

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 00458-12/13/KZN (3)

In the matter between:

CONSTRUCTION MEN AT WORK CC

Complainant

and

KRDS INSURANCE BROKERS CC t/a

ENSURE INSURANCE BROKERS

1st Respondent

DEVENDARAN GOVENDER

2nd Respondent

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

A. THE PARTIES

[1] Complainant is Construction Men at Work CC, a close corporation duly incorporated in terms of South African laws, with its registered address set out as 46 Jabu Ndlovu Street, Pietermaritzburg, KwaZulu Natal Province. Complainant is represented by its authorised representative, Andrew Konigkramer.

- [2] First Respondent is KRDS Insurance Brokers CC t/a Ensure Insurance Brokers, a close corporation duly incorporated in terms of South African laws, with its registered address situated at 398 Burger Street, Pietermaritzburg, KwaZulu Natal Province. First respondent is an authorised financial services provider with license number 14432.
- [3] Second Respondent is Devendaran Govender, an adult male and an authorised representative of first respondent. Second respondent is the Key Individual of first respondent. At all times material hereto, first respondent was represented by one Pinky Govender in rendering the financial service to complainant. Reference to Pinky, respondent or respondents must be read to mean respondents.

B. BACKGROUND

- [4] Complainant is in the business of hiring out bobcats and other construction related equipment and vehicles. According to the complainant, during November 2010, whilst parked behind locked gates in Scottsville, Pietermaritzburg, one of its bobcats¹ was stolen.
- [5] The loss was reported to the respondents who advised that the necessary claim forms be completed.

¹ A bobcat is construction equipment.

[6] After a lengthy period the insurers rejected the claim on the grounds of non-compliance with policy terms and conditions. Complainants later decided to lodge a complaint to this Office on 5 May 2012.

C. COMPLAINT

[7] In simple terms, complainant claims that it was the broker's failure to disclose the material terms of the policy to him which actually led to his claim being rejected by the insurers. Accordingly, complainant seeks relief against the respondents.

D. RELIEF

[8] Complainant wants the respondents to indemnify him against the loss he suffered following the insurers' rejection of his claim, in the amount of R103 000.00. The basis for complainant's claim is fully set out in this determination.

E. INVESTIGATION

[9] Complainant's version is contained in his letter of 28 April 2011 and in the FAIS complaints registration form. The gravamen of complainant's complaint is that respondents in violation of the provisions of the FAIS Act and the General Code, failed to appropriately advise him.

[10] In his letter complainant states that the equipment, (the bobcat) was stolen on 5 November². On Monday 8 November 2010, the claim was reported to Pinky Govender, (Pinky) of the respondent telephonically. On 11 November 2010, complainant received the claims forms from Pinky and completed them, after which they were sent to Pinky.

[11] Complainant stresses that:

- i) the loss was reported via telephone to respondents on Monday 8 November and claim forms completed within the 10 day period’;
- ii) he had never received the original policy and was not aware of the requirement to report the claim to KVTR; and
- ii) he was never requested to fit a security device to the machine and nowhere in any of the correspondence from either the respondents or the insurers was that point ever communicated to him, until the machine was stolen.

[12] The insurers Western National Insurance Company LTD (Western), and their underwriting managers, Tradesure Marine Underwriters (Pty) Ltd, (Tradesure) made it plain that the claim would not be entertained. In their letter dated 2 February 2011 Western rejected the claim on the grounds that:-

- a) the claim was not reported timeously;

² Note: The insurers in one of their letters have the date of the loss as 6 November 2010, however, nothing turns on this.

- b) the loss was not reported to KVTR; and
- c) The security requirements as set out in the policy were not fulfilled.

[13] The complaint was referred to the respondents on 14 May 2014 allowing them the six weeks that is recommended in the Rules on Proceedings of the Office, (Rules), to resolve the complaint with the complainant. Respondents were pertinently requested, in the event they failed to resolve the complaint with their client, to deal in their response with the allegations made by the complainant.

[14] On 29 June 2012, respondents replied. Before going into detail with respondents' version, it must be mentioned that respondents appear to have been totally unaware of the process to be followed, the forms to be completed and the time frame applicable to report claims.

[15] To say respondents' response to this Office lacked substance would be an understatement. On their own version respondents clearly have no appreciation of the provisions of the General Code of Conduct for Authorised Financial Services Providers, (the Code) and could therefore not have properly advised complainant. This conclusion will be apparent from the below paragraphs. For convenience, comments are made as the response is dealt with.

- i) Respondents make reference to and attach an e-mail from Bobcat (the importers and agents of bobcat in South Africa) wherein the

agents state that neither an alarm/immobiliser could be fitted as the machine has an open cab. The e-mail however, is dated 29 March 2011 one year and two months from the date the financial service was rendered. Of importance the e-mail is a response to an enquiry that was made by complainant at a time when he was trying to get the claim accepted by the insurers.

- ii) The respondents state that the claim was notified in time. They do not provide any proof of when they reported the claim and simply note that their computers crashed; similarly, no date is provided as to when their computers crashed. The policy provisions on the other hand make it plain that claims in the event of theft or hijacking must be reported as soon as the occurrence is known, to KTVR (24 hour control centre) the insurers, as soon as possible but not later than 2 working days after the occurrence.
- iii) With regard to the security requirements, respondents argue that they were not notified of the security requirements. The policy provisions relating to security requirements refer to '**MINIMUM VEHICLE SECURITY REQUIREMENTS**'. Whilst respondents acknowledge in their response that this is a special type of vehicle, they provide no information as to the steps they took to establish whether the security requirements set out in the policy were applicable to a machine of the nature of the bobcat. They provide no information as to what disclosures they made to their client

regarding the security requirements. In short, it appears that the respondents were neither familiar nor concerned with the insurer's requirements.

- iii) With regard to the requirement to notify Kempston Vehicle Theft Recovery, KVTR, respondents' ignorance of the insurer's requirements is once again apparent as evidenced in this statement by Pinky, *'I asked John what type of claim forms have to be completed because this is a special type of vehicle, but he did not mention that in the meanwhile I should report to KVT because it is the policy requirement as per Tradesure'*.
- [16] Respondent then makes the point that they *'only received the forms three days later, thereafter, the client completed the forms **after a few days** (own emphasis) it was sent to Tradesure.....Since Tradesure has taken three days to locate the Bob Cat, then took another day to send the claim forms, it is only fair that John at Tradesure takes the responsibility...'*
- [17] Following respondent's initial response, a further letter was sent to respondents on 10 August 2012 pointing out possible violations of the Code based on their version and a recommendation that they consider an amicable resolution with their client. Respondents' reply was received on 25 August 2012 wherein they simply stated, *'We wish to draw your attention as per the Bobcat official website that a bobcat is a machine-*

“Plant Machine” and not a vehicle, therefore the requirement for vehicles do not apply and so does KVRT.’

[18] A notice in terms of section 27 (4) of the FAIS Act was issued warning respondents that the matter had been accepted for investigation and further calling upon respondents to provide any further documents in support of their version. Respondents wrote back on 28 November advising that they were consulting their attorneys and would revert.

[19] A note was sent to respondents in March 2013 advising that the Office was left with no alternative but to prepare the matter for determination, to which respondents simply responded, ‘Ok’. Nothing further was heard from respondents.

F. DETERMINATION AND REASONS

- i) Did respondent in any way violate the provisions of the FAIS Act, whilst rendering financial services to complainant?
- ii) If the answer is in the affirmative, did such violation cause complainant the damage complained of?
- iii) Quantum.

Did respondents in any way violate the provisions of the FAIS Act, whilst rendering financial services to complainant?

- [20] It is difficult to even measure respondents' conduct against the Code as doing so would literally require that this Office canvass most, if not all the provisions of the Code. Upon reading the respondents' e-mail of 29 June 2012, the only rational conclusion to be drawn is that respondents sold a financial product to complainant in violation of the provisions of the Code.
- [21] It is equally important to note that throughout the correspondence with this Office, respondents never once claimed and provided proof of compliance with the provisions of the General Code. For example, respondents:-
- i) did not claim to have advised their client about any material terms and conditions of the policy. These include amongst others, exclusions, requirements in reporting claims and excesses payable;
 - ii) did not claim to have engaged in any exercise to establish their client's needs;
 - iii) did not claim to have disclosed any costs attendant to the product;
 - iv) did not claim or provide any record in support of compliance with the provisions of the Code.
- [22] Respondents provided no defence as to why (after being sent the policy as early as February 2010) it was not forwarded to their client.

[23] Providers like respondents who show no respect for the law erode public confidence and diminish the integrity of the financial services industry. Indeed, it is hard to conceive that ten years since the FAIS Act came into being this kind of danger is still unleashed to unsuspecting members of the public.

Did respondents' violation of the Code cause complainant the damage complained of?

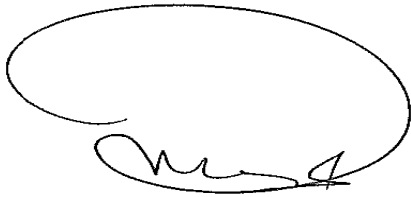
[24] The answer must be in the affirmative. As to the quantum, this Office wrote to the insurers seeking information as to how they would have computed the claim and how much they would have paid had the claim been successful. The insurers indicated they would have paid out an amount of R82 400.00.

G. ORDER

[25] In the premises, the following order is made;

1. The complaint is upheld.
2. Respondents are hereby ordered jointly and severally, the one paying, the other to be absolved, the amount of R82 400.00 to the complainant.
3. Interest on the said amount is to be calculated at the rate of 15.5% from a date seven (7) days from date of this order.

DATED AT PRETORIA ON THIS THE 20th DAY OF JUNE 2014

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by 'BAM'. The signature is enclosed within a hand-drawn oval shape.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS