



annual report 2019

the uninsured and the “not-so-insured”

Peter Nkhuna

Senior Assistant Ombudsman

The generally accepted statistic is that only 30 to 35 % of motor vehicles on South African roads are insured.

This statistic is simply based on recorded data. It is my contention, however, that in reality a greater proportion of vehicles considered insured may not in fact be insured. My submission is admittedly based on what some may call “anecdotal evidence” from complaints received by our office. The ratio of complaints received by OSTI to the total claims submitted to insurers is only 0.24% for 2019, so perhaps it is indeed only anecdotal.

Part of the reason for this view is that some consumers of insurance products do not comply with the terms and conditions of their policies. This may be either as a result of them not being aware of their responsibilities, or, alternatively, simply ignoring such responsibilities. We often find that insureds are of the mistaken belief that, by simply paying premiums, they are entitled to have all their claims settled by their insurers. On the contrary, the ombudsman’s finding in the matter discussed below demonstrates how important it is that insureds honour their own obligations.

Most motor policies impose the following responsibilities which are sometimes ignored or not met:

1. The duty to make accurate disclosures at all times;
2. The duty to allow only licensed drivers to drive the insured vehicle;
3. The duty not to drive the insured vehicle whilst the

driver is under the influence of alcohol;

4. The duty not to drive the insured vehicle recklessly;
5. The duty not to use an un-roadworthy vehicle on public roads; and
6. The duty to maintain the insured vehicle and keep it in a good state of repair;

The effect of ignoring or not meeting any of the above responsibilities is that, when an insured claims, the insurer may be entitled to decline liability.

In other words, while the vehicle would at face value be insured, in reality, and as a result of the insured not complying with the obligations set out in the policy terms and conditions, the vehicle is not covered. The insured would be operating on the premise that the vehicle is insured while his/her own conduct would lead him/her to being exposed to, at least, some of the risks that may materialise.

In one of the cases OSTI recently dealt with, the policy required that the insured keep his vehicle in a good state of repair. However, for whatever reason, the insured did not do this.

On a particular day, while the insured was driving his vehicle, he noticed that the vehicle was on fire. He, together with members of the community in the area, tried to douse the fire. There appeared to the insured to be no specific reason why the fire ignited. The insured subsequently registered a claim with the insurer.



During the assessment of the claim, the insurer found that the vehicle had been poorly maintained. It further found that the fire incident was as a result of the vehicle not having been properly maintained.

The assessor appointed by the insurer to determine the cause of the fire made the following findings:

- i. There were no signs of fire damage to the vehicle except for fire damage in the engine compartment;
- ii. The fire damage appeared to emanate from inside the engine;
- iii. There was evidence that the engine had overheated as a result of a cracked and broken plastic breather pipe of the positive crankcase ventilation system;
- iv. There was also evidence of one of the coolant hoses having been fitted by tying it with a piece of wire instead of a circlip/clamp normally used for such fittings, and the seal on the end of the rubber pipe was damaged;
- v. In addition, there was further evidence of advanced wear and tear, including oil leaking through the turbocharger's oil seals; and
- vi. It was the assessor's view that the fire was the direct result of the poor condition of the vehicle and that, if the vehicle had been properly maintained, the fire would not have occurred.

On the basis of the assessor's findings, the insurer declined liability for the claim and relied on the policy wording which stated that the insurer was not liable for "failure, breakage or rust, wear and tear, depreciation, perishing, fading, mechanical or electrical breakdown".

Being unhappy with the outcome of the claim, the insured lodged a complaint with our office.

It was the ombudsman's finding that the insurer's stance on the claim could not be faulted.

It is clear from the above example that, while this vehicle and the insured would have formed part of the statistics of the insured population, based on the condition of the vehicle, it was not, in fact, as comprehensively insured. In terms of the policy, there was no cover for any losses relating to accidents, fire or the other related perils where the condition of the vehicle was material to the loss.

In the case discussed above that the insured had failed to keep his end of the bargain, whilst, at the same time, expecting his insurer to honour the claim. In this case, had the insured maintained his vehicle, as required in terms of the policy, there would have been no loss or damage and therefore no claim.

It is conceivable that the insured's conduct could result in all of the benefits under an insurance policy becoming nullified, and not only some of them.

Insurance consumers are therefore encouraged to familiarise themselves with their policy terms and conditions and to conduct themselves accordingly, otherwise, they may find themselves unable to enjoy the benefits of their policies.

Peter Nkhuna
Senior Assistant Ombudsman

misrepresentation after the inception of the policy

Thasnim Dawood

Senior Assistant Ombudsman

Mr. V lodged a claim with his insurer for damage to his motor vehicle arising out of a motor vehicle accident. The vehicle was being driven by the insured's daughter-in-law, Mrs. M. The insurer rejected the claim on the grounds of material misrepresentation/ non-disclosure, on the basis that there was a material change in risk, of which it had not been informed.

The insurer advised that the regular driver of the vehicle on the policy was the insured's son, Mr. M. In the insurer's rejection letter the insurer stated that, when the cover for the insured vehicle was accepted, it was accepted based on the information and disclosures provided by Mr. V's broker when adding the vehicle to the already existing policy. Mr. V signed a form which noted all the relevant and necessary details. The insurer advised that Mr. V was asked for the details of the regular driver of the vehicle and the risk address as this had a direct impact on the insurer's decision to accept the risk. The insurer referred to the document where Mr. V stated and signed that Mr. M would be the regular driver of the vehicle. The vehicle had been bought for Mr. M.

During the investigation of the claim, the insurer found that Mr. and Mrs. M were separated from their marriage for approximately six to eight months prior to the accident and they were not living together. Mrs. M was living at a different address to the address noted on the policy. When they separated, Mr. M told Mrs. M that she could make use of the vehicle for herself and their children. Mrs. M had been using the vehicle ever since.

The insurer advised that both Mr. M and Mr. V were aware that Mrs. M did not have a driver's license and only had a learner's license and they were aware that Mrs. M would be using the vehicle as the regular driver.

The insurer advised that it was not informed that the regular driver and risk address had changed. The insurer submitted that the failure by both Mr. V and Mr. M to disclose the changes in the risk resulted in a non-disclosure of material facts. The insurer submitted that, if it had been made aware that Mrs. M would be the regular driver of the vehicle, it would not have accepted the risk as the regular driver, in terms of the policy, is required to have a valid driver's license.

The insurer referred to the following policy wording:

"information that affects and changes the risk: there is an obligation on you to advise us immediately on the happening of any event that may affect our decision to accept the risk or the terms on which we accept the risk or our continued acceptance of the risk. Should you not adhere to these obligations, we may void the whole or any part of this policy and the section as from inception or date of change" and for this general condition, the term "you" includes any person acting on your behalf. "

According to Mr. V, he did declare that Mr. M would be the regular driver, that Mrs. M would drive the vehicle and that she did not have a valid driver's license.

Mr. V submitted that he informed his broker that Mrs. M had a learner's license. He advised that he repeatedly

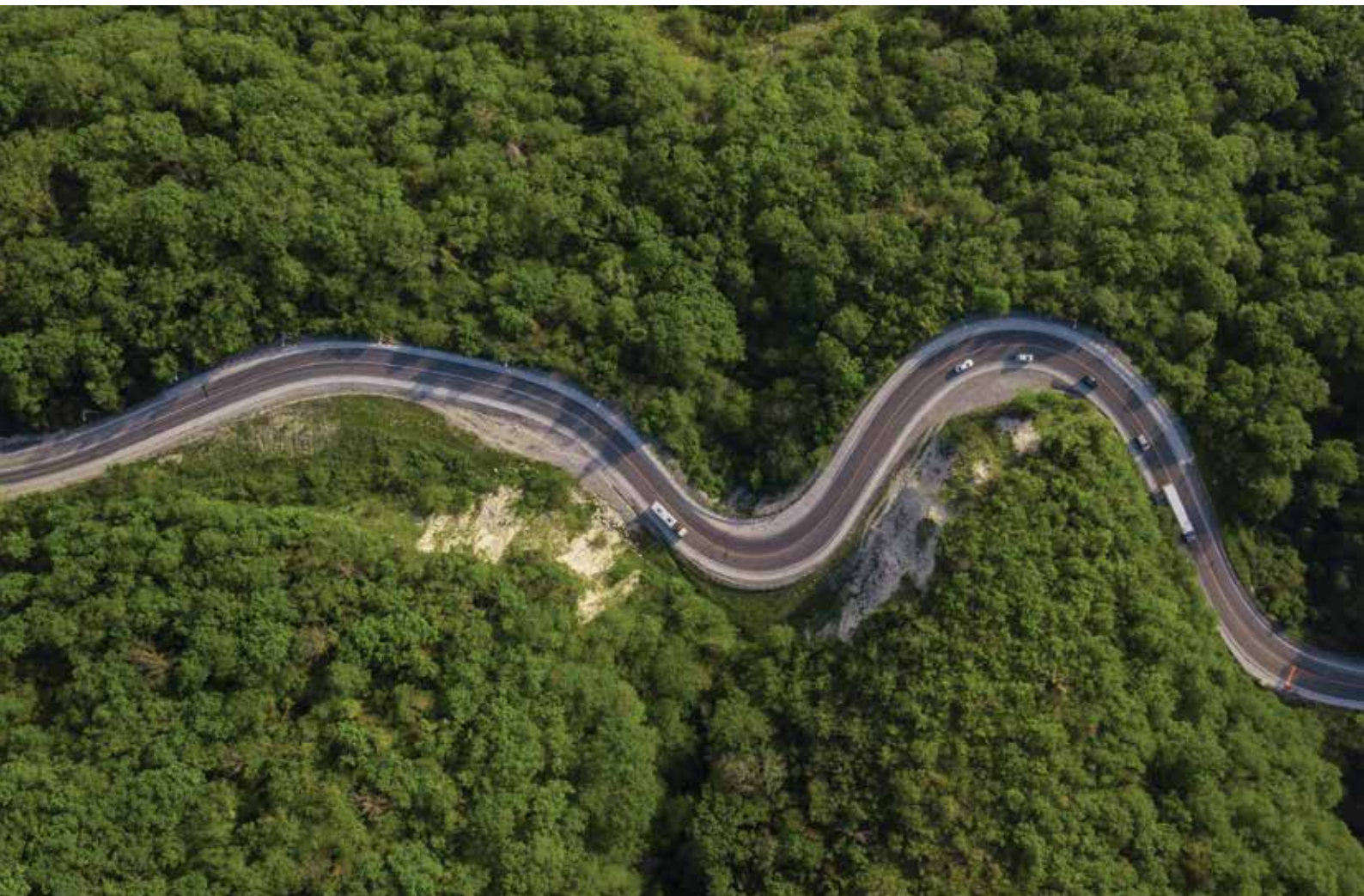
asked his broker to confirm that Mrs. M was covered by the policy even though she only had a learner's license. According to Mr. V, the broker confirmed that Mrs. M was covered. The insured argued that Mrs. M complied with the legal requirements of a holder of a learner's license, especially with the condition that such person may drive a vehicle if another person, who has a valid driver's license, accompanies him or her. Mr. V submitted that the policy contract did not define or describe the term "driver's license" and that it did not make any mention of a learner's license. He argued that, as a result, while the policy does not make reference to a learner's license, there is no restriction on the term "driver's license". According to Mr. V, he informed his broker that Mrs. M only had a learner's license and his broker assured him that she was covered under the policy.

Mr. V then referred to the policy wording and stated that it did not define a "regular driver". Mr. V said that

his broker's explanation was that "as long as his son was declared the regular driver, then his wife was automatically included and covered by the insurer."

Mr. V submitted further that the change in risk address was only material to the risk of theft and hijacking and that it was not material to the risk of accident. He argued that he had disclosed all the necessary information to his broker.

The insurer submitted that "license" means a valid driver's license and that the reference to a learner driver is there to ensure that there is no confusion that a learner driver needs to comply with the legislation concerning learner drivers. The insurer submitted that the issue was not whether Mrs. M could lawfully drive a vehicle in the circumstances permitted by the relevant legislation. The issue was that Mrs. M had become the regular driver of the vehicle which was a risk that the insurer would not have accepted. ▶



The insurer advised that the risk it underwrote changed fundamentally and that the insurer did not cover regular drivers who held only learner drivers' licenses. The insurer submitted that Mr. V did not meet his disclosure obligations in terms of the policy in that the insurer was not made aware, at any time prior to the accident, that the regular driver of the vehicle and the risk address had changed.

The insurer did not view Mr. M and Mrs. M as being "one as the other". The insurer submitted that factors such as age, driving experience and the number of years of holding a valid driver's license, have a direct impact on the acceptance of a risk and, if the risk is accepted, the conditions and rates that are applied to the premium. The insurer referred to the regular driver clause in the policy which reads as follows:

"2 REGULAR DRIVER CLAUSE

We use pertinent information about the stated regular driver to determine the premium we charge to insure each vehicle. This information includes the person's age, driving history, driving ability and financial status. You have to advise Us immediately of a change in the following:

2.1 The regular driver of a vehicle;

2.2 The occupation of the regular driver;

2.3 Change of use of the vehicle;

2.4 The financial status of the regular driver (including information relating to any judgments, convictions or if the regular driver has been declared insolvent or placed under administration);

2.5 Change of address where vehicle is kept overnight. We may decline to indemnify or compensate You for Your loss, damage or any liability under this section if the risk is materially changed without Our written consent."

The insurer stated that, when considering a change in the risk address, the insurer assesses not only the new address but also the security of the premises and where the vehicle is parked at night.

The insurer advised that in this matter it had not been given an opportunity to assess the changes in the risk. The insurer submitted that Mr. V's failure to disclose the change in the regular driver resulted in a material non-disclosure which entitled it to void the policy.

The issues that OSTI had to decide were whether there was a material change in risk and whether the insurer was entitled to reject the claim based on material non-disclosure.

When the policy was underwritten, the insurer was advised that the regular driver of the vehicle would be Mr. M and he was noted as such. It is common cause that Mr. M was in possession of a valid drivers license. It is also common cause that Mrs. M only had a learner's license. In order for Mrs. M to have driven the insured vehicle, she would have needed to comply with the requirements of the relevant legislature, in particular, to drive the vehicle while accompanied by a person who had a valid driver's license. At the time of the accident, Mrs. M had become the regular driver of the vehicle. This meant that there was a material change in the risk and the fact that Mrs. M only had a learner's license was clearly material to the risk, if not to the loss. The insurer would not have accepted the risk had it know that Mrs. M was the regular driver. The insurer did not accept regular drivers who only had learner's licenses.

Under the circumstances, our office found that there had been a material change in the risk in respect of the regular driver and that the insurer was entitled to reject the claim on this basis. Mr. V did not inform the insurer of this change and, had the insurer been informed, it would not have continued to accept the risk.

As a result the insurer's rejection of the claim was upheld and Mr. V's complaint was dismissed.

Thasnim Dawood

Senior Assistant Ombudsman

same-same, but different ... (in the context of cell phone claims)

Darpana Harkison

Senior Assistant Ombudsman

The insured submitted a claim for the theft of his cellphone, a Samsung S7 Edge, which took place during a burglary at his risk address on 20 October 2018. The insured referred the matter to the Ombudsman's office due to his dissatisfaction with the insurer's offer of settlement.

On 5 January 2018, the insured contacted the insurer to amend the policy as he and his wife had separated. When the insured asked the insurer's sales consultant what he would be paid by the insurer should anything happen to his cellphone, the insured was advised that he would be paid the insured amount, being R15 000.00, minus his excess of R500.00.

At the time that the insured submitted the claim, the Samsung S7 Edge could not be replaced and the insurer offered to settle the insured's claim by replacing the Samsung S7 Edge with a Samsung Galaxy S8. However, based on his conversation with the insurer on 05 January 2018, the insured was adamant that the claim must be settled on a cash-in-lieu basis in the sum of R14 500.00.

The issue to be determined by OSTI was whether the insurer's offer of settlement amounted to indemnification on the part of the insurer.

Short-term insurance contracts are contracts of indemnity which means that the insurer's obligation is to place the insured back in the same financial position that he was in immediately prior to the loss or damage. Indemnity also means that the insured should not profit from the insurer's settlement of the claim. Therefore, if the insurer were to settle the claim on a cash-in-lieu basis in the sum of R14 500.00, this would have amounted to the insured making a profit from the loss and the offer would fall outside of the scope of a short-term insurance contract.

The policy wording which the insurer relied on to substantiate its offer of settlement provided that:

"Need to claim

We have the choice to settle your claim in any of the following ways:

- *Paying out cash to you.*
- *Repairing the damage at a repairer of our choice.*
- *Replacing the item at a supplier of our choice.*
- *Any combination of the above.*

What's it worth

The insured value that's noted on your policy schedule is the maximum amount that we'll pay for any claim, less the excess amounts payable by you, and less any dual insurance and under-insurance."

It was pointed out to the insured that, when dealing with contents items, which depreciate in value due to use and rapidly changing technology, it becomes difficult for an insurer to place the insured back in the same financial position. Consequently, an extension of the indemnity principle is that where the risk item is insured for its replacement value, the insurer is then permitted to replace the lost used item with a new item which is similar to the item which was on cover.

It was not in dispute that the replacement phone, which the insurer sought to provide to the insured, was a newer and more modern phone than the one that was on cover. Therefore, the insured was advised that the insurer's offer to replace the Samsung S7 Edge with a Samsung S8 Galaxy did amount to indemnification on the part of the insurer.

The insurer then offered to settle the claim on a cash-in-lieu basis in accordance with the policy wording, which granted the insurer the right to decide the manner in which the insured was to be indemnified in the event of a loss.

In conclusion, OSTI held that the insurer had successfully proven that, on a balance of probabilities, its offer of settlement was fair and reasonable and in accordance with its obligations to indemnify the insured as set out in the policy wording. A recommendation was accordingly made to the insured to accept the insurer's offer.

Darpana Harkison

Senior Assistant Ombudsman