

**IN THE BOARD OF APPEAL OF THE FINANCIAL SERVICES BOARD  
HELD AT PRETORIA ON 26 TO 28 MARCH 2007**

In the appeal between:-

**SMIT GARRUN BROKERS (PTY) LTD**

Appellant

and

**RENIER REYNEKE TRANSPORT CC  
T/A PREMIUM TRUCKING**

Respondent

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**DECISION**

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**(A) INTRODUCTION:**

1. On 18 April 2005, Mr Renier Sarel Reyneke ("Reyneke"), the sole member of the Respondent close corporation, addressed a letter to the Financial Services Board (FSB) in which he complained about the conduct of one Mr Jaco Nel ("Nel"), an insurance broker in the employ of the abovementioned Appellant, as a result of a repudiated claim.
  
2. The complaint was duly referred by the Registrar of Financial Services Providers to the Office of the Ombud for Financial Services Providers ("the Ombud") for further investigation, and Reyneke was duly advised thereof by means of a letter dated 12 May 2005.

3. On 15 June 2005, Reyneke, on behalf of the Respondent, lodged a formal complaint with the Ombud against the Appellant. The complaint was thereupon considered by the Ombud, who made a determination in favour of the Respondent thereon on 3 May 2006.
4. On 2 June 2006, the Appellant, being aggrieved by the determination, filed a notice of application for leave to appeal in the Ombud's office against the determination. Such leave was, however, denied by the Ombud on 1 July 2006.
5. On 3 August 2006, the Appellant filed a notice of application for leave to appeal in the office of the Secretary of the Board of Appeal of the FSB. Such notice was served on the Ombud as well as on the Respondent.
6. On 22 August 2006, the Ombud's office transmitted all records concerning the complaint, together with a copy of the determination and the reasons therefor to the Secretary of the Appeal Board in terms of the relevant rules, read together with the provisions of Section 28(5)(b)(ii) of the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act"). These documents constitute a record of appeal as contemplated in Section 26 of the Financial Services Board Act, 1990 ("the Act").
7. In the premises, this appeal has been tabled before the Appeal Board for hearing in terms of Section 26(1) of the Act. It is an appeal by the Appellant against the Ombud's determination of 3 May 2006 ("the determination") in terms of Section 28(1)(a) of the FAIS Act, that the Appellant is liable to compensate the

Respondent for the loss it suffered as a result of the Appellant's non-compliance with the FAIS Act and/or its negligence in rendering financial services to the Respondent; to make payment to the Respondent in respect of commissions and interest; and to pay the case fee.

**(B) FACTUAL BACKGROUND:**

8. The following set of facts is gleaned and culled from the written argument of the parties, for which the Appeal Board is much indebted to the respective counsel. These facts serve as a backdrop to the nub of the dispute between the parties and are, by and large, common cause in that none of the parties disputes them. Besides, they are, to a great extent, corroborated by reference to relevant portions of the appeal record and by evidence recorded in the transcript of the Appeal Board's proceedings.
9. At all relevant times, the Respondent has been and still is an operator of a road-freight business. This being a high-risk business, the Respondent's fleet of trucks had been insured for material loss or damage under a policy providing comprehensive cover by Santam Insurance Ltd ("Santam") and thereafter by Regent Insurance Company Ltd ("Regent"). The Respondent had also been insured for goods-in-transit cover with Senate Transit Underwriters (Pty) Ltd ("Senate").
10. As already indicated above, the Respondent's sole member is Reyneke. He is a man with at least 20 years' experience as an insurance broker. His career as a broker commenced with Sanlam Life in Pretoria as a life agent. He then moved to Phalaborwa and

became an Old Mutual agent, rising through the ranks from broker to branch manager in Tzaneen, which position he held until he left Old Mutual to start his own brokerage firm Renier Reyneke Brokers CC, which dealt both in long-term and short-term insurance business. After a period of four years, i.e. some time in August 2003, Reyneke left the broking business in order to concentrate on his transport and road-freight business. He sold his short-term business to the Appellant and, as part of the sale, the long-term client files were handed over to Integrifin CC ("Integrifin").

11. At all material times the Appellant has been and still is a short-term insurance broker. The Appellant was the Respondent's broker in respect of its goods-in-transit insurance needs, which was covered by Senate. As to long-term insurance, the broking and investment thereof was dealt with by Integrifin, to whom Reyneke's long-term client files were handed over. In point of fact, the Respondent was a client of Integrifin from about 2003. Integrifin dealt with the personal life insurance of Reyneke and also attended to the pension needs of the Respondent's employees.
  
12. It was during the course of Integrifin's dealings with Reyneke that the question of the Respondent's fleet transport insurance arose and Nel, a member of Integrifin, was requested to enquire whether the Appellant was prepared to place the Respondent's fleet insurance. One needs to pause here in order to spell out the relationship between Reyneke and Nel. The two of them were good friends and there was regular social contact between them as much as there was regular social contact between their spouses and their children. It would appear that their personal friendship developed to become a business one, in that Reyneke so trusted

Nel as to allow the latter to provide a broad spectrum of financial services for the former, his wife and the Respondent. Nel, on the other hand, accepted that Reyneke had put his trust in him and that Reyneke had no reason to withhold information from him. Suffice it to say, however, that the Appellant declined to take on the Respondent's fleet insurance business, *inter alia* because the Respondent's claims history was significant and would have adversely affected rates which could be offered by the Appellant's group schemes.

13. It was about this time that Nel met a certain Chris Fulbeck ("Fulbeck") of Oakridge Risk Consultants (Pty) Ltd ("Oakridge"), who told Nel that Oakridge had the necessary experience in the fleet insurance business and that he (Fulbeck) could assist in obtaining fleet insurance cover for the Respondent. The Appellant agreed to obtain cover for the Respondent's fleet through Oakridge with an outside insurer. It was made clear to Reyneke that the Respondent's fleet insurance would not be placed on the Appellant's book, and would be placed elsewhere by Oakridge. The Appellant, Integrifin and Oakridge came to an arrangement in regard to their respective percentage shares of the commission arising from the placement of the Respondent's insurance business.

14. Fulbeck requested Nel to obtain details of the Respondent's fleet and of the names of its drivers and current rates of interest. On 7 October 2004, Reyneke gave written consent to the Appellant to obtain a complete copy of the fleet insurance policy from ICI (Regent) and on the same date the Appellant requested a policy schedule ("*volledige bylae*") from Regent. One may *en passant*,

point out that the Appellant was not, at the time, requested to obtain, and did not seek to obtain, the Respondent's fleet claims history from Regent. It was only on or about 21 October 2004 that Fulbeck telephonically requested Nel to obtain the Respondent's fleet claims history. Nel requested one Charmaine to attend to the request. According to Nel, Charmaine was a principal underwriter in the Appellant's office, and had previously dealt with the Respondent's insurance at Santam and Regent. This is, however, doubtful, as Reyneke had previously used the broker Abex for this class of insurance. At the same time Nel asked Reyneke for the Respondent's fleet claims history.

15. The Respondent's fleet claim history was obtained by fax from Santam on 21 October 2004. The following day the claims history was obtained by fax from the Respondent's office. This fax contained the following handwritten note in respect of the claims relevant to the Respondent's insurance with Regent, but which had not been reflected on the Santam Fleet claims history document:

*"2003 ± R1,2 miljoen  
2004 ± R70 000"*

Reyneke informed Nel that these figures related to claims against Regent, which had not been included in the Santam claims history. The notation is that of Mrs Marais, an employee of the Respondent who had been instructed by Reyneke to provide the Appellant with particulars of the Respondent's fleet claims history.

16. On 23 October 2004 one of the Respondent's vehicles was involved in an accident. This is the accident which is central to the

issue in this matter. It was the non-disclosure of this claim which later gave rise to the avoidance by the Respondent's subsequent insurer, African Motor Underwriters (Pty) Ltd ("AMU"), of its fleet policy.

17. On 25 October 2004, Nel visited the Respondent's offices and was handed another copy of the Santam fleet claims history, with a similar notation by Mrs Marais to the following effect:

*"Eise verlede jaar ± R1.2 miljoen  
Eis hierdie jaar: R70 000"*

18. On the same day, Nel faxed a bundle of documents to Oakridge, consisting of a transport questionnaire relating to the Respondent's business, the Santam claims history with Mrs Marais' notation in regard to the Regent claims, and the Respondent's then current rates.
19. On 28 October 2004, Abex (the Respondent's fleet insurance broker at the time) requested the Respondent to complete a claim form and to provide other relevant information in relation to the undisclosed claim.
20. On 22 November 2004, Oakridge provided a first quote in respect of the Respondent's fleet insurance, which quote Nel discussed with Reyneke, but which was not intended to be accepted as they were waiting for a better quote from Oakridge.
21. On 25 November 2004, Fulbeck requested the Appellant to obtain the Respondent's goods-in-transit claims history. The Respondent

- obtained the goods-in-transit claims history from Senate on 29 November 2004, which reflected a pending “*overturning*” claim in respect of “*fresh/perishable*” commodities on 23 October 2004 in the amount of R30,001.00.
22. On 1 December 2004, Reyneke accepted a settlement amount of R908,026.48 from Regent in respect of the undisclosed claim.
  23. Oakridge advised Integrifin of two further insurance quotes on 7 December 2004. The first was from AMU, in respect of the fleet insurance. This quote, which contained two options, was presented by Nel on behalf of the Appellant to Reyneke on 8 December 2004. Reyneke accepted the second of the two options with effect from 1 January 2005. The second quote was from Lion of Africa Insurance Company (“Lion of Africa”) and was for goods-in-transit cover.
  24. Fulbeck then requested Nel to obtain a proposal form from the Respondent. Nel attended at the Respondent’s offices on 9 December 2004 for this purpose, on which occasion Reyneke signed the proposal form. The proposal form was faxed to Oakridge on 9 December 2004.
  25. Oakridge placed the Respondent’s transport fleet insurance with AMU and its goods-in-transit insurance with Lion of Africa with effect from 1 January 2005.
  26. On 11 April 2005, AMU, in a letter to Oakridge, repudiated a fleet insurance claim lodged by the Respondent in respect of an accident that occurred on 15 March 2005 and voided the policy

from inception on the grounds of the non-disclosure of the undisclosed claim.

27. At a meeting on 12 April 2005, Reyneke chose to accept AMU's repudiation and agreed to place the Respondent's fleet insurance cover with SA Eagle on better terms and at better rates than the Respondent had enjoyed with AMU. On 13 April 2005, Reyneke cancelled the insurance, which had been placed with SA Eagle the previous day, in favour of a better deal through Mont Blanc Financial Services with Admiral.
28. The sequel to the repudiation referred to above manifested itself in Reyneke lodging a complaint on behalf of the Respondent to the Ombud about the conduct of Nel and the Appellant. The Ombud, after investigating the complaint, subsequently made the determination against which the Appellant is now appealing.

**(C) THE ISSUES TO BE DECIDED BY THE APPEAL BOARD:**

29. It is apparent *ex facie* the written argument filed on behalf of the parties in the light of the foregoing background that this matter turns on the crisp question of the failure to convey a complete claims history to the underwriter (AMU) and who, of the parties, was responsible for such failure. It follows that the issues to be decided by this Board can be formulated and couched in the following terms:

- 29.1 The nature and extent of the duty owed by the Appellant to the Respondent;

- 29.2 Whether the Appellant acted in breach of such duty;
- 29.3 Whether the Respondent has suffered damages as a result of such breach;
- 29.4 Whether, and if so to what extent, the Respondent was itself responsible for any such damages?

**(D) THE JURISDICTION OF THE APPEAL BOARD:**

30. The powers of the Appeal Board in respect of appeals are provided for by the Legislature in Section 26(10) and subsection 14(a) of the Act. These sections read as follows:

*“(10) The board of appeal may after hearing the appeal –*

- (a) confirm, set aside or vary the relevant decision against which the appeal was brought;*
- (b) order that the decision of the board of appeal be given effect to; or*
- (c) refer any matter back for consideration or re-consideration by the executive officer in accordance with such directions as the board of appeal may lay down.”*

And subsection 14(a) states:

*“The board of appeal may make such order as to costs*

*including an order regarding the refunding of any fees paid in terms of subsection 2, as it may deem suitable and fair.”*

**(E) THE APPLICABLE LAW:**

31. Regard being had to the issues which have to be decided, the applicable law in this appeal is, in addition to relevant common law principles and authoritative court decisions on the law of insurance, the following:

31.1 The Financial Services Board Act 97 of 1990 (“the Act”) (as amended);

31.2 The Financial Advisory and Intermediary Services Act 37 of 2002 (“the FAIS Act”) (as amended); and

31.3 The Commissions Act 8 of 1947 (as amended).

**(F) CONTENTIONS AND SUBMISSIONS ON BEHALF OF THE APPELLANT:**

32. Dealing with the question of the nature of the legal duty owed by a broker, counsel for the Appellant, Mr Loxton SC, contended and submitted, firstly, that this appeal does not require the Appeal Board to draw a distinction between the Appellant’s statutory and common law duties, since both can broadly be characterised as a duty to act with the care, skill and diligence expected of a reasonable insurance broker in its dealings with the Respondent. Secondly, that it is not necessary in this appeal to decide whether

the Respondent's true cause of action lies in contract because, the contract would, in any event, contain a tacit term encompassing the same duty referred to above. Thirdly, and lastly, with reference to the decided cases **Lenaerts v JSM Motors (Pty) Ltd 2001 (4) SA 1100 (W) at 1109 H – J** and **Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd 2004 (2) SA 1 SCA at 13 B – C** as authority, that the crucial question is whether or not in all the circumstances the Appellant owed a duty to ascertain that the Respondent had provided it with an accurate and up-to-date fleet claims history for transmission to AMU. Stated otherwise, the factual question is whether the Respondent was in all circumstances reasonably entitled to rely upon the Appellant to convey full and accurate information about the undisclosed claim to AMU.

33. As to whether the Appellant acted in breach of the duty owed to the Respondent, counsel for the Appellant starts by pointing out the three breaches alleged by the Respondent against the Appellant, and then proceeds to deal with each one of them *seriatim* and comprehensively as follows:

33.1 The first alleged breach involves the allegation by the Respondent that Nel was told of the undisclosed claim by Reyneke and that the Appellant, through Nel, ought to have informed Oakridge and/or AMU about it. This allegation is denied by the Appellant. It follows that the versions of the parties are mutually exclusive and the Board would have to decide which version is credible;

33.2 The second alleged breach is contended for by the

Respondent that the Appellant should have obtained the claims history in question from Regent, the Respondent's most recent insurer. The Appellant on the other hand, contended that it was entitled to rely on the Respondent's own written declarations, which do not refer to the undisclosed claim in question. Besides, submitted Mr Loxton, a reasonable broker would not have questioned his client's own declarations on recent claims where the client is a man with more than 20 years' experience as a broker in the insurance industry. Also, on 23 October 2004 the Appellant was placed in possession of two documents by the Respondent which contained similar information on recent fleet claims during 2004, but none of these documents referred to the claim in question. Counsel submitted that it was reasonable of Nel to assume that the information on claims provided by the Respondent on 25 October 2004 was complete and that there was consequently no reason for him to approach Regent to confirm the Respondent's own declaration.

- 33.3 The alleged third breach concerns the Respondent's argument that the Appellant should have been alerted to the existence of the undisclosed claim because of the recordal of a goods-in-transit claim on the goods-in-transit claims history which was obtained from Senate. In this respect, counsel for the Appellant submitted that there is nothing that appears from the goods-in-transit claims history information that should have alerted the Appellant to the possibility of a corresponding fleet insurance claim which is 30 times larger than the goods-in-transit one. Besides, submitted Mr Loxton, goods-in-transit insurance is quite distinct from fleet insurance.

34. As to the question whether the Respondent has suffered any damages as a result of the alleged breach, counsel for the Appellant contended and submitted that even if it were to be held that the Appellant breached its duty to the Respondent, the latter has failed to show that it suffered a loss in consequence. Furthermore, counsel submitted that if anything, it is apparent from the evidence that the Respondent did not suffer any damages as a result of the Appellant's conduct, more particularly in that:

34.1 the Respondent made its election and chose to accept AMU's cancellation of the insurance policy;

34.2 the Respondent received repayments in respect of the premiums it had paid under the cancelled insurance policy;

34.3 the Respondent accepted new insurance cover placed by the Appellant at a lesser cost than under the cancelled policy;

34.4 within a day, the Respondent had elected to cancel the insurance secured by the Appellant in favour of cover through another broker at even less cost to the Respondent.

In the circumstances, counsel for the Appellant submitted that the true cause of any loss suffered by the Respondent was its own conduct and such loss was not causally connected to the Appellant's alleged unlawful conduct.

35. Counsel for the Appellant concluded his argument by expressing the submission that the appeal should be upheld with costs and the

Ombud's determination set aside and replaced with an order that the complaint by the Respondent be dismissed with costs, such costs to include the costs of two counsel in the application for leave to appeal, petition for leave to appeal and the appeal.

**(G) CONTENTIONS AND SUBMISSIONS ON BEHALF OF THE RESPONDENT:**

36. Counsel for the Respondent, Mr Q Pelsers SC, in dealing with the nature and extent of the duty which the Appellant owed to the Respondent, began by quoting the requirements of Part II, Section 2 of the General Code of Conduct for Authorised Financial Service Providers and Representatives, which state that such providers and representatives have to render their services *"honestly, fairly, with due skill, care and diligence, and in the interest of the clients and the integrity of the financial services industry"*.
37. It is also contended and submitted on behalf of the Respondent that Nel, having the onerous duty imposed upon him by the foregoing Code of Conduct, on his own version that he was nothing more than a conduit pipe and scribe, did not act with skill but acted carelessly by not exhibiting any measure of diligence and was sloppy in protecting the interest of his client.
38. Counsel for the Respondent's point of departure is that the focus must be on the conduct of Nel, which is the concern of the Legislature and the regulator, and not that of Reyneke because the latter is not the subject of investigation and should be viewed in a benevolent light; that any criticism of Reyneke will have no effect on the determination of the issues unless it negatives a finding of

negligence. Also, that it is only if Reyneke had acted intentionally that there is a possibility of absence of negligence on the part of Nel.

39. Furthermore, it was contended on behalf of the Respondent that for the Appellant to suggest that there was a deliberate failure on the part of Reyneke to disclose the claim of 23 October 2007 (*sic*) (read 2004), which is an attack on the credibility of Reyneke, is of no consequence and it reflects an about turn on the part of the Appellant because the Appellant's only witness, Nel, testified that there was neither reason nor intent on the part of Reyneke to withhold information from him. Nel also did not get the impression or think that Reyneke was withholding information from him.

40. Still on the nature and extent of the duty concerned, it was argued and submitted that the test which is the focus point of the Appellant's analysis is wholly inapplicable because the **Lappeman** case does not deal with the brokering of a contract of insurance and apart from that, it was decided therein that there is no duty upon a broker to ensure that the insured complies with his obligations under a policy once a policy had been entered into. Counsel for the Respondent then discussed Nel's duty *in extenso* under the following sub-headings: That,

40.1 Nel was under a duty to ask the insured the questions which appear on the proposal form. With reference to case law reported in Lloyd's Law Reports as well as the case **Stander v Raubenheimer** 1996 (2) SA 670 (O), counsel for the Respondent states the proposition that the broker's duty is not limited to disclosing information received from the insured but

to actively assist the insured to disclose all material facts. This, counsel submitted, was not done by Nel;

40.2 Nel was under a duty to act with care, skill and diligence. A broker is not a mere scribe or a conduit pipe as Jaco Nel would have it, and what he accepted as a claims history is not one;

40.3 Nel was under a duty to assist the Respondent to disclose material information after Reyneke had, on 9 December 2004, mentioned to him a claim that was pending, Nel did not care to ask a single question about such a claim. Neither did he attempt to identify such claim in the information at his disposal, it was submitted;

40.4 Nel, on behalf of the Appellant, was under a duty to perform the mandate personally. The submission was made that Nel allowed one Charmaine to exercise a discretion in deciding which insurer should be approached for a claims history. He should have checked on her and instructed her to also obtain a claims history from Regent. He did not, it was submitted;

40.5 Nel did not broker Respondent's insurance business with skill, care and diligence. After being told of the pending claim by Reyneke on 9 December 2004, Nel did not ask any questions, when it was the easiest thing on earth to do; he instead made inexplicable assumptions; and he did not attempt to correlate the information with his transcripts. He thus breached his duty and is guilty of negligence, it was submitted.

41. As to the question whether the Respondent has suffered any damages as a result of any breach of his duty by the Appellant, counsel for the Respondent contended and submitted that the Ombud did not make a finding in respect of loss. He ordered the Appellant to be liable to compensate the Respondent for the loss suffered by the Respondent as a result of non-compliance and/or negligence in rendering the brokering service. He ordered the quantum to be determined at a later stage. The Respondent requests the Appeal Board to make an identical finding as that made by the Ombud because, as the Respondent submits, the evidence of Reyneke is indicative of a loss. The Respondent then referred the Appeal Board to the actuarial investigation which was obtained by the Ombud.

42. In conclusion, the Respondent requests the Appeal Board, in the circumstances, to dismiss the appeal with costs and to reconfirm the Ombud's order. Also, to order the Appellant to pay the costs of the application for leave to appeal and the petition for leave to appeal. Lastly, the Respondent submits that in the event of a costs order against the Respondent, the costs of the two counsel should not be allowed because, it is submitted, the Appellant afforded itself the luxury of extravagant legal representation.

**(H) CONTENTIONS AND SUBMISSIONS OF THE APPELLANT IN REPLY:**

43. It was argued and submitted on behalf of the Appellant in reply that:

43.1 it being common cause that the Board of Appeal must

determine the nature of the legal duty owed by the Appellant to the Respondent and whether the Appellant acted in breach of that duty, the Respondent's written argument, in particular the points or factors discussed therein, do not establish the nature of the legal duty to be determined. These factors relate to Nel's duties discussed with reference only to the General Code of Conduct for Authorised Financial Service Providers and Representatives by counsel for the Respondent;

43.2 the broker's duty is not an "*onerous*" one with which the Appellant was "*burdened*" as was argued on behalf of the Respondent. The Appellant argues that the question of the duty has to be decided on a balance of probabilities and that what was said by the Court in Lappeman's case is entirely apposite that the broker is not the insured's keeper;

43.3 the Respondent's contention that Nel was "*under a duty to, proverbially speaking, go out of his way for the Respondent*" is without any basis in law, hence the absence of any authority to support such a proposition. So too is the proposition that Nel was under a duty "*to get as much information as possible*" of all the claims up to date in order to have a full account thereof;

43.4 the essence of the dispute between the parties is whether the Appellant was, in all circumstances, entitled to rely on the information supplied by the Respondent as to its own claims history;

43.5 the material facts contained in the Appellant's written argument are not disputed by the Respondent, and that what the Respondent terms "*remarks in respect of the relevant facts*" in the Respondent's written argument are not substantiated by any references to the evidence which has been heard by the Appeal Board;

43.6 save to say that "*Reyneke is not the subject of investigation*", the Respondent's counsel has not dealt, in his written argument, with a submission by the Appellant that Reyneke was an argumentative, unreliable and unsatisfactory witness, whose versions of events are so contradictory, fanciful and improbable in the light of the evidence that his evidence cannot be accepted and consequently that Nel's evidence must be accepted as uncontradicted;

43.7 while it is correct for the Respondent to say that it is the broker's duty to assist in informing the insured about which facts are material to the particular insurance cover or policy and should assist the insured to disclose all material facts, this is, however, not a relevant concern in the present appeal.

44. As far as the Respondent's loss is concerned, the Appellant contended and submitted in reply that:

44.1 it is also in issue whether, in consequence of the Appellant's breach of its legal duty to the Respondent, the Respondent in fact suffered damages;

44.2 the submission made on behalf of the Respondent "*that the*

*evidence of Mr Reyneke is indicative of a loss*" is not only unfounded but also unsubstantiated. No evidence, which could be construed as Reyneke having given such an indication, was ever adduced before the Appeal Board so too is what the Respondent refers to as "*the actuarial investigation obtained by the Ombud*". It therefore cannot be relied on by the Respondent in argument. The submission is further made rightly, in the opinion of the Board, that the evidence has not established that the Respondent suffered a loss, and the appeal should be upheld for this reason alone;

44.3 the Ombud's order that the Appellant should return the commission and that the question of the quantum of damages be postponed should be set aside, for reason of being internally contradictory.

45. In so far as the question of costs is concerned, it was submitted on behalf of the Appellant in reply that:

45.1 in the event that the appeal is upheld, an order granting the Appellant the costs of two counsel would be justified;

45.2 the matter is an important one to the parties and to the insurance industry, that the complaint lodged by the Respondent to the Ombud struck at the heart of the Appellant's reputation as a broker;

45.3 it became necessary for the Appellant to exhaust all internal remedies and processes, from submissions to the Ombud to appearing before the Board of Appeal. Apart from that, the

matter raised important legal issues and the factual matrix is complicated. The record was voluminous, as is the transcript of the appeal proceedings. In all circumstances of this matter, the Appellant submits that it was a wise and reasonable precaution for it to engage two counsel.

46. In conclusion, the Appellant persists with its claim that the appeal should be upheld with costs and the Ombud's determination be set aside and replaced with an order that the Respondent's complaint be dismissed with costs, such costs as to include the costs of two counsel in the application for leave to appeal, petition for leave to appeal and the appeal.

(I) **ANALYSIS OF THE EVIDENCE AND FINDINGS:**

47. Having thoroughly perused the appeal record and all relevant annexures, and having heard the evidence adduced on behalf of both parties, and having heard oral argument by the respective counsel, and having had the benefit of their written argument, the Board of Appeal makes the findings set out below. That:

- 47.1 it is common cause that this matter revolves around the repudiation by African Motor Underwriters (Pty) Ltd (AMU) on 11 April 2005 of a fleet insurance claim lodged by the Respondent in respect of an accident which happened on 15 March 2005 and the voiding of the relevant policy from inception on the grounds of non-disclosure of an undisclosed claim. The question arises: Who, between the parties, was responsible for the failure to convey the complete claims history to AMU? This calls for a scrutiny of the conduct of the

main role players, namely Messrs Jaco Nel and Renier Reyneke, who represented the parties at all relevant times;

47.2 it is also not in dispute, because it is trite, that insurance contracts are contracts *uberrimae fidei*, that is, of the utmost good faith. The necessity for such good faith has been repeatedly emphasised by our Courts. (See **Bodemer N.O. v American Insurance Company 1960 (4) SA 428 (T) at 434 [confirmed 1961 (2) SA 662 AD]**);

47.3 it is indisputable that there are rights, duties and obligations between the insurer and the insured which flow from an insurance contract as in any other agreement. Utmost good faith implies that the proposer or the insured must disclose to the insurer anything known to him that is material even though he does not appreciate its materiality. What is material are those special facts upon which the contingent chance is to be computed, which lie most commonly in the knowledge of the proposer or insured only. (See the **Bodemer** case *supra*). The duty of good faith also implies that the insurer has the right to avoid the contract not only if the proposer has misrepresented a material fact but also if he has failed to disclose one;

47.4 as Lord Blackburn aptly put it in the English case **Brownlie v Campbell (1880) 5 App Cas 925 (HL)**:

*"In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is **uberrima fides**, that, if you know any*

*circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge, if he does take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy."*

47.5 it follows that Reyneke, as the insured, was under an obligation to disclose to AMU everything known to him that was material, even if he did not appreciate its materiality. AMU, as the insurer, had every right to avoid the contract (as it did) for reason of Reyneke's failure to disclose a material fact. The broker's position is, however, somewhat different. As counsel for the Respondent, in the Board's opinion rightly, argued that it was Nel's duty to act with reasonable care and skill, this is the most important duty arising from the brokerage agreement. This is in line with Rule II of the Policy Holder Protection Rules under the Short-term Insurance Act (PRRSIA), published in GNR 7009 in Gazette 22084 of 23 February 2001, which states that the purpose of the rules is to ensure that the intermediaries conduct business honestly, fairly and with due care and diligence. (See also **Stander v Raubenheimer** case no. 1611/91 of the OPD 11 November 1993 unreported judgment cited by Havenga P in **The Law of Insurance Intermediaries**, p 21 Juta 2001). (See also par. 40.1 *supra*).

47.6 where the insured utilises the services of a broker for the

purpose of procuring insurance, it is the duty of the broker to disclose to the insurer material information of which he is aware. If the broker fails to assist the insured to disclose material information when procuring insurance on behalf of the insured, the insurer may choose to avoid the contract. (See **Pickering v Standard General Insurance Co Ltd 1980 (4) SA 326 (ZA)**). The duty to disclose material facts of which the broker is aware, flows from the duty to assist the insured to disclose material information. Where the broker is assisting the proposer to complete the insurance proposal form, it is the duty of the broker to see that all answers written down by him accurately represent the information provided by the insured. The broker is, however, not responsible for the correctness or truth of the answers, except where he has greater knowledge than the insured as a result of his previous dealings with the insured. (See **Dunbar Alfred James v A&B Painters Ltd and Economic Insurance Co Ltd and Whitehouse & Co [1986] 2 Lloyd's Rep 616 (CA)**).

47.7           lastly, although the broker might have other obligations towards the insured, for example, the duty to deliver the policy or a copy thereof, to the insured, such duty is not relevant here. Suffice it to say that, still on the question of the disclosure of material information, the broker has a duty to warn the insured to disclose all material information and to assist him with this. (See **Warren v Henry Sutton & Co [1976] Lloyd's Rep 276 (CA)**);

47.8           In the present appeal it is clear *ex facie* the written argument of counsel as well as from the evidence tendered to the Board

of Appeal, that the versions of the parties as to who is responsible for the failure to transmit the complete claims history to the underwriter are mutually exclusive. In particular, the Respondent contended that Reyneke told Nel of the undisclosed claim either during the weekend of 23 to 24 October 2004, or on the morning of Monday, 25 October 2004, and on 9 December 2004. Nel, on the other hand, denied that he was ever told of the undisclosed claim prior to AMU's repudiation.

47.9 Where versions of the parties are mutually exclusive, a plaintiff (the Respondent in this appeal) would only succeed if he satisfied the Court (read Appeal Board) on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant (the Appellant in this appeal) is false or mistaken and falls to be rejected. In deciding whether that evidence is true or not, the Court (the Appeal Board in this case) will weigh up and test the plaintiff's (the Respondent's *in casu*) allegations against the general probabilities. (See **Baring Eiendomme Bpk v Roux 2001 (1) All SA 399 SCA**).

47.10 It is clear from the evidence heard by this Board that the question of the Respondent's fleet claims history first reared its head when, on or about Thursday 21 October 2004. Fulbeck requested Nel to obtain such history. Thereupon, Nel requested a principal underwriter in the Appellant's office called Charmaine, to do so and simultaneously asked Reyneke for such history. On Friday, 22 October 2004, the

Appellant procured the Respondent's fleet claims history from Santam and received a telefax of this document from the Respondent's office, which had a handwritten inscription by Mrs Marais in respect of the aggregate of fleet claims for 2003 and 2004 which were not recorded on the Santam document. Mrs Marais transmitted this document to Nel on the instruction of Reyneke.

47.11 On Saturday, 23 October 2004, one of the Respondent's motor vehicles was involved in a collision, which subsequently resulted in AMU avoiding the Respondent's fleet policy on account of the non-disclosure of this collision to it. The relevant claim submitted was for approximately R838,000.00 and was settled on 1 December 2004 for approximately R900,000.00. The following day was Sunday, 24 October 2004, and nothing noteworthy seems to have transpired, but on Monday 25 October 2004, the Appellant obtained a further document at the Respondent's office with a similar inscription by Mrs Marais concerning the aggregate of the Respondent's fleet claims for 2003 and 2004. An amount of R70,000.00 for 2004 did not, however, include the claim in respect of the collision of 23 October 2004. The information regarding the Respondent's fleet claims history was given to Fulbeck for the purpose of sourcing insurance cover and providing a quote.

47.12 It is common cause that the insurance claim arising from the collision on Saturday, 23 October 2004, was only lodged by the Respondent with its then insurer, Regent, after Thursday, 28 October 2004. On 29 November 2004, Fulbeck was placed in possession of a **goods-in-transit** claim history,

which he had requested on 25 November 2004 for purposes of a further quote. It recorded a claim of approximately R30,000.00, which the Respondent apparently abandoned. Reyneke signed the insurance proposal form on 9 December 2004.

47.13 The Board finds that since the undisclosed claim was only lodged by the Respondent with Regent on 28 October 2004, prior to sending the fleet claims history to Fulbeck, it would not have availed the Appellant to request it from Regent because by that time Regent did not have a record of the undisclosed claim as Regent had not yet been informed of it. Besides, both the Appellant and Fulbeck would, indeed, have been none the wiser when submitting the first provisional fleet insurance quote to the Respondent on 22 November 2004. It follows that any suggestion or contention that Nel should have approached Regent to obtain the fleet claims history cannot be sustained.

47.14 The Board also finds that there is no evidence pointing to the fact that Nel was aware of the **goods-in-transit** claim at any time before it was obtained from Senate on 29 November 2004. In any event, the Board considers it to be far-fetched to expect Nel to link the said **goods-in-transit** claim with the undisclosed fleet claim. These are two different claims relating to disparate insurance policies. The finding is also made that, in line with the duty of disclosure of all material facts, Reyneke, when he appended his signature on the insurance proposal form on 9 December 2004, was well aware of the significance of ensuring that the broker and the

insurer were in possession of an up-to-date claims history. It is clear from the testimony of Reyneke that he did not make Nel aware of the details of the undisclosed claim, such as its amount and its settlement amount, but, as he said, simply informed Nel of a pending claim.

47.15 Regard being had to the Pieckering case above, the Board finds that once Nel had been informed by Reyneke of a pending claim, he had a duty to warn Reyneke to disclose all material information in respect of his claim, more so that he, like Reyneke, also appreciated the significance of ensuring that the insurer is placed in possession of an up to date claims history. It was also incumbent on Nel to assist Reyneke to disclose the details of the pending claim. Nel did not do that.

47.16 As to the credibility of both witnesses for the respective parties, for the purpose of determining the probabilities of the matter, the Board finds that Reyneke was a poor witness for the Respondent's case. This is especially so in respect of his account of the events of 25 October 2004, 9 December 2004 and 12 April 2005. His testimony on the events shall not be repeated here, since it is borne out by the transcript of the appeal proceedings. Suffice it to say that he contradicted himself on more than one occasion. The Board is inclined to agree with the submission made by the Appellant's counsel that Reyneke was an argumentative, unreliable and unsatisfactory witness, whose versions of events are contradictory, fanciful and improbable in the light of all the evidence. Besides, the Board finds it curious that Reyneke's evidence was not corroborated by Mrs B I Marais and Mrs A E

Reyneke, because both were not called to testify. Also, the Board finds that the suggestion by counsel for the Respondent that "*Reyneke is not the subject of the investigation*" cannot avail Reyneke as an unsatisfactory witness. Over and above the foregoing, the Board finds that Reyneke has failed to prove the loss he allegedly suffered as a result of Nel's and Appellant's conduct. Lastly, the Board also finds that since the AMU policy was voided *ab initio* it follows that any commissions paid by AMU in respect of this policy would have had to be refunded to AMU, while Reyneke would have received a refund of his full premium less only a deduction for AMU's "*claims expenses*". No refund of commission to Reyneke by Smit Garrun should, in this event, have been appropriate.

47.17 As to Nel's credibility as a witness for the Appellant, the Board finds that it is naive of him to think that he was a mere scribe or a conduit pipe in his dealings of Reyneke. As a broker of many years of experience, Nel must have been aware of his duties towards the insurer as well as towards the insured/proposer, Reyneke. And yet he neglected to ask for details from Reyneke about the scribbled handwritten information given to him on 25 October 2004. If anything, the evidence as a whole indicates that Nel carried out his duties as a broker with such sloppiness and shoddiness that it borders on dereliction of duty.

**(J) CONCLUSION:**

48. In the light of the foregoing factual background, as well as the

application of the relevant law on the specific facts of this appeal, the Board of Appeal arrived at the inescapable conclusion that both Messrs Jaco Nel and Renier Reyneke are responsible for the failure to convey the complete claims history to the underwriter. Nel was aware, or ought to have been aware, that it is important to have a complete claims history for the purpose of enabling the underwriter to determine a new insurance premium for the Respondent's fleet. And yet Nel did not ask Reyneke the question whether there were any further subsequent claims since 25 October 2004 when he was provided with a claims history by Reyneke. Furthermore, Nel considered himself a mere scribe or conduit in handling the Respondent's insurance business and did not ask Reyneke relevant questions and details about the manuscript notation in respect of the claims relevant to the Respondent's insurance with Regent.

49. As to Reyneke, he also knew or ought to have known, that the complete claims history is important to the underwriter for determining premium levels for insuring the Respondent's fleet. Reyneke was aware of a large recent claim but did not communicate this information to the underwriter. He thus breached the duty of good faith by his non-disclosure of this material fact. His claim that he was made by Nel to sign a blank form is, for a man of his experience, risible, preposterous and unsustainable. Also, he proved to be an unreliable witness and could not substantiate his contention about having told Nel about a large recent claim because other witnesses were not called to testify.

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(K) **THE ORDER AND COSTS:**

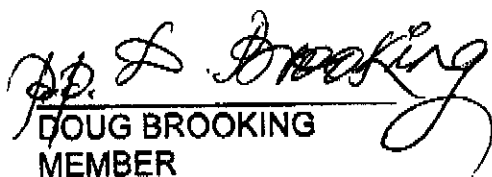
50. In the result, the Appeal Board unanimously makes the following order:


50.1 The appeal succeeds only to the extent that both Appellant and Respondent are found to be equally responsible for the non-compliance and for negligence in rendering the financial service in question;


50.2 Accordingly, the Board has decided that no compensation and/or restitution in respect of a commission together with interest thereon or otherwise is due and payable by the Appellant to the Respondent. It follows that the Ombud's order in respect of compensation for loss and/or payment of commission with interest is hereby set aside.

50.3 Each party shall bear its own costs, which costs shall include a contribution in the amount of R500.00 plus VAT of 14% towards the case fee by each of the parties, payable to the Ombud's Office within 14 (fourteen) days of this order.

**SIGNED AT PRETORIA ON THIS THE 31<sup>st</sup> DAY OF OCTOBER 2007**

  
DOUG BROOKING  
MEMBER

  
SOLLY STHOLE SC  
CHAIRPERSON

  
JAY PEMA  
MEMBER