

IN THE FINANCIAL SERVICES TRIBUNAL

CASE NO: FAB37/2024

In the matter between:

CHRISTO NEL

APPLICANT

AND

OFFICE OF THE FAIS OMBUD

1ST RESPONDENT

BARTON INSURANCE BROKERS (PTY) LTD

2ND RESPONDENT

DECISION

Panel members: LTC Harms (Chair) and MF Legodi (Deputy Chair)

INTRODUCTION

1. Rejection by **FAIS Ombud** (the first respondent) of a complaint lodged by the applicant against **Barton Insurance Brokers (Pty) Ltd** (the broker) cited in these proceedings as the second respondent, is being referred to this Tribunal for reconsideration in terms of section 230(1)(a) of the Financial Sector Regulation Act No. 9 of 2017 (FSRA).
2. Section 230(1)(a) of FSRA provides that a person aggrieved by a decision may apply to the Tribunal for reconsideration of the decision by the Tribunal in accordance with Part 4 of Chapter 15 of the Act (FSRA).
3. At the centre of the dispute, the question is whether the first respondent erred in finding that the broker duly notified the applicant that he was required to fit a

secondary tracking device and backup unit to his vehicle Toyota Fortuner, after it was classified by **Guardrisk Company Limited** as a high-risk vehicle.

Background facts

4. On 30 July 2020 the applicant insured his vehicle, a **Toyota Fortuner 2.8 906 4x4** (the vehicle) with **Guardrisk Company Limited** (the insurer). The insurance cover of the vehicle was inceptioned from 1 August 2020 and was insured for an amount of R735 100.00.
5. At the time the vehicle was insured, the applicant and his wife were the comprehensive insurance policy co-holders which preceded the purchase of the vehicle. Upon purchase of the vehicle, it formed part the assets covered under the comprehensive insurance policy.
6. It was part of the terms and conditions of the policy agreement that the vehicle had to be fitted with alarm, immobiliser and CIB approved tracking device. The applicant complied with these terms and conditions of the policy agreement. Further term of the agreement was that should it become necessary to fit a secondary tracking device and backup unit to the vehicle, the policy holder will accordingly be notified. This was in accordance with the policy endorsement, '*the Tracking Device and Back-up Unit Warranty -High Risk Vehicle*', having been stipulated in the policy schedule.
7. During or about July 2020, the applicant requested the broker, to change the comprehensive insurance policy by making him to be the sole policy holder. The implementation of the request to change the comprehensive insurance policy cover was preceded by several emails communication between the applicant and the broker, including at least one communication from the insurer.
8. On 4 August 2020 the insurer sent an email including the applicant using his email address at the time, CNCHRITO@gmail.com. In the email it was stated as follows:
"To whom it may concern

This is an automated email to certify that the following vehicle has been fitted with a car track unit...”

9. This was with reference to the vehicle. The email referred to above, was followed by other emails in the year 2021. This time between the applicant and the broker. On 25 February 2021 the subject matter being: “NUWE DEKKING” (meaning “New Cover”), the applicant using his email address, christo@emerge-group.co.za wrote to Ms Ferreira working for the broker using her email address: yolanda@barton.co.za.
10. In the email of 25 February 2021, the applicant informed Ms Ferreira that he wanted certain items or assets to be included in the comprehensive insurance cover, but that he did not want his wife to be told of the additional cover. On Monday 1 March 2021 Ms Ferreira responded on behalf of the broker by using the applicant’s email address referred to in paragraph 9 above. Ms Ferreira confirmed that there would be no problem in adding the cover and for this, she requested to be furnished with the value of the items the applicant wanted to be added to the cover.
11. On 17 March 2021, the applicant responded to Ms Ferreira’s email of 1 March 2021. He apologised for the delay and attached a document indicating the value of the items he wanted to be added to the cover. He used his email address referred to in paragraph 9 above.
12. On the same day at 12:55, Ms Ferreira responded and confirmed that the items will be added to the policy cover. The same applicant’s email address was used.
13. On Sunday 2 July 2023 the applicant’s vehicle was stolen. On 4 July 2023 he submitted a claim for the loss of the vehicle. The claim was ultimately submitted to the insurer by the broker.
14. On 7 July 2023 the applicant received a response from the insurer. They required proof of “vehicle tracking device and back-up unit” before they could decide

whether to approve the claim or not. The applicant was surprised by this enquiry as he was not aware of any such request or notification thereof.

15. On 1 September 2023 the applicant was informed by the broker that the claim has been repudiated by the insurer on 28 August 2023. The reason for the repudiation was stated as follows:

“The vehicle is classified as a high-risk vehicle and is required to be fitted with a tracker device and back-up unit.

The “Tracking Device and Back-Up Unit Warranty – High Risk Vehicle” endorsement was stipulated in the policy schedule.

Notification was sent to your broker on the 24th of February 2023 advising that a tracking device as well as back-up tracking unit were required to be fitted to the vehicle by the 1st of April 2023.

Cartrack was informed that only one tracking device was fitted to the vehicle and that no back-up unit was fitted to the vehicle.

According to the aforementioned, you did not adhere to the applicable policy endorsements and the claim cannot be entertained”.

16. On 4 September 2023 the applicant sent a letter of demand to the broker based on its alleged negligence and breach of its obligations by not informing him of the need to have a back-up tracking unit due to the vehicle having been classified as a high-risk vehicle prone to theft.

17. When the broker did not adhere to the demand, the applicant on 23 October 2023 lodged a complaint with the Office of the Ombud whose decision is now the subject of reconsideration application in terms of section 230 of FSRA. On 23 November 2023 the broker alleged that it informed the applicant by using his wife’s email address that was provided when the comprehensive insurance cover was initiated.

18. On 24 July 2024 the applicant responded to the broker's submission. On 4 August 2024 the Office of the Ombud issued a preliminary finding. More submissions were sought from the parties to deal with the preliminary findings. The applicant responded on 15 April 2024. On 22 April 2024 the first respondent dismissed the complaint on the ground that it lacked reasonable prospects of success.

Did the Office of the Ombud err in dismissing the complaint?

19. The parties have agreed to have the application be disposed on papers without verbal or oral argument. The first respondent in its email dated 10 November 2023 asked the broker to respond to a complaint lodged by the applicant.

20. The broker then in paragraph 2 of its email of 23 November 2023 indicated that it was providing '*full version of events pertaining to this complaint with supporting documents*', as requested by the first respondent. It however failed to provide such "supporting documents" relevant to the issue.

21. The issue for determination for determination before the first respondent was whether the broker was negligent in using the email address of the applicant's wife when it sent notice to fit secondary tracking device and backup unit to the vehicle.

22. Of relevance to the issue, the broker in paragraph 9 of its email dated 23 November 2023 submitted that the email address of the applicant's wife was used because on CIB's internal system to which Barton as a broker for CIB/ Guardrisk has full access and that the email address for the policy, was listed as sarie-swanepoel@yahoo.com.

23. Furthermore, in paragraph 9 of its email, the broker explained that '*when Mr Nel added the Fortuner in 2020, the policy holder's name was changed to his name only and he arranged to pay the premiums and sent all communications to Barton regarding the policy. Ms Swanepoel's assets remained insured under the policy*'.

24. The statement, "...sent all communications to Barton regarding the policy", is not detailed and is not confirmed or supported by any such 'full version of events to the

complaint with supporting documents” referred to in paragraph 2 of the broker’s email.

25. If there was anything contrary to the version of the applicant and supported by the emails referred to in paragraphs 9 to 13 above, “...all communications to Barton regarding the policy” as suggested in the broker’s email of 23 November 2023, would have been provided.

26. The first respondent in dismissing the applicant’s complaint, seems to have ignored the proven and undisputed facts regarding the communications referred to in paragraphs 9 to 13 above. In its dismissal of the complaint, the first respondent stated as follows:

“Despite the fact that Ms Swanepoel had been removed as policy holder in July 2020, the respondent, continued to use her email address as no specific instruction had been received from you to change it”.

27. Firstly, on the facts of the case provided by the applicant, it was not necessary to give specific instruction to use the applicant’s email address when the notice to fit the secondary tracking device and the back-up unit, was given. The broker through Ms Ferreira had previously in 2021 communicated with the applicant and the applicant’s email address was used and not that of his wife. Therefore, “sent all communications regarding the policy”, could only have been with reference to the communications mentioned in paragraphs 9 to 13 above.

28. Secondly, it was unreasonable and negligent on the part of the broker to use the email of Ms Swanepoel when in the email of 25 February 2021, the applicant *inter alia*, advised or instructed the broker in Afrikaans as follows:

“Ek sal waardeer as Sarie nie vir tyd en wyl nie enige “notification” of iets van so aard ontvang hiervan nie”.

29. In the quotation above, the applicant made it clear. He did not want his wife to be given any notification of whatever nature. This instruction by the applicant as the sole policy holder, was ignored. Instead, on 24 February 2023 the broker elected

to send “the Backup Tracker Notification” to the applicant’s wife who at the time, was no longer a policy holder.

30. The applicant denied that the notice to fit additional backup tracker device to the vehicle, was ever brought to his attention. He also indicated that his wife told him that she never received such a notice. It does not appear from the record in these proceedings that, these denials were ever investigated by the first and or the broker before the decision to reject the applicant’s complaint, was reached.

31. In the circumstances, the first respondent erred in rejecting the applicant’s complaint on the basis that it has no prospects of success. The dismissal of the complaint is destined to be set aside.

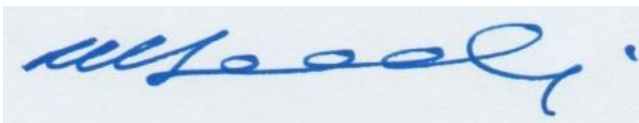
ORDER

32. Consequently, an order is hereby made as follows:

30.1 The dismissal of the complaint is hereby set aside.

30.2 The matter is hereby remitted to the first respondent for reconsideration.

Signed on behalf of the Tribunal on 5 November 2024



MF Legodi