact that Mr. Phoshera's claim under the new policy contract was considered by the same administrator who would also consider it under the original policy. Any contention that the administrator would apply Condition 3 differently in the context of the identical set of circumstances of this case is so unlikely that it would not be justifiable to require that this matter be postponed for Compass to be joined in these proceedings so as to give them the opportunity to be heard.

Doing so would unduly delay access to justice for the respondents and it would not be just and equitable.

[69] That should however not deter Mr. Phoshera from pursuing a claim against Compass outside of the proceedings before this Appeal Panel should he be so inclined and make that choice. However in the context of Condition 3 his claim is unlikely to succeed in circumstances where he has already admitted that he was not compliant with the terms of Condition 3. An issue for those proceedings might be to determine how Mr. Phoshera's premiums which had been passed on to Auto & General might be dealt with. Before this Appeal Panel however, Mr. Phoshera has no valid claim against any of the current respondents.

For the above reasons, his appeal against the decision of the Ombud is therefore dismissed.

COSTS

[70] Although his appeal is dismissed, Mr. Phoshera was well within his rights to appeal against subjecting him to an insurance policy contract without his consent and knowledge. That part of the judgment is decided in his favour. Although he does not succeed in his claim against the respondents, failed to timeously join Auto & General and failed to join Compass at all in these proceedings, overall, this Appeal Panel is inclined not to make a cost order in this matter.

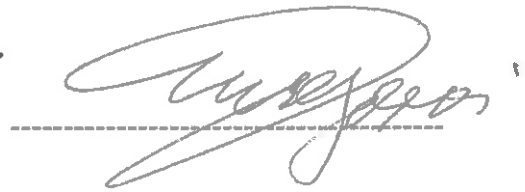
CONCLUSION

[71] The appeal against the decision of the Ombud is dismissed for the reasons articulated in this judgment and we make no order as to costs.

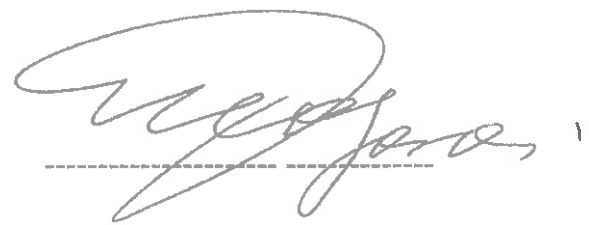
ORDER

1. The appeal is dismissed.
2. There is no order as to costs.

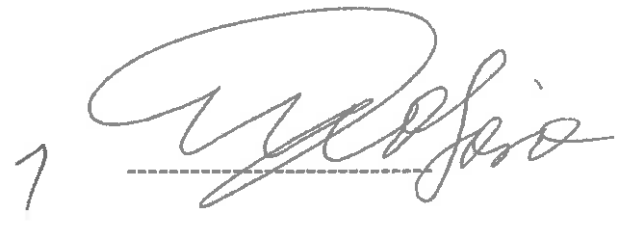
Signed at Pretoria on this 28th day of August, 2017.

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Justice Y Mokgoro: Chairperson

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1 **Mr. L Makhubela: Member**

A handwritten signature in black ink, appearing to read 'J Pema', written over a horizontal dashed line.

1 **Mr. J Pema: Member**