

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.

MATERIAL MISREPRESENTATION AND DISHONESTY

Mrs V's policy inception with her insurer on 26 November 2018. She enjoyed "All Risks" cover for portable possessions.

Mrs V submitted a claim to her insurer in respect of the theft of her laptop and camera out of the boot of her motor vehicle, which occurred on 2 April 2019. The laptop and camera were specified under the policy. Mrs V also had cover for her motor vehicle and household contents under the policy.

According to the insurer's rejection letter dated 11 April 2019, it declined liability for the claim on the following grounds:

1. Fraudulent Claim: Misrepresentation / True and Complete Information.
2. Non-Compliance: Lack of Reasonable Proof of Ownership.

During the underwriting of the policy, Mrs V was asked to disclose any losses she had suffered in the preceding three years, being 26 November 2015 – 26 November 2018. According to a copy of the recorded underwriting conversation provided by the insurer, Mrs V disclosed a burglary which occurred in November/December 2017 to the value of approximately R20 000.00.

Following Mrs V's alleged loss, an assessor was appointed to validate the claim. The insurer advised that the underwriting information provided by Mrs V was incorrect. The insurer stated that Mrs V failed to disclose additional claims submitted to her previous insurer during the relevant three year period. The insurer submitted a TransUnion Claims Enabler Report and a copy of a recorded telephone conversation held with the previous insurer to substantiate these claims. The TransUnion Claims Enabler Report recorded 12 claims. The total value of the claims were approximately R291 499.00.

During the telephone conversation with the previous insurer, the assessor was

informed that Mrs V had three separate policies under the financial services group. She submitted a total of seven claims relating to household contents and portable possessions between 18 February 2017 and 15 November 2018. The previous insurer also advised that the policy was cancelled in November 2018 based on an 'unfavourable claims history'. In light of the assessment findings, the insurer rejected the claim and voided the risk based on material misrepresentation and dishonesty.

The rejection letter further stated that Mrs V informed the assessor that her laptop and camera were previously stolen in 2013. She stated that they were both subsequently replaced and never stolen again until the reported incident. According to the rejection letter, the assessor discovered that Mrs V claimed for the same/similar items with her previous insurers after 2013 and was compensated for that loss. The insurer argued that Mrs V intentionally provided misleading information relating to the claimed items. However, the insurer did not provide OSTI with a copy of the assessment conversation held with Mrs V.

In her details of the complaint, Mrs V informed this office that she had decided to change her insurer in November 2018 because her previous insurer had treated her unfairly after a home burglary claim. Her response to the previous losses was that the South African crime rate was notoriously high and that was why she insured her valuables.

Mrs V did not provide reasons for not disclosing the previous losses to her insurer during the underwriting of her policy.

The insurer cited the following relevant sections of the policy wording as the basis for the rejection of this claim:

"THE CONTRACT

The policy wording and your policy schedule is a legal contract between you and us.

The contract is based on the information you gave us when you applied for insurance, either by speaking to us or on any document.

Our duty is to provide the cover explained in this policy wording subject to the terms of the policy and the specific rules in your schedule for those sections which are shown on your policy schedule and for the insurance period set out on the same schedule.

Your duty in terms of the contract is to follow the rules explained in this policy wording and your schedule. If you do not carry out your duty in terms of the contract, we may increase your premium, cancel your policy or we may not pay your claim."

"DISHONESTY

We may refuse to pay a claim under this policy or cancel the policy from the date on which you have deliberately or dishonestly tried to take advantage of us.

For example, if you dishonestly exaggerate (overstate) the amount of your claim to get an inflated claims payment under your policy or if you give incorrect information to either get cover at a reduced premium or hide the fact that you did not comply with policy terms and conditions, all benefits under this policy will be lost, the policy may be invalid and you may not be entitled to a refund of premium (our emphasis). We may also take legal action against you. If this happens, you will have to repay all amounts which we previously paid towards your claims under this policy."

"OWNERSHIP

You are not covered under any section in this policy if you are unable to prove ownership or if you are not the legal owner of the item.

When you want to claim, you must:

- 3) Always give us true and complete

information. All documentation and information which you provide as evidence or support of any claim must always be true and correct."

The following provision was also noted on Page 8 of the Policy wording;

"CHANGES IN YOUR CIRCUMSTANCES

It is very important that you give us honest and accurate information at all times. This is what determines your risk profile and whether we accept your policy and what your premium should be. If you give us false or incorrect information, your policy may be invalid or you may not be covered in full or in part."

The insurer argued that Mrs V had a duty in terms of the policy to disclose all material facts truthfully, so that it could properly assess the risk. It submitted that by failing to disclose the additional losses, Mrs V misrepresented material facts relating to her risk profile. This created an unacceptably high risk according to its underwriting guidelines. The insurer submitted that it would not have agreed to conclude a contract of insurance with Mrs V had it been aware of her insurance loss history.

The Ombudsman's findings

Short-term insurance contracts are entered into in good faith. Under common law, a policyholder when requesting cover must make full disclosure of all matters material to the insurer's assessment of the risk. This principle is founded on the insurer's legal right to be informed of all the material facts to enable it to properly assess the risk. An insurer has the right to avoid a contract of insurance if the proposer has misrepresented a material fact.

The Supreme Court of Appeal conveyed the common law principles applicable to misrepresentations in **Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419 A**, as follows:

"There is a duty on both insured and insurer to disclose to each other prior to the conclusion of the contract of insurance every fact relative and material to the risk (periculum or risicum) or the assessment of the premium. This duty of disclosure relates to material facts of which the parties had actual knowledge or constructive knowledge prior to conclusion of the contract of insurance."

In terms of section 53(1) of the Short-term Insurance Act 58 of 1998, (STIA), an insurer has the right to avoid a contract of insurance if the proposer misrepresented information which was *"likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof"*. The test for materiality is then prescribed as follows;

"1) B. The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short-term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk."

The court in **Oudtshoorn Municipality** also remarked that the test for materiality is whether the notional reasonable person would have considered that the information should have been disclosed to the insurer.

In OSTI's view a 'reasonable person' in the position of Mrs V would consider that the additional losses and claims may influence the insurer's assessment of the risk and should, therefore, be disclosed.

The following was a transcription of the relevant portion of the underwriting conversation;

Advisor: *Have you had any losses in the past 3 years?*

Insured: *I have had a burglary yes. Last year. December last year. November somewhere around there.*

Advisor: *You had one last year, okay. And how much did the loss amount too?*

Insured: *R20 000.00.*

Advisor: *R20 000.00 - otherwise any other losses in the last three years?*

Insured: *No.*

Advisor: *Okay.*

OSTI was satisfied that the underwriting questions relating to Mrs V's loss history were clear. OSTI also confirmed that Mrs V was advised at the commencement of the underwriting conversation that the information she provided must be true and complete. She was also informed that incorrect information may affect the outcome of her claims.

The policy documents were also sent to Mrs V on 5 November 2018, before the commencement of cover.

Having regard to the facts in the matter and the ordinary application of the law on the relevant issue, OSTI found that Mrs V misrepresented material facts relating to her risk profile. This misrepresentation materially affected the insurer's assessment of the risk. The insurer was induced into concluding an insurance contract that it would not otherwise have entered into had Mrs V's claims history been fully disclosed. OSTI therefore found that the insurer was within its right to void the cover and reject the claim.

Mrs V informed OSTI that the insurer continued to collect the insurance premiums from her bank account notwithstanding the cancellation of the policy. This was addressed with the insurer and it confirmed that the relevant department was instructed to void the policy in April 2019. It appeared that, due to an oversight, this instruction was not carried out. The insurer rectified this on 11 November 2019. The policy remained void and Mrs V was refunded all premiums collected since 2 April 2019.

Osti's view was that the insurer was justified in its decision to avoid the risk on the ground of a material misrepresentation. The rejection of Mrs V's claim was therefore upheld.

The insurer's second rejection reason on the ground that Mrs V failed to provide reasonable proof of ownership for the items claimed was not adequately addressed in its response to the complaint. In her correspondence to this office, Mrs V provided two invoices for a camera and laptop dated July 2015 and September 2015 respectively. In reviewing the conversation between the assessor and Mrs V's previous insurer, OSTI noted that she submitted three claims for similar items between February 2017 and June 2018. It was therefore not clear if the invoices provided were in respect of the current loss. Nevertheless, given the finding OSTI made concerning the insurer's first rejection reason and the voidance of cover, the rejection of the claim stood despite Mrs V having provided proof of ownership and quantum.

Osti was unable to assist Mrs V and the matter was resolved in favour of the insurer.