

## **Insurance- What exactly does the law require a prospective insured to disclose when acquiring insurance?**

Insurance has been controversially described as the single most important concept developed by mankind. Whether you agree with that or not, when one considers it, insurance ticks away behind the scenes in most of our lives from the time we wake till the time we go to sleep and even while we sleep; life insurance, disability insurance, household insurance, car insurance, professional liability insurance... the list goes on.

Insurance developed because life is full of risks, many of which are too onerous for the average person or business to manage. The result: companies which are willing to take on that risk on your behalf, at a cost- the premium. In calculating the premium the insurer must be in a position to accurately assess the risk.

When one browses through the law reports it is evident that the failure to provide proper information at the time of taking out insurance remains the most common reason for insurers to avoid liability under a claim. It is so common in fact that one wonders why it is that so many claimants fail to provide such information. One would think that because insurance is taken out for peace of mind, those taking it out would take more time and care in providing the requisite information to their insurers. Perhaps the answer lies in the fact that most people do not know what the law requires them to disclose.

The question is then: what exactly does the law require a prospective insured to divulge at when taking out insurance cover?

When negotiating an insurance contract parties are considered to be doing so in "good faith". This requires the parties to be open and honest with each other and to make open and truthful representations about their circumstances. Any misrepresentation of facts is a breach of the duty of good faith.

South African law recognises two types of misrepresentation: a positive misrepresentation which is simply referred to as a misrepresentation and a negative misrepresentation, which is referred to as a non-disclosure.

A positive misrepresentation occurs when the insured represents a fact as being other than it is. This could be a lie or a mistake. For example, if a 21 year old insured inadvertently answered the question, "How old will you be at your next birthday?" by stating "21 years"- he

would have misrepresented his age.

A non-disclosure occurs when an insured fails, without being specifically asked, to disclose information which is material to the calculation of risk. For example by failing to disclose that cargo was going to be carried on deck rather than below deck.

The effect of a misrepresentation or non-disclosure is dealt with in section 53 of the Short Term Insurance Act of 1998 (the "Act").

In terms of the Act an insurer can only avoid liability under a contract of insurance if "a reasonable, prudent person would consider that the particular information... 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."

In other words there needs to be an element of materiality between the information misrepresented and the risk. The court has interpreted this section of the Act as creating an objective test; in other words the test of the reasonable person.

It is accordingly of no relevance whether either the insured or the insurer thought the information was relevant and material. If the insured was aware of the existence of the information and a reasonable person would have thought that the information should have been disclosed just in case it was relevant, then, in our law, it should be disclosed.

Although this test provides a guideline, the difficulty will always be that an insured, when applying for insurance, will always think itself to be the epitome of the reasonable person. It is difficult to conceive a situation where a person filling out a form says to himself, "I wouldn't disclose this but then again I'm not a reasonable person." As a result the best yardstick to go by is to ask yourself: is this relevant? No matter the answer, if you have had to ask the question, it probably is.