

CASE STUDIES

Please note that each matter is dealt with on its own merits and no precedent is created by the findings in these matters. The case studies are intended to provide guidance and insight into the manner in which OSTI deals with complaints.

FAILURE TO PROVE DISHONESTY OR DRIVING UNDER THE INFLUENCE OF ALCOHOL

Mr M was involved in a motor vehicle accident around 22h00 on 8 August 2018. He reported that a friend, Ms S was the incident driver. The incident description provided by both Mr M and Ms S was that a third party driving a Toyota Corolla skipped a stop street and collided into the insured vehicle.

The insurer asserted that Mr M breached his obligations in terms of the contract of insurance by failing to provide true and complete information relating to the circumstances of the loss. The insurer submitted further that a breathalyzer test conducted on Ms S at the accident scene indicated that she was under the influence of alcohol. It was on these two grounds that the insurer rejected the claim.

1. Mr M's alleged failure to provide true and complete information to the insurer.

The contract of insurance provides:

"Be honest

Always provide us with true and complete information. This also applies when anyone else acts on your behalf."

"You need to give us:

True and complete information to us and the authorities. We act on the information you provide, therefore any information which is misleading, incorrect or false will prejudice the validity of your claim."

The insurer appointed an assessor to validate the claim. The assessor interviewed Mr M and Ms S on 14 October 2018. The insurer submitted that Mr M had to disclose his whereabouts before the accident and provide further details in respect of the accident.

Mr M stated that he was at work from 07h30 to 14h30. Thereafter, he went to assist a student with school work. Mr M stated that he left the student's place around 18h00 and visited a friend, Mr P. They later drove to a 'chesanyama'. He stated that they ate liver and drank coke. Mr M advised the assessor that they had left the 'chesanyama' around 19h00 with several passengers inside his vehicle. He stated that they have driven to Ms S's home and spent some time there. Mr M informed the assessor that the accident occurred on the way to drop off another friend named Mr O. He stated that he had asked Ms S to drive the vehicle because she knew how to get from her place to Mr O's home. Mr M submitted that he did not consume any alcohol the entire day.

During the assessment conversation, Ms S confirmed that she was the incident driver. She also corroborated Mr M's version regarding the circumstances of the loss. Ms S was asked whether she had, had anything to drink before the incident. She submitted that she had consumed two Millers earlier that day, before 17h00. The assessor found a receipt for a

bottle of Russian Bear vodka inside the vehicle during his inspection. According to the receipt, the alcohol was purchased at Tops Liquor, Katlehong at 15h25. The assessor confirmed from Mr M's bank records that he had made this purchase.

The insurer submitted that the evidence of the transaction at Tops Liquor contradicted Mr M's timeline concerning his whereabouts between the time he had visited the student and Mr P. According to the insurer, when confronted with these findings, Mr M only advised the assessor that the alcohol was purchased for his friend Mr O. In his submissions to OSTI, Mr M stated that he had informed the assessor that he was not really keeping track of the time. Mr M advised that he merely estimated the timeline provided during the assessment interview.

The insurer submitted further that Mr M's bank statement reflected a transaction at "Lizzy's" for R200.00. It stated that Mr M could not provide any detail of what he had purchased.

The assessor also interviewed two witnesses at the accident scene. The insurer submitted that, according to these witnesses, the incident driver was male. They identified Mr M on an ID photograph presented by the assessor as having been the incident driver. They also stated that Mr M was injured by an airbag in the accident. The witnesses also informed the

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assessor that a woman, who was a passenger at the back of the vehicle, submitted that she was the incident driver. They stated that she did so as she was the only vehicle occupant who was not drunk.

The assessor interviewed another witness named Mr X. The insurer submitted that Mr X confirmed that a woman identified herself as the incident driver. He was however not convinced that this was the case. Mr X stated that he believed that the incident driver was an injured male who was lying outside the vehicle. Mr X also stated that the vehicle occupants were all drunk.

The assessor also interviewed the towing operator who uplifted Mr M's vehicle. He stated that the vehicle smelled of alcohol. He also found alcohol bottles in the boot. The towing operator stated further that, in his view, all of the vehicle occupants were under the influence of alcohol because they smelled of alcohol. The insurer also submitted that assessment notes were made that the vehicle interior smelled of alcohol and had spillage marks. The towing operator also stated that Ms S told him that she was driving the vehicle.

Mr M argued that he could not have been the person identified by the witnesses as lying down as he was busy communicating with the insurer telephonically and with the towing operator at the scene. According to Mr M, Mr O was the person lying down at the accident scene. He stated that Mr O was seated on the back seat without a seatbelt. The impact of the accident lunged him into the windscreen. Mr M submitted that he was seated on the front passenger's seat and had minor injuries. Mr M also denied that all of the passengers inside the vehicle were drunk as two of his friends inside the vehicle did not drink alcohol at all.

The insurer argued that the assessment findings indicated that Mr M gave false and misleading information with regards to his whereabouts before the accident, the identity of the incident driver and the consumption of alcohol. According to the insurer, there was sufficient circumstantial evidence on

which it could prove that Mr M was the incident driver and that he was under the influence of alcohol at the time of the accident. It further argued that the discrepancies noted in the assessment prejudiced its right to validate the claim. Mr M submitted recorded telephone conversations with a police officer. According to Mr M, the police officer and the investigating officer agreed to assist him with CCTV footage from nearby cameras to prove that he was not the driver. Mr M was however not able to obtain the footage.

As this is a civil matter (as opposed to a criminal one), the insurer is not required to prove the facts beyond a reasonable doubt but on a balance of probabilities. The insurer bears the onus of proving that Mr M submitted false information regarding his whereabouts before the accident, the identity of the incident driver and the consumption of alcohol. If this onus was discharged by the insurer, then OSTI had to decide whether the insurer was able to determine its liability for the claim based on the information provided by Mr M.

The receipt from Tops Liquor was the only evidence the insurer relied on to challenge Mr M's submissions with regard to his whereabouts before the accident. It proved that Mr M left the student's home before 18h00. This evidence, however, could not be considered in isolation. OSTI had to consider the evidence and facts of this matter as a whole before determining the materiality of this discrepancy.

OSTI considered Mr M's submission that the timeline provided during the assessment was an estimate. Mr M did not conceal the alcohol he had purchased. When OSTI listened to the recorded assessment interview provided by the insurer, OSTI noted that Mr M was asked if he had purchased any alcohol on the day of the accident. He disclosed having purchased the bottle of vodka.

The transaction at Lizzy's was in the amount of R84.00, not R200.00 as submitted by the insurer. OSTI confirmed that Mr M informed the assessor, during a subsequent recorded

assessment conversation submitted by the insurer, that this was what he had paid at the 'chesanyama'.

OSTI also listened to the assessment recordings with the two witnesses at the accident scene. In OSTI's view, their submissions were merely speculative and could not be relied upon without proven objective facts.

The witnesses at the accident scene concluded that Mr M was the incident driver without having witnessed the accident take place. Their statements did not indicate that they had seen Mr M driving the vehicle, or seated on the driver's seat, or exiting the vehicle from the driver's side. What they had said was that, if a driver was drunk, the sober person will always claim to be the driver.

One of the witnesses had stated that the woman could not have driven the vehicle because she was not injured. He had said that he had also seen her seated on the back seat. In the same conversation, the other witness (who was assisting the assessor with translations) mentioned that the witness was drunk on the night of the accident and had not seen properly. This other witness also mentioned that the man who allegedly drove the vehicle suffered injuries because of the airbags. According to Mr M, he was seated on the front passengers' seat. He could, therefore, have been hit by the airbag from that seat. The assessment photographs had shown that both airbags deployed. The witnesses also submitted that Mr M referred to the vehicle as his. This did not conclude that he was the incident driver.

The witnesses at the accident scene referred the assessor to Mr X. They stated that Mr X was the person who had best seen the accident. According to his recorded statement to the assessor, Mr X arrived at the accident scene after all of the vehicle occupants had exited the vehicle. He therefore, could not confirm the identity of the incident driver.

Further to the above, the Metro Accident Report made no mention of any issues with regard to the identity of the incident driver. Apparently, none of

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the insurer's witnesses raised this with authorities who attended the accident scene. The statement of the towing operator regarding the presence or use of alcohol was too general and did not take the matter further.

In light of the above, OSTI found that the evidence submitted by the insurer did not support the allegations made against Mr M. The insurer failed to prove that Mr M had submitted false information regarding his whereabouts before the accident, the identity of the incident driver and the consumption of alcohol. The insurer was therefore not justified in declining liability on this ground.

2. Driving under the influence of alcohol

The insurer had submitted that if Ms S was the incident driver, the evidence indicated that she was under the influence of alcohol. Ms S admitted to consuming alcohol before the accident. The insurer advised further that a metro police officer conducted a breathalyzer test on Ms S at the accident scene. The test results showed a breath alcohol content of 0.14mg per 1,000ml.

The contract of insurance provides;
"You're not covered for driving under the influence

If the person who drives the car:

- Is under the influence of alcohol or drugs
- Has a concentration of alcohol in their blood exceeding the legal limit or fails a breathalyzer test.
- Is under the influence of medication

used contrary to a practitioner's or the manufacturer's instructions.

- Refuses to give either a breath or blood sample."

The policy entitled the insurer to decline liability where the incident driver was under the influence of alcohol, or had a blood-alcohol level exceeding the legal limit, or failed a breathalyzer test. Ms S's blood-alcohol levels were never tested. The legal limit of a breathalyzer test is 0.24mg per 1,000ml. Therefore, Ms S did not fail the breathalyzer test. The issue which had to be determined, therefore, was whether Ms S was, on a balance of probabilities, under the influence of alcohol at the time of the accident. In this regard, the insurer bears the onus of proving that Ms S did, in fact, consume alcohol on the day of the incident. This was not in dispute. The consumption of alcohol alone, however, was not the end of the matter. The insurer further bears the onus of proving that Ms S was influenced by such consumption resulting in the accident.

It is trite that a driver will be found to be under the influence of liquor when "*the skill and judgment normally required of a driver in the manipulation of a vehicle was diminished or impaired as a result of the consumption of alcohol. The judgment of a driver will be impaired not only when his vision is dulled or his judgment is blunted or his muscular reactions to communication from his brain made sluggish, but also when the consumption of liquor has induced an exuberant over-optimistic frame of*

mind which causes him to take risks which he would not have taken but for the liquor he has consumed." - **Swart v Mutual & Federal Insurance Co. Ltd (10352/2004) [2009] ZAWCHC 107 (4 August 2009)**. The court in **Swart** stated further that the inference to be drawn must be based on objective facts, not conjecture and speculation. It was under these circumstances that the onus of proof would shift to Mr M. According to an affidavit deposed to by the metro police officer who attended the accident scene, Ms S's alcohol consumption did not exceed the legal limit. The third party, on the other hand, was found to have been three times over the legal limit. The incident description confirmed in the accident report pointed to the third party's culpability. None of the insurer's witnesses described Ms S's demeanour as that of a person whose mental faculties or driving ability were affected by alcohol to the extent that she was incapable of driving the vehicle with the required skill, care or judgment.

The insurer therefore had not demonstrated sufficient evidence to prove that Ms S was influenced by the consumption of alcohol or that it had contributed to the accident. In light of this, the insurer was not justified in its decision to decline liability on the basis that the incident driver was under the influence of alcohol.

Accordingly, OSTI recommended that the insurer settle the claim. The insurer agreed to settle the claim. The dispute was therefore resolved in Mr M's favour.

