THE OMBUDSMAN'S BRIEF CASE.

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(Newsletter of the Ombudsman for Short-Term Insurance)

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DEVELOPMENTS IN THE OFFICE

1.	The office of the Short-Term Insurance Ombudsman was once again nominated in 2004 as finalists in the prestigious DTI awards (Department of Trade and Industry) in the category of Industry funded organization for recognition of excellence in consumer protection.

2.	When the FSOS Bill became law earlier in the year, it became apparent that the statutory or catch all ombudsman would have (some) jurisdiction over commercial matters. The Act provided that this jurisdiction can be limited by regulation. The office of the Ombudsman was recently afforded the opportunity to provide input on proposed regulation that would inter alia, provide jurisdictional limits for the statutory ombudsman. The Board of the office of the Ombudsman for Short-Term Insurance, together with the SAIA Board, approved proposals that would allow this office to also deal with limited commercial insurance disputes. As the statutory ombudsman can only deal with matters not within the jurisdiction of a voluntary office, our proposals on the regulations followed the proposals as agreed to by our Board. If our proposals are accepted, the practical effect would be that qualifying commercial complaints will only be dealt with by this office. Attached hereto find our proposals in this regard.

CHAPTER 2

LIMITATIONS ON THE JURISDICTION OF THE STATUTORY OMBUD WHERE THE INSURED IS A BUSINESS ENTITY OR LEGAL PERSON

(Section 19 (1)-(4)) of the Act).

Limitation of statutory Ombud's jurisdiction

(1) The statutory Ombud created in terms of sec 13 and 14 of the Act, will not have jurisdiction to hear a complaint if the complainant is a small business, including a sole proprietor or trader, a juristic person, partnership or trust that had a turnover in the last financial year of more than R5 million.

(2) Where the complainant is a person mentioned in sub section 1, the statutory ombud's jurisdiction will further be limited to only deal with the following classes of insurance:

(a) Fire and Allied Perils, provided there is no claim for loss of profit or business interruption in which event the ombud would not have jurisdiction
(b) Glass
(c) Theft
(d) Motor
(e) Travel
(f) Sickness and Accident and
(g) SASRIA claims affiliated to the aforesaid classes of insurance.

(3) The statutory Ombud will not have jurisdiction to hear a complaint if it constitutes a monetary claim in excess of R800 000,00 for a particular kind of financial prejudice or damage, unless the respondent has agreed in writing to this limitation being exceeded, or the complainant has abandoned the amount in excess of R800 000,00.

1.	Nedbank and Nedbank Insurance brokers may be engaging in prohibited practices under the Competition Act
2.	The interpretation of Section 43(5) (a) of the Short term Insurance Act was inconsistent with and violated several provisions of the FAIS Act and could be challenged in terms of the Constitution.

3.	The FAIS Act prevails when any other law regulating market conduct in the rendering of financial services is inconsistent or in conflict with the FAIS Act.
4.	The homeowner is made party to an agreement with an insurer with whom he or she may not want to deal with which is in conflict with the Law of Contract, which states that in order for a valid contract to exist, the parties themselves must reach a consensus on the terms.

Quote:

" You should be free to use an insurance Company of your choice when taking out short-term insurance on your property that is bonded to a bank…" Charles Pillai

This ruling has no impact or effect on the manner in which complaints are dealt with by our offices. The nature of the complaint is outside the jurisdiction of this office as the requirement is imposed by the financial institution concerned and not the ombudsman.

OMBUDSMAN'S ADVICE

1. THEFT BY DECEPTION / INSURER LIABLE

The Insured was anxious to sell his Nissan Hard Body and advertised the vehicle in both Junk Mail and Auto Trader. In addition, he parked the vehicle in front of his business with a '*for sale'* sign on it. The vehicle was guarded by a 24-hour guard. A potential purchaser contacted the Insured and the following day the Insured telefaxed details of the vehicle to enable the purchaser to obtain a bank guaranteed cheque. That same day, the purchaser arrived at the Insured's office after 16:00 and wished to test-drive the vehicle. The purchaser went for the test drive with the Insured, together with one of his employees. After the test drive the purchaser stated that he wished to buy the vehicle. The purchaser had allegedly forgotten to bring the bank guaranteed cheque, but around 18:00 that same evening, the purchaser presented an envelope to the Insured. He opened it and half pulled out the cheque inside and then handed the purchaser the keys to the vehicle as well as the original documentation. About an hour later, the Insured examined the cheque more closely and, to his horror realised it was a possible fraudulent cheque because it appeared to be a photostat. The next day, the bank confirmed that the document was indeed a fraudulent cheque. The Insurer rejected the Insured's claim on the ground that the Insured did not take reasonable precautions to prevent the loss. The Insured had failed to obtain an identity document, address or reference of the purchaser.

The onerous obligation on an Insurer to demonstrate that the Insured did not exercise reasonable care or precautions to prevent a loss is common knowledge. The motor policy

cover is virtually on an All Risk basis insuring loss of or damage to the Insured property, even if this may have been caused by the Insured's negligence. The Insurer agreed to settle the claim.

2. INSUFFICIENT EVIDENCE TO UPHOLD DECLINATURE OF A CLAIM – VEHICLE ALLEGEDLY BEING DRIVEN BY PERSON UNDER THE INFLUENCE OF ALCOHOL

The Insured was on her way home after having been out for dinner, when she lost control of her vehicle and drove into a wall. The owners of the wall reported to the Insurer that the Insured could not stand on her feet and fell three times. She had to lean against her vehicle to keep her balance. Her speech was *'terrible, could hardly hear what she was saying"*, and she smelled of alcohol. They asked the police not to arrest the lady because, according to them, she was not young anymore and had undertaken to pay for the damages to the wall. The S A Police also reported that the Insured *'was under the influence of alcohol'*. Her speech was slurred and she had to lean against her vehicle, and would allegedly not have passed a blood alcohol test.

The Ombudsman pointed out to the Insurer that the Insured had reported that she had hit her head in the collision and *'was in total shock'*. The Ombudsman submitted that if the lady was concussed, then it was not surprising that she could not stand on her feet and would fall over. This could also explain her speech. The smell of alcohol on the lady's breath would not be sufficient to establish on a balance of probabilities that the Insured drove the vehicle while under the influence of alcohol. The Ombudsman requested the Insurer to indicate whether it had any further objective evidence to establish that the Insured drove the vehicle while under the influence of intoxicating liquor. The Insurer conceded that it was not in possession of any further objective evidence to indicate that the Insured was under the influence of alcohol at the time of the incident. It accordingly admitted the claim in full.

3. LOSS OF WATER FROM BURST PIPE NOT COVERED

The Insured's policy incepted on 22 March 2005, and exactly three months later he reported a loss to the Insurer advising that a pipe had burst and as a result thereof, vast volumes of water were lost. He claimed for reimbursement for the costs thereof. The Insured was advised that a burst pipe is a peril that is covered in terms of the policy and that the cost of repairing the pipe would be covered. The Insurer furthermore stated that in terms of the policy, the claim for loss of water was not covered. The Insured referred to policies of two other Insurers, which did give cover for costs of water lost through leakage.

The Ombudsman agreed with the Insurer that in terms of its policy, the Insured's claim was not covered.

4. LATE NOTIFICATION (BY FOUR YEARS) OVER-LOOKED

The deceased's 39-year-old husband and shift boss at a gold mine, spent Sunday night, 16 April 2001, away from home. When he returned home on Monday morning, 17 April, his 26 year-old wife was understandably upset and a full-scale argument developed between the married couple. The argument became violent and, in desperation, the wife, at 7:30, requested the presence of the police, who arrived promptly. She did not wish to accompany the police, but requested them to make regular checks on the house. Shortly after the police left, the Insured's husband produced a firearm and she ran to the neighbour's house for safety. She was pursued by her husband, who shot and killed her. The police were called, but the husband committed suicide as the police were approaching the house. Four years later, the Executor in the Estate of the deceased (the wife) lodged a claim with the Insurer, which rejected the claim on the grounds of late notification. The policy provided for a claim to be lodged within 180 days of bodily injury.

The Ombudsman pointed out to the Insurer that the Executor in the Estate of the Insured had considerable difficulty in obtaining documentation, because of the enmity which existed

between the two sets of parents of the deceased, e.g. the two deceased were buried on separate days in separate graves. The family of the husband had removed all papers and documentation and did not grant the Executor access to such documentation. The Insurer was then persuaded to meet the claim and paid R50 000 to the Executor.

5. MATERIALITY OF LEARNER'S LICENCE

The Insured's daughter, who had a learner's licence and was unaccompanied, came to a halt behind a vehicle that indicated that it intended to execute a right-hand turn. Whilst stationary, the Insured's vehicle was hit from behind by the third party vehicle. The Insurer rejected the claim on the ground that the driver of the Insured's vehicle had a learner's licence and was not accompanied by a passenger with a driver's licence.

The Ombudsman pointed out to the Insurer that although the driver did have a learner's licence, the fact that she was not accompanied by a passenger with a driver's licence was not material to the loss and the Insurer then admitted the claim.

6. TRYING TO SCORE A PROFIT RESULTS IN A LOSS

The Insured decided to sell her Mercedes C180 Kompressor 2003. She thought she could do better than the trade-in offer she received from a second-hand dealer and advertised the vehicle in the *Junk Mail*. In terms of the insurance policy, she was required to have a tracking device fitted to the vehicle. She transferred the device from the vehicle to a new vehicle she had bought. She was contacted by a prospective purchaser of the old vehicle, and then arranged for one of her male friends to take the vehicle to a shopping centre. As so often happens in cases of this nature, the buyer asked to test-drive the vehicle. The prospective buyer was accompanied by one male partner, who got in the back seat and the Insured's male friend got into the left front seat next to the driver. When they reached the Old Johannesburg road, the Insured's male friend was threatened with a pistol and he was then dropped in a desolate area and his cellphone and wallet were taken from him. Needless to say, the Insured never saw her vehicle again. The Insurer rejected the claim on the ground that the Insured had breached the condition that the vehicle, in order to obtain theft cover, should be fitted with a tracking device.

The Ombudsman was satisfied that for theft cover to operate, it was necessary that the Mercedes Benz be fitted with a tracking device and the Insurer was accordingly entitled to maintain its rejection of the claim.

7. FAILURE TO PRODUCE SUPPORTING DOCUMENTATION

On 11 June 2005, the Insured's property was burgled and a number of items stolen. The Insurer rejected the claim because the Insured had failed to prove ownership and value of the items claimed for. The entire claim was then rejected.

The Ombudsman pointed out to the Insurer that the Insured was recently divorced and it was accordingly little wonder that she would not have documentary proof of items stolen, because the documents might be in the possession of her ex-husband. The Ombudsman further pointed out that it was clear that the theft was genuine, and that provided the claimed items were in keeping with the life-style of the Insured and compared to the remaining property was not out of line. The Insurer made an offer of settlement which was accepted by the Insured.

8. INSURER BOUND BY THE ACTIONS AND ERRORS OF IT'S UNDERWRITING MANAGER

The Insured's vehicle, while driven by his son, was damaged in a collision. The underwriting manager appointed an assessor and authorised the repairs. After the vehicle was repaired,

the Insured rejected the claim on the grounds that it had not received the correct premium. It stated that although the underwriting manager had been informed that the Insured's son was the regular driver of the vehicle, the policy was incorrectly loaded.

The Ombudsman ascertained that a block of business had been transferred to the current Insurer by utilising the information set out on the previous Insurer's schedule without carrying out any further enquiry on the full extent of the current risk. The underwriting manager was notified of a claim, and as the Insurer's agent, appointed an assessor who duly agreed to the cost of repairs and authorised the repairer to carry out the work. The risk has been incorrectly rated by the underwriting manager and a dispute arose between the Insurer and its agent. The Ombudsman concluded that any differences did not in any way affect the Insured's claim as he was in possession of a policy and cover was in place, and directed the Insurer to settle the repairer's account.

9. FAILURE TO COMPLY WITH IMMOBILISING REQUIREMENT

The Insured's Fiat Uno Mia was stolen in Germiston. The vehicle was fitted with a gearlock (which was engaged) and a tracking device was installed. The claim was rejected as the immobilising equipment for theft cover to operate was the fitment of a VESA Level 4 Immobiliser.

The Ombudsman found that adequate notice had been given by the Insurer of the requirement and drew to the Insured's attention the consequences should he fail to comply. No evidence could be found to confirm that the Insurer had agreed to waive the requirement as the vehicle was fitted with a tracking system.

The Ombudsman agreed that the Insurer's decision could not be faulted on the basis of the facts presented.

TIME BARRING

TIME BARRING: Barkhuizen v Napier (Case Number 569/04, unreported)

The judgement handed down by De Villiers J in the matter of Barkhuizen v Napier, in which the constitutionality of time-barring was placed under the spotlight was recently overturned on appeal.

In the High Court judgement, Judge De Villiers found the time-bar clause unenforceable because it conflicted with S 34 of the Constitution, which states that "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

The learned judge based his findings on the following key points:

* That S34 applies not only against the state, but horizontally in contractual relations between private persons.
* The limitation of this period requires constitutional justification as the prescriptive legislation allows a plaintiff 3 years to institute action from date of loss.

* S 34 grants a contracting party a right of access to court that should not be obstructed

On appeal Judge Cameron raised two main questions in determining his finding:

* To what extent should the Bill of Rights provisions apply between contracting parties and
* If they do apply, does S 34 render the time-bar unconstitutional?

Cameron J considered, amongst other points, that the Time barring Clause may restrict the Insured to a limited period for the service of a Summons from the date of declinature. However, the clause does not exclude the courts jurisdiction entirely.

He argues that to challenge the term constitutionally is very narrow as one's dignity, equality and human rights should not invalidate a contractual term nor does the fact that the term is seen to be unfair or operate harshly lead to the conclusion that it offends a constitutional principle.
Cameron outlines the importance of having the freedom to engage in contractual arrangements and cautions the courts on intruding on apparently voluntarily concluded agreements or arrangements especially where it requires judges to impose their subjective, individual conceptions of fairness and justice of the terms and conditions of the individual arrangements.

A critical question posed is whether the plaintiff in effect was forced to contract with the Insurer on terms that infringed his constitutional rights to dignity and equality in a way that requires the court to develop the common law of contract so as to invalidate the term. A voluntary agreement was entered into entitling the plaintiff to insurance in respect of his vehicle on payment of a premium. The Time barring clause formed part of the agreement and thus defined the ambit of rights. It is interesting to note that Cameron emphasised the lack of evidence before the Court in this respect. One cannot help wondering if the decision would have gone the other way if the Court had had evidence to show that there are no, or few, short term insurance contracts that do not have a time bar clause.

Cameron distinguishes between ones statutory right and a contractual right. In a claim for delictual damage, for example, the claimant has a pre-existing right to legal redress. An unreasonable Time Bar in a statute then limits the existing right of access to court, which is deemed unconstitutional.

However, in a contractual agreement such as an insurance policy, there is no pre existing entitlement against the Insurer outside the contract. The terms and conditions of the contract define the rights, including the Time Bar. Without the contract, there would be no right of redress. Cameron pointed out that in a situation like this, it is ridiculous to argue that a contract limited a right, when that right would not have existed but for the existence of the contract.

In conclusion Judge Cameron states that the plaintiff concluded the contract of insurance freely and in the exercise of his constitutional rights to dignity, equality and freedom and that constitutional norms and values cannot operate to invalidate the contract entered into.

The appeal therefore succeeded.

Ombudsman's office:

Because the Ombudsman has the power as well as the duty to apply Equity, this office will still request the Insurer to investigate a claim even if it is time-barred. If it

transpires that the Insurer was wrong in its original rejection of the claim, the office will endeavour to persuade the Insurer to meet the claim. We have in the past had no difficulty in persuading Insurers to pay these time-barred claims. We would not be able to make a ruling. However, in the decision of Wimbledon Lodge (Pty) Limited versus Gore No and Others 2003 (5) SA 315 at 321 SCA, the following is stated:

"No one is allowed to improve his own condition by his own wrongdoing"

On this basis, if an Insurer has wrongly rejected a claim, Insurers have readily admitted the claim notwithstanding breach of the time-barring provisions contained in the Policy.

Message from the office:

The office of the Ombudsman wishes everyone a Happy Christmas and prosperous 2006.

Please note that our offices will be closed from the 22nd December 2005 and will re-open on the 3rd January 2006.

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