THE OMBUDSMAN'S BRIEFCASE

Official Newsletter of The Ombudsman for Short-Term Insurance

Winner of DTI Organisational Champion Award for 2007

Issue No. 2 of 2007

In this issue:

OSTI participates in its first "Take a Girl Child to Work Day"

The Ombudsman's Office was a keen and first time participant in the national initiative; Take a Girl Child to Work Day, which took place on 24 May 2007.

Three young ladies, Caroline Gumede, Kgomotso Phakoe and Shireen Nel, all of whom were related to OSTI staffers, joined the Office. The idea being to provide the young ladies with the opportunity to experience a day in the workplace to see first-hand how the working world really works and first-hand experience is what they received! After being welcomed they were whisked away and spent time in the call centre, with the Assistant Ombudsmen and in the finance

division. Assistant Ombudsman, Noa Kraut provided them with an introductory talk on "What is insurance and the role that the Ombudsman's Office has to play".

Despite their apprehension when they first arrived they soon found out that the Office is rather a "cool place to work at", especially when they saw that the Boardroom table doubles up as a pool table at lunch time and staple fare is pizzas!

Put to work they sent faxes, answered the switchboard, sent emails and jotted down notes.

"Before we came to the Office we did not really know what insurance is all about. We now know the difference between short and long-term insurance and what our rights are as consumers if we have a claim repudiated. We have an appreciation of what really happens in the workplace and thank the Ombudsman for providing us with this wonderful opportunity. "

OSTI hosts Annual General Meeting and welcomes a new Member to its Board

The Ombudsman for Short-Term Insurance hosted its Annual General Meeting at the Johannesburg Country Club on 22nd May 2007 where Board Members were elected. The Office warmly welcomes new Board Member, **Patrick Ward from the Financial Services Board, who replaces Jacky Huma.** At the first Board meeting after the AGM Isabel Jones was re-elected as Chairman and Gail Walters as Deputy Chairman.

New Appointments at the Office

We are pleased to welcome three new staff members to the Office, namely Muzi Magagula who joined as an Assistant Ombudsman, Bradford Adams as a Client Liaison Officer and Michelle Grobler as Secretary to Assistant Ombudsman, Naresh Tulsie.

Muzi is no stranger to the insurance sector having worked for several short-term Insurers before joining the Ombudsman's Office in May. Muzi has a Diploma in Insurance and is an Associate of the Insurance Institute of South Africa. Muzi says that his career objective is to create an environment of trust and understanding of risk and how it is managed between the Insurers and insuring public. *"I am focused and highly motivated and look forward to my new role as Assistant Ombudsman"*, says Muzi.

Muzi Magagula,
Assistant Ombudsman

Bradford previously worked for Nedbank Limited as an Inbound/Outbound Call Analyst before joining the Ombudsman's Office. Bradford says, *"It's an honour to work for the Ombudsman. I have learnt so much in the short time that I have been here. I think that the Ombudsman is an asset to the community. As client liaison officer I deal first hand with complaints, assisting where necessary and learning something everyday. With the increase of calls and complaints received, the Ombudsman is really out there helping clients"*.

Bradford Adams, Client Liaison Officer

Michelle matriculated from Sir Pierre Van Ryneveld High School in 1996 with a "get it done" attitude towards life. She says that she is a fun loving person who enjoys the outdoors and landscaping. She joined the Ombudsman's Office on 1st April 2007 as a Secretary to the Assistant Ombudsman. As for the Ombudsman's office Michelle says, *"It is an absolute pleasure to be a part of such an efficient organisation"*.

Michelle Grobler, Secretary to Assistant Ombudsman

Bidding Farewell to Deputy Ombudsman, Jim McIntosh and Assistant Ombudsman, Naresh Tulsie

Jim McIntosh, Deputy Ombudsman and Naresh Tulsie, Assistant Ombudsman will be bidding farewell to the Ombudsman's Office at the end of July.

Jim will officially be retiring from the workplace to catch up on some well earned rest. He joined the Ombudsman's Office in 1996, after retiring as a General Manager of a major Insurer. His extensive wealth of insurance knowledge has been an asset to the Office and he will be sorely missed. We wish him well for his retirement and future endeavours!

Jim McIntosh, Deputy Ombudsman

Naresh's expertise will not be lost to the sector as he will be joining a group of companies engaged in the insurance sector as Group Legal Advisor. He joined the Ombudsman's Office in 2000 and says that the past seven years have been both wonderful and challenging, however the time has come to look to and face new challenges and hopefully implement on a practical level in the industry itself, all that he has learnt since joining the Office. We wish Naresh every success in his new role!

Naresh Tulsie, Assistant Ombudsman

Ombudsman's Advice

DOLUS EVENTUALIS AND MOTOR VEHICLE ACCIDENTS

A rather unusual complaint was referred to the Ombudsman's office by a husband and wife who both had the good fortune to drive Mercedes Benz A & G motor vehicles. The husband owned an E55 AMG and his wife a C35 AMG. Both vehicles were Insured on the same policy and in the joint names.

The facts are that one Friday evening the couple agreed to meet at a local watering hole where they enjoyed dinner. After dinner they decided to travel to another local pub to meet with some friends. They duly settled in their respective vehicles with the husband driving ahead.

On route, approaching a major intersection, the wife noted that there was along queue of vehicles in the right-hand lane intending to turn right. At that stage the traffic light was red. Approaching the intersection the traffic light turned to green and the wife then moved over onto the left-hand lane intending to proceed straight through the intersection. Her husband was stationary at the intersection in the left hand lane as the traffic light was red. After the traffic light turned green he had not yet pulled away when the unfortunate wife approaching from behind did not see her husband's stationary vehicle and collided into the rear of it. The impact was considerable and both vehicles were written off in the collision.

The Insurer immediately repudiated liability for both claims. Initially the Insurer contended that the wife had been driving whilst under the influence of alcohol. When the Insurer realised that he could not substantiate this defence it switched tactics and then maintained that the Insured was precluded from claiming for the losses on the grounds that the loss had been intentionally caused. This defence the Insurer attempted to establish by showing that the wife had driven at an excessive speed and that she *"must have foreseen the possibility that driving at this speed would cause a collision, but simply continued to do so"*.

The Ombudsman adopted the view that even assuming that *dolus eventualis* did constitute a basis for a defence, this had not been established. Clearly the wife did not intend to collide with her husband's motor vehicle and could never subjectively have foreseen this as a possibility. The Insurer attempted to show that the wife had been driving at an excessive speed by the use of reconstructive experts. The services of two experts had been employed, who arrived at wildly different estimates of the speed that she was driving. The Ombudsman felt that not only were the estimates of speed arrived at by the reconstructive experts open to serious criticism, the Insured did not consider the possibility that the wife had simply been negligent – an event covered by the terms of the policy. Furthermore even if the wife had foreseen the possibility of a collision in these circumstances and had nevertheless continued with her conduct, this could not constitute a defence for the damage to the husband's motor vehicle. The Ombudsman was of the view that the Insurer had not established a defence and that all the indications were that the unfortunate collision had been occasioned but nothing more than the negligence of the wife who had failed to keep a proper lookout. The Insurer, despite extensive debate on the matter, did not want to concede liability but when faced with the prospect of a formal Ruling by the Ombudsman, eventually agreed to entertain the claims for both vehicles.

FAILURE TO DISCLOSE A SPOUSE'S FINANCIAL CIRCUMSTANCES

The Ombudsman's office was recently requested to consider a repudiation by an Insurer of a claim arising out of the theft of a motor vehicle where liability had been rejected on the grounds that at the time the policy was taken out the Insured had not disclosed that her husband had various judgements against him. It was alleged by the

Insurer that this affects the moral risk attached to the policy and that the Insurer was entitled to avoid the policy on the grounds of non-disclosure.

- The Insured challenged the declinature pointing out that she was not aware of the judgements obtained by various creditors against her husband most of which pre-dated her marriage. The parties were married out of community of property and the Insured had purchased the vehicle through a finance agreement from her own resources.

- The Ombudsman pointed out to the Insurer that the Insured's spouse could not, in the given circumstances, derive any benefit from his spouse's claim, whether directly or indirectly. Apart from the question of whether the Insured was aware of the judgements obtained against her spouse, it was clear that she acquired the vehicle from her own means, was the sole driver of the vehicle and was responsible for the payment of the instalments to the financial institution which had financed the transaction. The Ombudsman felt that the financial affairs of the Insured's spouse did not have any material bearing upon the risk or the circumstances of the loss. It would be highly prejudicial to the Insured to deny her an indemnity in the circumstances.

- The Insurer accepted the view of the Ombudsman and agreed to accept the claim.

FAILURE TO HAVE LINKED ALARM

- The Insured filed a complaint with the office of the Ombudsman arising out of the rejection of a claim made in terms of a commercial policy. The Insured ran a Hairdressing Salon situated within a Shopping Centre. The theft section of the policy contained an endorsement to the effect that it was a condition precedent to the liability of the Insurer that the premises be protected by an installed burglar alarm and that the burglar alarm system at the premises shall be set and armed and made fully operational when ever the premises was not open for business.

- The Shopping Centre had a central control room equipped with a radio based station permitting security to communicate with the Head Office and guards on the site. The Insurer rejected the Insured's claim for loss suffered during the theft on the basis that the premises was not protected by a linked alarm system. The Insurer contended that shops in the shopping centre did not have linked alarm systems but only a local security arrangement. The Insurer's contention was that if the true security arrangements at the shopping centre had been disclosed, the risk would not have been accepted.

- The Ombudsman upheld the Insurer's contentions stating that it was clear that the conditions of the endorsement requiring an installed alarm to be set and armed and to be made fully operative when the protected buildings were not open for business had not been complied with.

INSPECTION CERTIFICATES

- The Insured complained to the office of the Ombudsman that her claim for damage to her motor vehicle arising out of a collision had been rejected by the Insurer on the grounds that she was required to have her vehicle subjected to an inspection within 48

hours of commencement of cover and to furnish the Insurer with a copy of the inspection certificate within 7 days.

- By way of explanation, the Insurer stated that as the Insured had not had previous insurance she was requested, when the policy was proposed through the Broker, to have the vehicle inspected at a designated inspection centre within 48 hours and to submit a copy of the inspection certificate within 7 days of the inception date of the policy. The Insured replied stating that she purchased the vehicle new and was not aware of the obligation to obtain an inspection certificate. The Insurer on the other hand contended that the vehicle had not been purchased new but that it had in fact been purchased second hand.

- Having regard to the dispute as to whether the Insured had been advised of the requirement for the inspection certificate, the Ombudsman requested the Insurer to make available a copy of the recorded sales conversation with the Insured. It was also pointed out to the Insurer that the Insured vehicle had been damaged whilst parked in a Shopping Mall and the vehicle was still available for inspection. The purpose of an inspection certificate was to determine the existence of a motor vehicle and its general condition. The existence of the Insured vehicle was not in question.

- The Insurer was subsequently unable to obtain the voice recording of the conversation between the Broker and the Insured and consequently agreed to settle the Insured's claim. The Insured's motor vehicle was accordingly repaired.

NON-PAYMENT OF PREMIUM

- The Insured submitted a claim on the 5th of October 2006 arising out of a motor vehicle collision, which had occurred on the 4th of October 2006. The Insurer declined the claim, *inter alia,* on the grounds that it was not on risk as the time the incident occurred due to the non-payment of premium. It appeared that the Insured's policy had incepted on the 30th of October 2003 and between that time and the date on which the incident giving rise to the Insured's claim, the policy had been cancelled three times on account of non-payment of premiums. In the incident month, October 2006, the first attempt made to collect the premium was on the 1st of October 2006, but the debit order was returned on the 7th of October 2006 as unpaid due to funds not being provided for. The Insurer made a second attempt to collect the debit order on the 20th of October 2006, but again the request for premium was rejected due to insufficient funds in the Insured's bank account. The policy lapsed due to two consecutive non-payments of premium in the months of October and November 2006.

- The Ombudsman upheld the rejection of the Insured's claim and pointed out to the Insured that in terms of the Policyholder Protection Rules a period of grace of 15 days in which to pay the premium was granted but that payment of the premium had not been made within this time and accordingly the Insurer had not been on risk at the time that the collision occurred.

Agent for Insured or Agent for Insurer or both?
by
Naresh Tulsie, Assistant Ombudsman

A distinction is drawn in the Short-term Insurance Act 53 of 1998 (hereinafter referred to as "the SIA") and in the regulations in terms of the Long-term Insurance Act 52 of 1998 (hereinafter referred to as "the LIA") between two different types of insurance Intermediaries, namely independent Intermediaries and Representatives.

Crucially the representative is employed or mandated by an Insurer and is therefore acting on behalf of an Insurer. It could therefore be assumed that those Intermediaries, not being Representatives, act on behalf of the Insured. However certain independent Intermediaries also act on behalf of an Insurer, for example, Intermediaries acting in terms of a binder (s 48(2) of the SIA), or independent Intermediaries authorized to collect premium in terms of s 45 and s 54(4) of the SIA, and in so doing acting on behalf of the Insurer.

The SIA and the LIA are not a codification of the law relating to insurance Intermediaries, and general principles of law, for example the law of agency, continues to play an important role in determining the rights and duties of insurance Intermediaries. The SIA and the LIA do not provide adequate means of determining whether an Intermediary is acting on behalf of the Insured or the Insurer when carrying out any particular act.

At common law, an Insurer's (principal's) liability for its agent's acts and omissions is primarily governed by the general principles of the law of agency, and in particular the contract of mandate.

A distinction is often drawn between an Insurance Broker and an Insurance Agent to distinguish between those who primarily (but not exclusively), act on behalf of the Insured and the Insurer respectively. The Intermediary however, often wears two hats, as agent of the Insurer and also as broker (or agent of the Insured). The crucial question which would then arise is whether, in respect of any particular conduct, such Intermediary is the agent of the Insured, or of the Insurer, or of both.

The following role players could potentially be involved in an insurance transaction:

Insurer / Underwriting Manager/ Outsource Agent / Claims / Policy Administrator/
Insurance Agent / Broker / Sub-Broker / Insured

Clearly, given this type of scenario, the Insured is often not even aware who his Insurer is and, when asked to identify the Insurer, would often refer to the Intermediary (as the Insured may think that the Insurer's agent is the Insurer).

The problem appears when the Intermediary is placed in the invidious position of representing the two parties, who may have competing interests, at the same time and in respect of the same judicial act. For the potential unwitting Insured, this could lead to disastrous consequences. For example, he may disclose material information to an Intermediary, such as a broker or canvassing agent, who assists him in the completion of

the proposal form, yet find that this information was not conveyed to the Insurer and faces the declinature by the Insurer of a claim.
There is a clear need to determine for whom the Intermediary is acting in performing a certain act and to ensure that the Intermediary performs this function within his mandate. It is furthermore apparent that the statutory definitions and common law concepts are not conclusive in determining for which party an Intermediary may be acting in respect of a particular judicial act.

The Financial Advisory and Intermediary Services Act) hereinafter referred to as the "FAIS Act") draws a distinction between Product Suppliers, Financial Services Provider's (hereinafter referred to as FSPs) and Representatives. However, in practice one finds that an Insurer being a Product Supplier, also registering as a FSP. Intermediaries (both mandated and independent) are also registering as FSPs, whilst at the same time also potentially being Representatives of the Insurer. To this one has to add that the FAIS Act also draws a distinction between a discretionary FSP and an administrative FSP. It is highly doubtful that this proliferation of terminology and role players, and the concomitant criteria to differentiate between them, could be in the interests of protecting the insuring consumer.

The FAIS provisions (like the SIA and LIA definitions or concepts of independent Intermediaries and Representatives) are not clear enough, alternatively inappropriate, when dealing with insurance Intermediaries, as the distinction between Representatives and FSP's appear to render no assistance when seeking to determine which principal can be held liable. Surely the utilisation of uniform definitions and nomenclature in the FAIS Act and the SIA and the LIA would have been preferable.

However, in terms of section 13(6) of the FAIS Act a person who on 30 September 2004 acts for or on behalf of a person, who is a licenced FSP, is regarded as a representative. This provision is significant in that nothing further needs to be done to elevate the employee to the status of a representative. If the FSP does not want to be responsible for the financial services rendered by the person acting for or on behalf of the FSP, the FSP must withdraw the representative's authority by altering the underlying contract, or by even terminating the contract with the representative.

It is thus the contractual relationship which will determine if the Intermediary is a representative of the FSP or not, and the FAIS Act therefore changed nothing in this respect.

The Ombudsman's office will thus consider the conduct of the Intermediary concerned and where for example such Intermediary collects premiums for an Insurer, or issues policies on behalf of the Insurer, or even concludes contracts or handles claims on behalf of the Insurer, such Intermediary is more likely to be regarded as the agent of the Insurer for that specific action and thus the Insurer held liable for such Intermediary's conduct.

For more information, contact Paul van Onselen at info@osti.co.za

OSTI: The implications of the Financial Services Ombud Schemes Act on the Office

The Financial Services Ombud Schemes Act, No 37 of 2005 became law on the 9th of February 2005. In terms of this Act any ombudsman's scheme operating in the financial services industry, has to apply for recognition from a Council established in terms of this Act, in order to continue operating. Section 10 sets down the minimum requirements that schemes have to comply with if they want to be recognised. The Ombudsman for Short-Term Insurance applied for recognition and received it in 2006. The purpose of this article is to examine these requirements in more detail, and also discuss the consequences for an Insurer if they don't subscribe to a recognised scheme.

REQUIREMENTS FOR RECOGNITION

Section 10(1) sets down minimum requirements that a scheme has to comply with for recognition. Subsection (a) states that the majority of institutions in a particular category of financial institutions must participate in the scheme. In the case of the Ombudsman for Short-Term Insurance, nearly all short-term Insurers subscribe to the scheme. To our knowledge only a handful of small niche Insurers that write business that in any event, usually fall outside our jurisdiction, are not members of this office.

Subsection (b) sets out the requirements for the appointment of the ombudsman. The body tasked with the function of appointing the ombudsman, settling of his/her remuneration and monitoring of the performance and independence of the ombudsman, may not be controlled by the participants in the scheme. In the case of the Ombudsman for Short-Term Insurance, this function is performed by the Board. The Board comprises of four Representatives from the insurance industry, four consumer activists and a member is appointed by the Financial Services Board. In this way we comply with the Act as the industry representatives can't control the Board.

Subsection (c) states that a scheme must provide for minimum requirements relating to qualifications, competence, knowledge and experience with which the ombudsman has to comply. The Ombudsman for Short-Term Insurance must be an admitted attorney or advocate or judge of at least 15 years standing. Seven of these years must also have been spent in matters involving short-term insurance.

The scheme also has to have sufficient human, financial and operational resources, funded by participants, to enable the scheme to function efficiently and timeously (Subsection d). Subsection (e) deals with procedural issues. Of these the most interesting is Subsection (e)(iv). This provision dictates that where appropriate, the ombudsman must be able to apply principles of equity in resolving complaints. Since 2001 the Ombudsman for Short-Term Insurance has been mandated to make binding rulings based on equity and law.

Subsection (f) requires a scheme to make provision for the effective enforcement of determinations of the ombudsman. Members of the Ombudsman for Short-Term Insurance have to sign a written contract binding them to the rulings made by the ombudsman. The remaining subsections require a scheme to treat consumer concerns equitably (Subsection (g) and to co-operate with the Council (Subsection h). Regulations were issued in terms of the Act to provide for more detail on how to interpret the Act (GN29145 of 18 August 2006).

THE "CATCH ALL" OMBUDSMAN

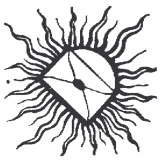
Section 14 ensures that no consumer complaint originating in any area of the financial services can fall through the cracks. In terms of this section a statutory ombudsman is created to deal with any complaint falling outside the jurisdiction of an existing ombudsman. The statutory ombudsman also has jurisdiction to deal with complaints against financial institutions not participating in a recognised scheme. Should a short-term Insurer thus not subscribe to the office of the Ombudsman for Short-Term Insurance, any such complaint must be referred to the statutory ombudsman. In terms of the FAIS Act, the statutory ombudsman will off course also be mandated to apply principles of equity when resolving complaints.

WHAT DOES THE OMBUDSMAN DO?

The Ombudsman for Short-Term Insurance resolves disputes between Insurers and consumers in an independent, impartial, cost-effective, efficient, informal and fair way.

The Ombudsman is appointed to serve the interests of the insuring public and the short-term Insurance Industry. The Ombudsman acts independently of the Insurance Industry in all complaints. All members of the South African Insurance Association conducting personal lines and commercial lines business have voluntarily agreed to accept the Ombudsman's formal recommendations.

If you have a formal complaint of require assistance please contact the Ombudsman's Office by calling 0860 726-890 or visiting our website at www.osti.co.za, where application forms can be downloaded or completed on-line.



CONTACT US:

If you would like to be added to our mailing list, please contact us on:
Tel: 011 726-8900 Fax: 011 726-5501 or email:
info@osti.co.za
For more information on our activities, please visit our website at www.osti.co.za. We welcome any feedback or comments you may have.