

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

**Case Number: FOC4412/06-07/GP 3**

In the matter between:-

**SHAUN JANSEN VAN VUUREN**

**Complainant**

and

**ACTION PLAN MANAGEMENT CC**

**Respondent**

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**DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY  
AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')**

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**PARTIES**

[1] The Complainant is Shaun Jansen van Vuuren, an adult Civil Draughtsman of 16 Heidelberg Road, ELSPARK, GERMISTON, 1428.

[2] The Respondent is Action Plan Management CC, a close corporation with registration number 96/08805/23, of 53, 13<sup>th</sup> Avenue, EDENVALE, BEDFORDVIEW, 1610.

**The background**

- [3] The Complainant caused his off-road motorbike to be insured through respondent with Constantia Insurance Company Ltd., for amongst other perils, theft. Wheels Underwriting Managers (Wheels) were the underwriting managers.
- [4] About five weeks after inception of cover the motorbike was stolen from Complainant's locked garage. He duly claimed for the loss.
- [5] The insurer rejected the claim on the grounds that a tracking device or alarm had not been fitted on the motorbike even though it was a condition for cover.
- [6] The complaint was first lodged by complainant with the OSTI. The OSTI investigated the matter and concluded that the insurer's decision to reject the claim could not be faulted because the completed proposal form clearly excluded theft cover if the motor cycle was not fitted with either a tracking device or an alarm system. The OSTI suggested that complainant lodge a complaint with this Office against the intermediary as the latter may not have correctly advised the complainant; hence the complaint to this Office.

#### **The relief sought by Complainant**

- [7] Complainant seeks compensation for the loss of his motorbike, which was insured for R50 000.00.

#### **Investigation by this Office**

- [8] Complainant informs this Office in the complaint form that he was not correctly advised by his broker (the respondent) about what he “had to do to qualify for full insurance cover on [the] off-road motor bike.” The person he dealt with in the respondent’s office was a Mr Riaan Swanepoel (Riaan).
- [9] It is common course that Riaan faxed a proposal form to the complainant. Complainant completed it and sent it back to Riaan, who confirmed in writing on the 10<sup>th</sup> June 2006 that complainant was comprehensively covered. Complainant was aware that the form contained special conditions, amongst others that riders under the age of 28 years were excluded from cover. Theft cover for machines valued at R40, 000 or more was also excluded, unless fitted with an approved tracking or alarm system. A further condition was that there would be no theft cover for machines not kept in a locked garage overnight, unless fitted with either an alarm or tracking system. It is not in dispute that at the time of the theft the motor cycle was in a locked garage which had been broken into.
- [10] Complainant says his bike does not have a battery. Since a tracking device would require a power source, he did not think the requirement applied to him. It was only after the loss that he found out from the Wheels that there was a specific device for that purpose.
- [11] Significantly, he queried the age restriction as he was under 28 years of age at the time. He was informed by Riaan that he would nevertheless be covered. However, he did not query the requirement for a tracking or alarm system for a machine that did not have a battery or other power source.

- [12] Complainant further says that he did not know that a tracking system existed which could operate on the cycle without a battery. He was told of this by someone at Wheels after the theft occurred. It was explained to him how the device operated and he was also informed that the respondent should have given him the necessary information in that regard. Complainant says he then telephoned Riaan to find out if he knew anything about this. Riaan told him he would find out and call him back. Riaan called back and confirmed the grounds for rejection of the claim. He said he would speak to his boss Pieter and they would try to help him in some or other way. A meeting was set up with one Adolph at Wheels, who said that as Pieter had threatened that he will report Wheels to the Ombudsman and was rude he was not going to try and help him to get the insurer to re-consider its rejection of the claim.
- [13] Complainant alleges that at the meeting with Adolph, Riaan had confessed that it was actually his fault for not advising him appropriately.
- [14] Respondent's legal representative wrote to this Office that when complainant phoned in to report the claim he had informed "the salesperson who assisted him previously . . . that he had never got round to fitting the tracker or immobiliser system." Presumably, the "salesperson" referred to is Riaan. This is contrary to what complainant says – that Riaan had admitted being at fault for not advising him properly.
- [15] Complainant also says that he was never asked for proof of installation of the device. This is in my view irrelevant as it is within the discretion of the insurer whether to ask for such proof or not.

[16] This Office asked complainant to obtain a formal letter rejecting the claim. Complainant wrote that in spite of repeated requests to do so, both Wheels and Riaan failed to provide him with such a letter. Wheels claimed it had lost his file. Riaan, he says, simply made promises which he never kept since the claim arose. However, the letter dated 20 February 2007 from the OSTI to complainant makes it clear that the insurer had in fact rejected the claim.

### **Determination and reasons therefore**

[17] The first issue to be determined is whether there rested a duty on the respondent to inform the complainant that an alarm or tracking device was required to be installed for theft cover. This may be disposed of very simply. Complainant admits being aware of the requirement for an alarm or tracking device prior to the claim having arisen.

[18] The crisp issue to be determined is whether, where the complainant was already aware of the requirement, there rested a duty on the respondent to inform the complainant that there existed a device which would enable a motorcycle without a battery to nevertheless be able to operate the alarm or tracking device.

[19] Complainant says he assumed that the requirement did not apply to him because his cycle did not have a battery. In his complaint to this Office complainant says:

*“ . . . I knew that the bike I was buying, did not have a battery (because it is a full off-road motorbike) to operate any of the two devices mentioned.”*

- [20] There is some dispute about whether complainant told the respondent that he (complainant) thought the alarm or tracking device requirement did not apply to him because in his view the motorbike was not a “machine”.
- [21] The “Motorcycle Proposal Form” refers to a “machine”. Mr Pieter Bekker of the respondent wrote to complainant in an e-mail dated 6 June 2007 wherein he inter alia confirmed to complainant that the latter had told him on two occasions that he did not think the tracker/alarm requirement applied to him because under “Special Conditions” the proposal form referred to a “machine”, and not “motorbike”.
- [22] Complainant responded to the e-mail by saying that in July 2006 he had confirmed to Bekker that because his motorcycle did not have a battery he did not think the security requirement applied to him. He then says the “machine” versus “motorbike” idea had in fact, emanated from Bekker as a possible solution to his rejected claim.
- [23] In this regard it is important to note that Complainant filed his complaint with the OSTI on the basis that he did not think his motorcycle was a machine and therefore did not fit it with an alarm or tracking device. This factual dispute relates to events after the claim was repudiated.
- [24] In any event, the heading of the proposal form indicates clearly in large capital letters inside a rectangular block that it is a “Motorcycle” proposal form. Subsequent reference in the form to a “machine” can in my view only be construed as a reference to a motorcycle. In the context of the proposal form as a whole it would be difficult to interpret the word “machine” to mean something other than a motorbike.

[25] In spite of the factual dispute, this matter can be determined on the basis of complainant's own admission contained in his letter annexed to the complaint form filed with this Office and the e-mail dated 6 June 2007.

[26] Complainant admits being aware of the insurer's requirements. If he thought the requirement was not applicable or entertained any doubt in this regard it would have been a simple matter to contact respondent for clarification. He did not do so. This is not a situation where the broker incorrectly advised the complainant that, for example, he did not require an alarm or tracking system.

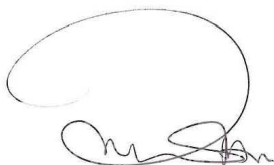
[27] In the result the complaint falls to be dismissed.

### **THE ORDER**

I make the following order:

1. The complaint is dismissed.
2. The Respondent is ordered to pay case the fee of R1000.00 to this Office within 30 days of date of this order.

**Dated at PRETORIA this 26th day of January 2009.**



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**NOLUNTU BAM**

**DEPUTY OMBUD FOR FINANCIAL SERVICES PROVIDERS**