

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FOC1127/06-07/MP 3

In the matter between:-

JOHN ANTHONY MACIEL

Complainant

and

BOUVEST 2340 CC T/A A. NELL MAKELAARS

Respondent

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

A. PARTIES

[1] The Complainant is John Anthony Maciel, an adult sales representative of 11, Syring Flats, Tautes Avenue, GROBLERSDAL, 0470.

[2] The Respondent is Bouvest 2340 CC, trading as A. Nell Makelaars a close corporation with registration number 2001/071670/23, and principal place of business at 5, Kruger Street, GROBLERSDAL, 0470.

B. THE BACKGROUND

[3] Complainant insured his motor vehicle with Santam in August, 2005. The respondent, through its employee Ms Susarah Maria Vos (Vos), is the intermediary through whom he did so. The vehicle was stolen a few months later in November. A claim was duly submitted to the insurer but it was rejected. The policy was also cancelled and premiums refunded on the ground of non-disclosure, alternatively misrepresentation of a material fact.

[4] The insurer in its letter of repudiation alleged that complainant had failed to disclose that his previous insurer had cancelled his policy, alternatively, stated the vehicle would be used for private or domestic purposes when it was used for business purposes as well.

[5] Complainant says he (through his wife) had disclosed that he was previously insured with SA Underwriters but the broker failed to mention it in the proposal form. He alleges that Vos did not disclose it even though she had been given a piece of paper on which complainant's previous insurers and claims history had been written. In a letter dated "2005/12/006" (*sic*) *complainant's wife* says:

"Mev. Vos het die inligting oorgedra op die aansoek vorm nadat ek reeds geteken het." (Mrs Vos transferred the information to the application form after I had already signed [it].)

He therefore lays the blame for the non-disclosure squarely at the door of Vos.

[6] In a letter to the underwriters, Vos says the omission was due to her own fault and that complainant should not be penalised for it.

[7] At first blush one would have thought the admission ought to have persuaded her employer (the respondent) to accept liability and settle the matter with complainant. Respondent however, believed it should not be held liable as in any event, the insurer would not have accepted the claim because of the misrepresentation about the use of the vehicle.

The relief sought by Complainant

[8] The Complainant seeks to be compensated for the loss of his vehicle due to theft.

Investigation and Determination of the complaint by this Office

[9] The complaint was first lodged with the Ombudsman for Short Term Insurance, who eventually found that no fault could be attributed to the insurer. The complaint was then referred to this Office.

[10] According to information obtained from the Financial Services Board, Vos is licensed to give advice and act as intermediary for, amongst others, Short-Term Insurance: Personal Lines.

[11] A letter was written to the Respondent on 11 August 2006 affording it an opportunity to resolve the matter with complainant before a formal investigation is launched. A Mr. AHG Nell of the respondent faxed a copy of a letter dated 9 October 2006 to this Office which he had addressed to the complainant. He pertinently states that the:

“ . . . claim was not paid because the vehicle was used for business purposes and was insured for personal/pleasure use.”

A letter in terms of s27 (4) of the FAIS Act was sent to the respondent notifying him that the matter was proceeding to a determination.

[12] On 20 October 2006 Vos faxed a letter dated 5 December 2005 by Brolink and addressed to the complainant wherein it states that the voiding ('nietigverklaring') of the policy by the insurer was based on non-disclosure, alternatively misrepresentation of a material fact by the complainant. It does not state what the non-disclosure or misrepresentation was about. However, in an e-mail dated 18 January 2006 Ms Irene Tate of Brolink wrote to Vos:

“ . . . we would like to emphasise that the “misrepresentation” which we refer to in the rejection letter is very definately (sic) misrepresentation from the client’s side. Refer to your email dated 6/1/2006 – Point [6] and the paragraph headed Motor relating to the use of the vehicle.”

- [13] The e-mail referred to as being dated ‘6/1/2006’ appears in fact to be in the form of a letter incorrectly dated ‘6 December 2006’. In that letter Vos says:

“Point [6]:

The client told me that she cancelled the policy not the Insurers.

. . .

“Motor

The client specifically told me that the LDV was only used for private purposes, no goods will be carried.

What her husband told the assessor is not what she told me.

. . .

“On the Risk Evaluation Section, I answered 2 of the 3 questions although I did not tick Yes/No. It was my mistake to write in Outsurance. She did bring a page with her with notes that she had made before she visited our office. The name of the last company was written at the back of the page and I did not see it. . . .

“These people did suffer a great loss and I am asking you not to penalize them for my stupidity/negligence.

“The mistakes that I made was (sic) not deliberate.”

[14] The references to “Point [6]” and “Motor” are to an e-mail dated 14 December 2005 from Irene Tate of Brolink to the respondent in which she points out to the respondent what went wrong with the claim. She points out a number of aspects in which the respondent failed to comply with the “*Santam / Brolink Underwriting Rules*” which had been handed to respondent.

[15] The facts that caused Vos to say it was her fault are as follows:

15.1 On 11 August 2005, complainant’s wife met Vos, an employee of the respondent. An insurance application form styled ‘Brolink Huis en Persoonlike Versekering Aansoek Vorm’ (‘Brolink House and Personal Insurance Application Form’) was completed partly by Vos and partly by complainant’s wife and signed by her as well. It is not in dispute that complainant’s wife at all material times acted on his behalf and with his authority.

15.2 The vehicle, a 1999 Mitsubishi L300 with a stated value of R48 000.00, that was eventually stolen, was one of the items listed in the insurance application form. Complainant’s wife completed the first page relating to general information and the debit order details and signed and dated a declaration stating, *inter alia*, that the application will form the basis for the contract between the parties. Vos completed the rest of the form.

15.3 It is not in dispute that Vos completed the details of the vehicles to be insured and details of previous insurance and claims history on the basis of notes on a piece of paper provided to her by complainant's wife.

15.4 Under the heading "Risiko Evaluasie Vorm" (Risk Evaluation Form) details are requested of the applicant's previous insurance. Three questions are asked and the applicant is required to tick either 'yes' or 'no' next to each one in the two boxes provided. (If the applicant were to answer 'yes' to any question then further details had to be provided.) Although none of them have been ticked, further details are provided in answer to the first and third questions.

15.4.1 The first question is whether the applicant's belongings have previously been insured. If the answer is in the affirmative, details are requested of previous insurers and dates of insurance. Vos wrote the name of only one insurer, i.e. 'Outsurance – 31/08/2005.' Outsurance does not appear on the note.

15.4.2 The second question is whether any insurer ever cancelled, refused or imposed any limitations ('beperkings') on the applicant's policy. If the answer was 'yes' then it was to be

referred to Brolink, the underwriting managers ('Indien "Ja" verwys na Brolink').

15.4.3 The third question is whether the applicant or any other person requesting cover had experienced any accidents, illnesses or losses in the previous three years. If 'yes,' details are to be provided. Vos states there was a burglary ('inbraak') in 2000, and a Daewoo and Toyota Hi-Lux vehicles were stolen in 2001 and 2002 respectively. No mention is made of the fact that SA Underwriters cancelled a policy of the complainant on 10 August 2005. On the back of the note provided by complainant's wife is written '*SAU – 0076140 cancelled on 10/8/2005*'.

15.5 Vos wrote to Brolink in a fax dated 6 December 2005 that she was given to understand that the claim was rejected because the insured did not disclose his last claim. She says the blame lies with her. Complainant's wife had told her about a previous claim but she (Vos) did not think it would affect the insured's claims history because it was in any event not paid out.

[16] In an e-mail dated 20 February 2006 Brolink's Legal Adviser, a Mr Arthur Davies wrote to Ms Natasha Laing at Santam that the policy was not avoided on the basis of the inaccurate claims history but:

“because there was a misrepresentation regarding who cancelled the previous policy. Had we known the previous insurer cancelled (avoided) the policy we would not have accepted the policy.”

Davies then goes on to mention that although the vehicle was covered for private use the complainant had in fact told the assessor who investigated the claim that when he bought the vehicle (a light delivery van or ‘bakkie’) his intention was to use it for furniture and refuse removal so that it could pay for itself. Says Davies:

*“Had we known this we would not merely have charged a higher premium
... we would have declined the risk.”*

[17] Brolink had instructed Douglas Loss Adjusters CC to investigate the claim. In its report the loss adjuster refers to “Annexure 12” which is a signed statement dated “05-11-15” it obtained from the insured (complainant). In it the complainant says, *inter alia*:

“I normally use the vehicle for both private and business purposes. The intention of the vehicle (sic) was to be used as a furniture delivery vehicle and refuse removal on weekends as well as my fishing trips.”

[18] In the letter dated “2005/12/006” to Brolink complainant’s wife (presumably in response to the letter dated 5 December 2005 from the latter) in which she further says:

“Op die 11/08/2005 het ek die kantore van A. Nell Makelaars gekontak in verband met voertuig versekering.

“Ons het op 10/08/2005 ons versekering te SA UNDERWRITERS gekanseleer aangesien hulle nie ‘n eis wou uitbetaal, omrede ek die fout gemaak het om nie alle vorige eise te verklaar nie, dit was uit onkunde en nie moedswillig gewees nie” .(emphasis added)

[19] This is contrary to what SA Underwriters says. In an e-mail dated 19 January 2006, one Liezl of SA Underwriters writes to the respondent that:

“we informed the client on 10/08/2005 that we were cancelling the policy with immediate effect due to the non-disclosure of previous losses”.

(emphasis added)

[20] Finally, it should be mentioned that complainant enlisted the services of an attorney after lodging his complaint with this Office. Although this Office does not allow legal representation as of right – it being within the Ombud’s discretion to do so – complainant was allowed in this instance to make submissions through his attorney. In a letter dated 20 November 2006 to this Office the attorney makes two points which are worth noting.

20.1 One is that complainant’s wife had signed the proposal form only after Vos had completed it. This is contrary to what complainant’s wife wrote¹

¹ Par 5 above.

to Brolink where she says Vos had transferred the information from the piece of paper only after she had signed the form.

20.2 The other point the attorney makes is that his instructions are that at no point did complainant speak to an assessor. This again, flies in the face of the statement² he signed, which the assessor says he obtained from the complainant. The most probable inference one can draw from this is that when the complainant realised that his non-disclosure is also a ground for rejection of the claim, he changed his stance and claimed he never spoke to an assessor.

[21] The complainant (and his wife) have given differing and conflicting versions of the facts and also made a misrepresentation to SA Underwriters which led to the latter cancelling complainant's insurance with it due to non-disclosure of previous claims. On the other hand, Vos readily admitted her mistakes and even implored the insurer not to penalise the complainant for her mistake. The mistake was not material in the circumstances.

[22] The crucial issue here is that even if Vos had not made the admitted mistakes, the insurer would still have rejected the claim on the ground of misrepresentation.

² Par 17 above.

[23] In the result, I am unable to find in favour of the complainant.

[24] However, having said that I cannot but once again caution intermediaries to follow the letter and spirit of the General Code of Conduct for Authorised Financial Services Providers and Representatives promulgated in terms of the FAIS Act. The Code spells out clearly that providers must, at all times act with due skill, care and diligence. The outcome of this determination would have been very different had it not been for the complainant's own material misconduct.

Quantum of the loss

[25] I need not determine the quantum of complainant's loss due to dismissal of the complaint.

THE ORDER

I make the following order:

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

Dated at PRETORIA this 20th day of January 2009.



CHARLES PILLAI

OMBUD FOR FINANCIAL SERVICES PROVIDERS