IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA **CASE NO: FOC 2372/06-07/EC (3)**

In the matter between:

PALMERIOS HOSPITALITY C C Complainant

and

WILLIE DU PLESSIS FINANCIAL SERVICES Respondent

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

A. PARTIES

[1] The Complainant is Palmerios Hospitality CC, a close corporation duly incorporated in terms of South African laws with its principal place of business in 109 Epson Road, Nahoon, East London, Eastern Cape. Complainant is represented by its authorised representative, Bruce Maclean ('Maclean').

[2] The Respondent is Willie du Plessis Financial Services, an authorised financial services provider of 2 Ridge Road, Beacon Bay, East London, Eastern Cape Province. The key individual and proprietor of the Respondent is Willem Jacobus du Plessis.

B. INTRODUCTION

[3] Complainant through Mclean lodged a complaint with this office on 10 October 2006 after Santam, the insurers on risk for Complainant's vehicle, repudiated an indemnity claim in respect of the vehicle. The basis for the repudiation was that Complainant had failed to comply with the security requirements prescribed by Santam. After unsuccessfully challenging Santam's decision through the Ombudsman for Short Term Insurance, Complainant lodged a complaint with this Office. Complainant's sole contention is that it was never informed of the security requirements. Complainant therefore requests this Office to investigate the conduct of its broker, the Respondent.

C. BACKGROUND FACTS

[4] During or about July 2004, Complainant sought the assistance of Respondent to obtain insurance cover for its short term needs. Quotes were requested from Mutual & Federal and Santam insurers. The Santam

quote was accepted. Several vehicles were placed on cover. Cover commenced on 13 October 2004. Only one of the vehicles covered by the policy is in issue. That vehicle is a 1992 Ford Courier ('vehicle'). The vehicle and its canopy is valued at R46 000.00.

[5] On 8 June 2006, whilst Mclean was playing tennis with his friends at a private residence, the vehicle was stolen. He only realised this as he walked out of the residence with two of his friends at about 22h30. The theft was reported to the police the following day and the insurance claim was lodged a few days later. On 14 August 2006, Complainant received notification of Santam's decision to repudiate the claim on the grounds that the security requirement to have a VESA approved immobiliser on the vehicle had not been complied with. As it turned out, the immobiliser that Complainant's vehicle had was an outdated model, which did not satisfy Santam's requirements.

D. COMPLAINANT'S CASE

[6] In its letter of complaint dated 16 October 2006, Complainant states that the first time it ever heard of the VESA requirement was when Santam repudiated its claim. Prior to that, Respondent had never mentioned to it that the immobiliser needed to be VESA approved. Complainant, in support of its case provided this office with copies of correspondence between it and the Respondent, pointing out that none of the

correspondence made mention of the requirement. Complainant's letter dated 16 October 2006, contains the following pertinent comments regarding what it believes the Respondent should have done to ensure compliance with Santam's security requirements:-

> 'The correct procedure is to have typed me a letter attached to my policy document as those received by him and attached, (sic) highlighted it and followed up regularily (sic) until this was done. If i (sic) had failed to do it a follow up letter saying, Mr Mclean, we will be withdrawing cover if you have not complied by such a date and forwarded us with the certificate.'

Complainant states that had this matter been brought to its attention timeously it would have attended to it.

The relief sought

[7] Complainant seeks from Respondent payment of the amount by which Santam would have indemnified it, being R46 000.

E. RESPONDENT'S CASE

[8] On 22nd January 2007, the complaint was forwarded to Respondent requiring him to address this Office in the light of the allegations made by Complainant. His response was received on 6 February 2007. In his response, Respondent maintains that he had advised Complainant of the

VESA requirement at quote stage which was around July 2004. Not only did he advise it at that stage, he stated that he had in subsequent meetings with Mclean pointed out that the requirement of a VESA approved immobiliser was still outstanding. Respondent refers to a meeting held on 18 November 2004 at Mclean's friend's place where he pointed out that Complainant would have no cover for the vehicle unless he had a VESA approved immobiliser installed in the vehicle. Nothing in support of this claim was furnished to this office. Respondent however furnished this Office with the following documents from Complainant's file:-

8.1 A single page from the policy schedule indicating notes made during a consultation with Maclean, annexed hereto marked BM1. The policy schedule indicates the period of insurance as 1/12/2005 to 31/12/2005. The following are some of the handwritten notes that appear on this document:-

'No Burglar Bars in office!!; Does not want Bars! Theft = excluded'

'NB Needs Security Protection – VESA!! Still to be fitted!! No Theft Cover!'

Another comment appearing on the page relates to food liability for R1000, and a note to add a laptop valued at about R10 000. The words, 'make model and serial number' appear. The make is described as 'Dell'. There is no information indicating the model or serial number. Additional comments appear at the bottom of the page.

The words:-

> 'Computer in office: Value: R6000 incl CD writer,
>
> Make: Auwa – Built up.
>
> Bar Code (indecipherable) No: F0073094'

also appear on the document.

There are further notes below this, parts of which are indecipherable whilst others refer to 'windows and office' and a figure of 'R5000.00'

These notes, according to Respondent were made during a visit to Complainant's premises as part of the annual routine to review its short term insurance portfolio.

8.2 In addition, several file notes have been submitted to this Office. The file notes date back from September 2004 to January 2007, setting out dates of contact with Mclean and a brief description of what took place. A note is made on 13 October 2004 to the following effect:-

> 'Spoke to client - He will send the info to me, Including when he's fitting the VESA and Proof Thereof.'

Another note dated 8 June 2005 states:-

> 'Spoke to client – Reminded him of Vesa for veh. .....+B/Bars = No theft!!

There appears a further file note dated 8 December 2005 which says:-

> 'Reminded Bruce on VESA, Burglar Bars (Not worried about B/Bars)'

In all the file notes number five pages and contain various annotations, including the above and other matters relating to claims made by Complainant against its insurer and the Respondent's attendance thereon.

[9] Respondent further stated in his reply that a meeting had been scheduled with Mclean for the 31 of May 2006. In preparation for the meeting, a letter was sent to Mclean earlier on the same day. The content of the letter reads:-

> '**Santam Policy No: 63110096655**
>
> With reference to our meeting this afternoon, kindly have the following information ready for us so that we can add these items to your insurance.
>
> Makes, Models and serial no's of all new programmes you have acquired. As well as: the Make, Model and serial number of the laptop.
> We will need all details of any other items you may have purchased that need to be insured which we may be unaware of.

Please note: Santam requires your vehicle; the Ford Courier to have a VESA approved immobiliser.

We also recommend you add the following sections onto your insurance policy:

Reinstatement of Data: Premium: R16.67
Increased cost of working: Premium: R16.67

A reminder: It is required under your policy that you have burglar bars and security gates fitted.

Thanking you in advance,

Lolita
Short Term Insurance'

[10] In response to this letter of 31 May 2006 sent by facsimile transmission to Complainant prior to the meeting, Complainant remarked that the facsimile was sent at night. He further maintains that he only received it some days later, after the theft. He also adds that he does not go to that office on a daily basis as it is a guest house managed by an elderly lady on his behalf. It is common cause that the meeting of the 31 May 2006 did not take place as Mclean had decided to go and watch his son playing in a rugby match. A further letter was sent by facsimile transmission by Respondent to Complainant for Mclean's attention, on the same day of 31 May 2006.

The letter sates:-

> 'We arrived at Palmerios Hospitality for our appointment with you today 31/5/2006 and you were unfortunately not there, according your telephonic conversation with Willie, you were at rugby.
>
> We will contact you on Monday 05/06/2006 to reschedule a meeting.
> Kindly have the following information ready:
> Makes, Models, and serial no's of all new programmes you have acquired, as well as the make, model and serial no of the laptop.
>
> Thank you
>
> Lolita Holmes
> Short Term Insurance'

[11] The vehicle was stolen on 8 June 2006.

F. INVESTIGATION

[12] During the course of our investigation, Complainant was furnished with a copy of Respondent's reply and invited to comment. In his e-mail sent to this office on 13 January 2008, Mclean points out that Respondent failed Complainant in that he did not apply the correct protocol. Relevant aspects of the letter are set out hereunder:-

‘I have read through the brokers (sic) letters and attachments to you. It is quite understandable that he wishes to defend his position as a situation such as this reflects on the competancy (sic) of his office.... I have sent all relevant policy documents... regarding this matter and it is herein that all the facts lie. Reading through Mr Du Plessis letters and files (sic) notes to you I (sic) find that much of the information supplied to you is of no real relevance. File notes can be quite easily compiled after the fact which i (sic) suspect may have been the case. According to all his file notes and the times he apparently verbally requested i (sic) fit a vesa immobiliser. (sic) I adamantly reject this and unfortunately cannot accept this as procedurally correct. From the outset of cover a letter should have been directed to me with reference to the immobiliser. This vehicle had an immobiliser and i (sic) did not know it was not a Vesa immobiliser. How did he know it was not one.....

Why would he have all these notes in his file about immobilisers but never once communicate any of this to me in writing on any of his sent documents and correspondence.... Surely somthing (sic) as importatnt (sic) as this should have been attended to with immediate effect from inception. It would have been my right to respond and agree to have them checked.... and rated or refitted or alternatively waive theft cover. It would have been my decision, the same as his reference to burgalar (sic) bars in the Guest house. I waived this as i (sic) did not want the Guest house to be made into a POW camp. I had management and staff on the premises so i (sic) did not deem it necessary. The back up fax referred to which was sent to the office (PM) (sic) on the day the meeting was supposed to have taken place did come through. This was the first ever document or mention of a Vesa immobiliser. As I was not always at the guest house i (sic) was notified of the fax. I am not entirely sure of the date but my Manageress mentioned to me and i (sic) new (sic) it was regarding the meeting which was to have taken place which did not. A meeting was to be re–

> scheduled and these matters were on the agenda so it was of no immediate concern as they were to be discussed at a new date. The vehicle was stolen 8 days later before the meeting took place with a weekend inbetween (sic).
> (quoted as is, with errors and omissions).

Disputed facts

[13] The single material disputed fact here is whether Respondent ever informed Complainant about the requirement to have a VESA approved immobiliser. Respondent advises that he did advise Complainant of this requirement; whilst Complainant maintains that he did not. In my view, it is not necessary to hold a hearing on this single disputed fact. The probabilities and the undisputed facts are sufficient for me to reach a decision on this aspect on the basis of the documentation exchanged between the relevant parties.

G. DETERMINATION AND REASONS

[14] The complaint was lodged to this Office on the basis of a violation of the provisions of the Financial Advisory and Intermediary Services Act 37 of 2002, ('the FAIS Act'). It is apposite to mention that the FAIS Act became fully operational on 30 September 2004. It is also appropriate to mention that a complaint is defined in the FAIS Act as:-

'a specific complaint relating to a financial service rendered by a financial services provider or representative to the Complainant **on or after the date of commencement of this Act.....**.' (own emphasis).

[15] From the facts of this case, it is common cause that the financial service was rendered during or about July 2004. This is a period before the commencement of the FAIS Act. It is however common cause that financial services were also rendered post 30 September 2004. In fact, the policy commenced on 3rd November 2004, three months after the initial meeting. This means, notwithstanding the Pre-FAIS status of the initial meetings between Complainant and Respondent, financial services were still rendered after the coming into operation of the FAIS Act. Therefore, the conduct of the Respondent must comply with provisions of the FAIS Act, in particular the General Code of Conduct for Authorised Financial Services Providers and their Representatives, ('the General Code').

[16] The issues are:-

16.1 Was there breach of the statutory duties prescribed in the FAIS Act on the part of the Respondent whilst rendering financial services to the Complainant? Specifically, did Respondent advise Complainant of the requirement to have a VESA approved immobiliser?

16.2 If it is found that there was a breach, was that breach the cause of Complainant's loss?

a) Was there a breach of the statutory duties placed upon Respondent by the FAIS Act when rendering financial services?

[17] According to Complainant, Respondent never mentioned the requirement of a VESA approved immobiliser to it. The only time that Complainant got to know about this requirement was when Santam rejected its claim. Respondent on the other hand denies that he never mentioned this to Complainant. In his letter of the 6th February 2007, he states that he had disclosed this to Complainant at quote state and in subsequent meetings and or communications with Complainant. In amplification of his case, Respondent furnished this Office with a copy of a page of Complainant's insurance schedule. On the page comments are scribbled relating to burglar bars, a note about the VESA requirement and information sought about computer serial numbers, make and model. The notes on the policy schedule according to Respondent were contemporaneous with a meeting between Mclean and Respondent. At this meeting Mclean had his own copy of the policy schedule, in order to follow the discussion. This was not denied by Complainant in its response to this Office.

[18] In addition to that piece of evidence, file notes have been furnished indicating various communications with Mclean in relation to a number of other issues revolving around Complainant's insurance. Yet another piece of evidence is a copy of the letter of 31 May 2006, referred to in paragraph 9 of this determination, which was faxed through to Complainant in preparation for a meeting arranged between it and Respondent.

Complainant's response in its letter of October 2006 to the fax reads:-

> 'The fax was sent through at night and i (sic) also only received this some days later, also after the theft. I do not go into this office on a daily basis as it is a guesthouse which is managed by an elderly lady for me. Nevertheless, this was the first time this would have been brought to my attention.'

Interestingly, in its letter dated 13 January 2008, referred to in paragraph12 of this determination, Complainant however confirms that the manageress had mentioned the letter to him.

He concluded that it was:-

> '…..regarding the meeting which was to have taken place. A meeting was to be re- scheduled and these matters were on the agenda so it was of no immediate concern as they were to be discussed at a new date.'

[19] Before I deal further with the merits of both versions, I consider it necessary to deal with the Complainant's understanding of the nature of the duty owed to it by its provider (in this case, the Respondent) whilst rendering financial services. The General Code carries full details of the duties of a provider when rendering financial services to a client.

[20] According to Complainant, Respondent should have:-

> '**typed me a letter..... and..... highlighted it and followed up regularily (sic) until this was done. If I had failed to do it a follow up letter saying, Mr Mclean, we will be withdrawing cover if you have not complied by such and such a date....'** (own emphasis)

Whilst there is no question about the legal duty to make disclosures of material terms to one's client when rendering financial services, the expectation that the Respondent should have followed up until Complainant had complied with the security requirements is something I cannot agree with. By no stretch of the imagination can Complainant's expectations be realistic. The fact is, a letter had been typed and sent to Mclean per facsimile. This is common cause. He does not deny receiving the facsimile, nor does he claim that this is not the fax number from where he had agreed to receive correspondence in relation to Complainant's short term matters from Respondent. He merely points out that the fax was sent at night and that he does not go to that office on a daily basis. In

his latest reply to this office dated 13 January 2008 he concedes that the manageress mentioned the letter to him but he concluded that it was about the meeting that was to be re - scheduled.

[21] The notion that Respondent should have followed up regularly until Complainant had complied is not founded anywhere in law. In fact, in *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd and another* [2003] 4 All SA 317 (SCA), where the essence of the insured's case was that the brokers, as experts in the field of diamond insurance would have known of the practice of doing 'off– the- book' transactions and should therefore have drawn the insured's attention to the key clause in the insurance contract. It was further contended that the brokers should have alerted the insured to the fact that it would be in breach of a promissory warranty and hence lose indemnity should it not keep full records of all transactions. The decision turned on the legal duty of an expert broker, it being common cause that the defendant was an expert in the field of diamond insurance. Lewis JA reached the following conclusion on behalf of a unanimous court:-

> 'The second difficulty with the appellant's argument relates to a broker's duty in principle. Even if the representatives of the MIB Group had had knowledge of the practice in the diamond trade, was it then incumbent upon them to ask Lappeman whether the appellant did off-the-book transactions? I consider not. The authorities on which the appellant relies, and the evidence of the experts on insurance broking, suggest that once the insured is apprised of the duty to keep

> full records of all transactions, there is no need for the broker to go further and ask whether the insured does in fact keep records. [Page 327 par.43]
>
> A broker does not, and cannot be expected to control the business of the insured. Even a specialist broker's duty does not encompass the duty to ensure that the insured complies with his obligations under the policy. He is not the insured's keeper. This duty, as specialist broker, is discharged when he has done everything reasonably necessary to draw the attention of the insured to obligations imposed by the policy. It is the insured's responsibility to ensure compliance'. [Page 327 par. 44]
>
> Once it is accepted – as it is – that the MIB Group representatives did advise Lappeman of his obligations there cannot be room for arguing that Lappeman, an astute business, needed to be asked whether the appellant complied with obligation to keep full records. It was the appellant's responsibility alone to ensure compliance. I consider therefore that MIB Group did not breach any duty to the appellant. For that reason alone this appeal must fail.…'[Page 327 par. 45]

Applying the principles to the facts of this case, I can say that it was not expected of Respondent to be 'the insured's keeper'. I find on probabilities and on the undisputed evidence that the Respondent had advised Complainant of the requirement to install a VESA approved immobiliser in the vehicle. Once Respondent had advised Complainant of this, he owed no further obligation to ensure, as Complainant seems to believe, that he should have done so. I am of the view that Respondent had done everything reasonably necessary to draw Complainant's attention to the

security requirements that needed to be installed on the vehicle and it was Complainant's obligation to ensure that he adhered to it.

[22] In so far as the Mclean's suspicion that the file notes furnished to this office could have been compiled after the fact, this is highly improbable. The file notes do not only refer to the VESA immobiliser. They refer to a whole host of other things including *inter alia* requests for serial numbers of computers, notes and reminders about burglar bars to be installed in and around the building where the bed and breakfast business is located, prices paid for the laptop and computer and amounts relating to food liability. The information relating to the values of the laptop and computer would no doubt have been obtained from Complainant. Complainant does not put these in dispute. I therefore accept that he has no problem with the file notes in any other respect except in so far as they refer to the VESA requirement. Some notes relate to claims being processed and settled with the figures being set out. Assuming that the Respondent had indeed compiled the file notes as an afterthought, the file notes are in different hand writing. This indicates that anyone who would have dealt with Complainant in relation to its insurance would make a note in the file. It is interesting to note that nothing else in these file notes is disputed. The dispute seems to be revolving only around any reference to the VESA requirement. As is apparent from the notes themselves, no lines are left blank. Every attempt is made to fill in each and every line. Therefore, if

indeed this was an afterthought chances then are that all reference to the VESA requirement should have been squeezed on top of other sentences. This is not the case. The notes appear to be making reference to the events as they occurred.

[23] A further reason as to why Complainant's version is doubted is that in the two letters dealt with in this determination from Mclean to this office, Complainant has made inconsistent statements. This raises questions on the credibility of Complainant's version. Firstly, in the letter which this office received in October 2006, Mclean claims to have received the letter days after the theft. In the letter of the 13 January 2008, he makes no reference to receiving the letter late. Rather, he makes the point that the manageress mentioned the letter to him. He however concludes that it was about the meeting that did not take place. This means he did not take the trouble to read the letter. He was content with assuming that the letter was about the meeting and that nothing was of immediate concern as another meeting was to be scheduled. This, in my view was a fatal error on the part of Complainant. On a balance of probabilities it can be accepted that Respondent did disclose the requirement of the VESA approved immobiliser to Complainant. It was up to Complainant to ensure compliance with the provisions of the policy and not Respondent. In that event, Complainant has not succeeded in its claim that Respondent

violated the provisions of the FAIS Act whilst rendering financial services to it.

Therefore the complaint falls to be dismissed.

Accordingly, I make the following order:

(1) The complaint is hereby dismissed

(2) Respondent is hereby ordered to pay the case fee of R1000 to this office.

DATED AT PRETORIA ON THIS THE 25th DAY OF FEBRUARY 2008

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CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS