



THE OMBUDSMAN
For Short-Term Insurance

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THE OMBUDSMAN'S



BRIEFCASE

Newsletter of The Ombudsman for Short-Term Insurance

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ADVICE FROM THE OMBUDSMAN: 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.

ADVICE FROM THE OMBUDSMAN: CASE STUDIES

INTERPRETATION OF POLICY WORDING IN ORDER TO DETERMINE LIABILITY

Western National Insurance Co

Whilst on a holiday trip, Mr X parked his vehicle and trailer in a parking area at a coffee shop. He was meeting family at the coffee shop on his way back home from holiday.



When Mr X came out of the coffee shop, the trailer with its contents to the value of R200 000-00 had been stolen. Relying on a limit of R20 000-00 in the policy for "loss of contents from a vehicle", the insurer offered to settle the claim in the amount of R20 000-00.

Mr X challenged the insurer's decision and sought indemnification of the full value of the loss.

Under the "Contents of all risks cover", the policy provided cover for contents anywhere in the world. The policy read "(we) will compensate you for any loss of or damage to contents removed from a dwelling anywhere in the world up to an amount not exceeding 25% of the contents sum insured of the dwelling or the amount stated in the schedule – whichever the lesser."

The policy read further that:

"Compensation under this cover is specifically excluded per the following:

3.7 Loss of contents from a vehicle (including caravans and trailers) in excess of R20 000-00."

The issue for determination by the Ombudsman was whether the clause limiting liability in respect of goods stolen from a vehicle was applicable in circumstances where the goods were stolen in conjunction with the item (i.e. the trailer) in which they were housed.

Mr X argued that, as a layman, he found the wording of the exclusion "was unclear, ambiguous and inadequate" for him to understand the scope of the limitation. He further stated that "loss from a vehicle" has a different meaning from "loss of a vehicle with its contents."

He was of the opinion that the exclusion did not apply to the loss

"of a vehicle with its contents". He stated that "loss from" and "loss of" have totally different meanings. He understood it to mean that the exclusion would only apply where loss occurred from the vehicle/trailer and not where the vehicle/trailer was stolen with its contents. He said that the fact that the contents were later removed ("loss from") was irrelevant as the initial loss happened with the theft of the trailer, and that such loss was not excluded or dealt with in the policy document.

The insurer, in its formal response to this office, stated that in order to enhance the ease of legibility, the policy had been written in plain English. It was drafted in such a way that the normal, literal meaning of the words could be assigned to them. The insurer referred to the Oxford dictionary which defined the word "from" (quoted from the online version at <http://www.oxforddictionaries.com/definition/English/from>) as:

"PREPOSITION

Indicating the point in space at which a journey, motion, or action starts:

"She began to walk away from him"

"I leapt from my bed."

FIGURATIVE

"He was turning the Chamberlain government away from appeasement."

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The insurer concluded that the loss had indeed occurred “from” a trailer and that the limitation applied. The insurer stated that it had performed in terms of the policy contract between it and Mr X by having offered R20 000-00 in compensation for the loss claimed.

The Ombudsman recommended to the Insurer that it settle the full claim raising the point that the word “from” does not only indicate the point in space at which a journey, motion or action starts but also means separation or removal, such as in the example “the party was ousted from power after sixteen years”.

In the Ombudsman’s view there was no separation of the stolen contents from the trailer; the contents were stolen together with the trailer and therefore the exclusion relied on by the insurer did not apply.

As Mr X had cover under the contents all risk section of the policy up to a limit of 25% of the contents sum insured, Mr X’s claim was payable under this section of the policy.

The Ombudsman held the view that if it was the insurer’s intention to exclude or limit its liability for a claim where items were stolen together with an insured vehicle or trailer, then this should have been clearly stated in the wording of the exclusion. The Ombudsman further stated that the fact that the word “from” was open to more than one interpretation, as illustrated by the examples given by the insurer, entitled the Ombudsman to invoke the contra preferentum rule against the drafter of the policy, being the insurer.



The Ombudsman held that the insurer was therefore not entitled to apply the R20 000-00 limit to Mr X’s claim and recommended that the insurer pay the claim in full, which the insurer agreed to do.

NON-DISCLOSURE OF PREVIOUS LOSSES

Mutual & Federal Insurance

Mr Y submitted a claim for a single motor vehicle accident.

The insurer rejected the claim on

the grounds of non-disclosure by Mr Y of previous losses suffered by him, which according to the insurer, was a breach of the policy terms and conditions.



In support of the rejection of the claim the insurer referred to the General Terms and Conditions of the Policy under “Your Responsibilities” which reads as follows:

4.1 You must check all the information you have provided to make sure it is correct, including material information.

Material Information is information that a reasonable person would consider essential to iWYZE in order to properly assess your risk. In assessing your risk, we can decide whether or not to insure you, what premium to charge for your risk and whether to apply addition terms and conditions.

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4.2 **IMPORTANT:** All information provided by you will be validated at claims stage.

Example of material information: PREVIOUS burglaries, accidents or judgements against you.

If you do not provide us with correct information, it would be interpreted as a misrepresentation, omission or non-disclosure and iWYZE may:

- a) Reject your claim
- b) Declare your policy invalid from the start date of the policy
- c) Cancel your policy;
And
- d) Recover any compensation we have given you in settlement of previous claims.

4.4 You must inform us immediately if any information we have about you and/or the items you have insured changes or is no longer true and complete."

During the telephonic sale of the insurance policy, Mr Y was asked to disclose losses suffered in the last five years. He informed the insurer that he had suffered one loss in 2011.

During the validation of the claim, the insurer established that Mr

Y had three more losses within this period, which were not disclosed at the inception of the policy.

According to the insurer, had the losses been disclosed at the sales stage, the premium would have been calculated differently. The insurer therefore suffered a prejudice of 23.6% in respect of the premiums. The insurer submitted that it had not considered a proportional settlement of the claim due to the fact that the misrepresentation was made intentionally by Mr Y. Mr. Y disputed this arguing that he disclosed what he could reasonably remember.

The Ombudsman pointed out that the losses which were not disclosed fell within the five year period on which the insurer's questions were based and further, that the recorded sales conversation did not give any indication that Mr Y was uncertain about what the insurer required in order to correctly underwrite the risk.

The Ombudsman further stated that short-term insurance is a contract entered into on good faith and that there was no obligation on an insurer to verify the information at the sales stage of the policy.

The insurer had discharged its obligation in terms of the Policyholder Protection Rules in that it had created a clear duty of disclosure and that the insured should, in the position of a reasonable person, have known that he needed to disclose all losses suffered in the last five years to the insurer.

The Ombudsman therefore upheld the insurer's decision to decline liability.

TWO INDIVIDUAL CLAIMS OR ONE CLAIM

Infiniti Insurance Co Ltd.

Mr P filed a complaint following the insurer's decision to only settle a portion of a claim for damage to the engine of his motor vehicle, a BMW X5.

The issue that the Ombudsman had to decide was whether two separate claims with the same components under a limited liability provision in an insurance policy should be treated as two individual claims or as one claim

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with a single application of the limit.

In terms of the policy schedule, the insurer's liability on the repair or replacement of any part was limited to the amount specified in respect of that component as set out in the Limits of Liability Table forming part of this policy. In this matter, the component was an engine which had a limited liability of R70 000-00.



Mr P first had a claim six months after buying the vehicle when the turbo of the vehicle needed to be replaced. The cost of the replacement was R85 000-00 and the insurer paid R20 000-00 in terms of the policy for a turbo. Four months later, the vehicle's engine failed as a result of the exhaust VANOS unit on the cam shaft being faulty. The quotation for repairs was in the region of R60 000-00 and the insurer paid R41 344-98, again in terms of the policy's limit of liability for an engine.

Approximately two months after the second failure, the oil pump failed. This led to a bearing failure which resulted in the engine seizing. The quoted cost for these repairs was in the region of R135 000-00.

According to the assessor appointed by the Insurer, "the oil pump failed resulting in a drop in oil pressure which subsequently damaged the big end bearings."

The assessor, in detailing his findings, stated that on inspection of the cam shaft it was noted that the cam-lobes were slightly scored and that the cam gears were new and recently replaced. He stated that the tappet cover and cylinder showed no signs of any sludge build-up within the engine. He inspected the sump and found that there were metal particles in the sump due to the bearing failure that occurred within the engine. He inspected the oil pump and found that it was turning freely and that the oil pickup was clear of any signs of blockages.

The repairing dealer was requested to strip the oil pump open so that it could be inspected internally and it was observed that the oil pump gear casing was deeply scored

and that there were also metal particles evident within the oil pump.

It was found that the oil pump suffered score marks and pit marks on the oil pump gear veins that increased the operational allowed clearances of the oil pump gears and ceiling ability to create oil pressure. The lack of oil pressure resulted in big end bearing failure and the big end bearing on the number 8 cylinder was turning within the bearing cap causing severe damage to the bearing. An oil sample was taken and presented to the lab for analysis. The results of the lab analysis had not been provided by the insurer to this office.

In the insurer's formal response to the complaint, and in subsequent responses to this office, the insurer advised that its limit of liability would be R70 000-00 and that, based on the assessor's findings and having considered the vehicle's engine repair history, it was of the opinion that due to the condition of the oil pump and bearings, the oil pump failure was already imminent at the point of the previous engine repair and that the amount of damage to both the oil pump and the severe scoring of the bearings would not have occurred in 880 kilometres. It was the insurer's opinion that the

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current repair or failure would have been a contributing factor to the previous engine repair.

For this reason, the insurer was only prepared to assist with the balance of the engine benefit limit. In other words, as the insurer had, in the second claim, already paid R41 344-98 towards the repair of the engine, it was only prepared to pay the balance of R28 655-02, both amounts together totalling the maximum engine limit of R70 000-00.

Mr P wanted the insurer to pay R70 000-00 towards the current damage and repair costs and was of the opinion that the current engine failure was unrelated to the previous failure and repairs carried out. He stated further that if the current failure was indeed related to the former claim, then the dealer should have picked this up at the time of the previous repair and their failure to do so amounted to negligence.

The insurer maintained its stance that the current failure was related to the previous claim and that it was therefore not liable to pay another R70 000-00 in respect of the engine benefit.

The Ombudsman pointed out that nowhere in the report did

the assessor state that the current damage was related to the previous claim, that the oil pump failure was already imminent at that point, that the current damage on the vehicle could not have occurred in 880 kilometres or that the current failure had contributed to the previous engine damage.

Mr P obtained a report from the dealer which stated that the repair had no relation to the previous repair carried out on the vehicle when the VANOS unit was replaced, which was situated on the cylinder head. It stated further that the reason for replacing the VANOS unit was because the engine warning light kept coming on and that the vehicle came back for a noise in the engine.

The Ombudsman was of the view that the insurer had not discharged its onus of proving on a balance of probabilities that the current damage to the vehicle was related to the previous failure and/or repairs and that the insurer was therefore not entitled to settle the current claim on the basis that it had proposed to do.

The Ombudsman also stated that the insurer could not rely on the final decision of its claims department and its claims management as their technical expertise could not be viewed as independent.

Further, if the Ombudsman were to find that the current failure to the engine was related to the previous failure and/or that the oil pump failure was already imminent at that point, the policy wording made the repairing dealer the agent for the insurer. From the insurer's formal response, it appeared that the limits of liability in respect of the first two claims were authorised to the repairing dealer, making the repairing dealer the insurer's agent. If the insurer's agent had failed to pick up any imminent oil pump failure, then the insurer's agent was negligent for not having picked up this failure and repairing it at that stage. This, in turn, rendered the insurer negligent.

However, as there was no independent expert evidence to support the insurer's contention that the current failure was related to the previous failure and/or repairs, the insurer was requested to settle the current claim in terms of the limit of liability for the engine component, being R70 000-00.

The insurer agreed to settle the claim on that basis.



NEW STAFF MEMBERS

We have pleasure in welcoming the following new members of staff

Sangeetha Sewpersad - Assistant Ombudsman

Sangeetha joined the insurance industry in November 2011. Prior to joining OSTI in February 2017, Sangeetha worked for an insurer as a Legal Dispute Specialist and later as a Legal and Compliance Advisor. She accredits her knowledge of insurance law to having had great mentors in both the legal and insurance industry. She holds a BA and an LLB degree from the University of Natal (now UKZN) and is admitted as an Advocate of the High Court of South Africa.

Sangeetha's passions include law, theatre and live comedy.



Siphephelo Mbuli - Assistant Ombudsman



Siphephelo started his position at OSTI in April 2017, he obtained his LL.B degree from the University of Pretoria in 2008. Thereafter he worked as a candidate attorney at a law firm in Sandton and was admitted as an attorney of the High Court in May 2011. He has worked for a leading insurance broker and a specialist underwriting manager. He recently completed his LL.M degree with the University of South Africa. He still finds time to play soccer socially with friends.

Deola Matsimela - Receptionist

Deola joined OSTI in March 2017. Before joining OSTI Deola worked as a receptionist at various companies.



Lebogang Morokolo - Filing Clerk



Lebogang joined OSTI in October 2016. Prior to joining our office he worked as a constable at the South African Police Services.

CONSUMER TIPS

1. Insurance is based on utmost good faith. Your premium is based on the information that you give to your insurer. Always be honest.
2. Thinking of renovations to your home? Poor design and faulty workmanship on your house may result in it not being covered by your insurance company.
3. Letting your son or daughter drive your car without telling your insurer that they are regular drivers may result in your claim being rejected.
4. Check your policy to see if you are covered for damage caused by potholes or uneven roads.



WHAT DOES THE OMBUDSMAN DO?

How we can assist you if you have a complaint with your short-term insurer

The Ombudsman for Short-Term Insurance (OSTI) resolves disputes between insurers and consumers. We are an independent organisation appointed to serve the interests of the insuring public and the short-term insurance industry. Our mission is to resolve

short-term insurance complaints fairly, efficiently and impartially. We offer a free service to consumers whose claims have been rejected or partially accepted by their insurer. We apply the law and principles of fairness and equity.

WHAT TO DO

IF YOU HAVE A COMPLAINT?

Before contacting our Office, we would advise you to complain to your insurance company first. It is best to complain in writing. Make sure that you keep copies of all correspondence between you and your insurer.

If you are not happy with your insurer's decision you can complete our complaint form and send it back to us either by post, fax or email.



If you would like to lodge a complaint or require assistance, please contact our Office by calling

011 726 8900 or 0860 726 890

or download our complaint form via our website at

www.osti.co.za, click on lodge a complaint and then click on steps to follow.

JT088 - PARIKA GRAPHICS / 0860 727 7452

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Email: info@osti.co.za

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Address:

Sunnyside Office Park, 5th Floor, Building D

32 Princess of Wales Terrace

Parktown, Johannesburg

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