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Misrepresentation in Insurance

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Introduction

This article deals with the topic of misrepresentations in the insurance industry and explores instances where insurers can repudiate insurance policies.

Good Faith in Insurance Policies

In the case of *Mutual & federal Insurance Co Ltd v Oudtshoorn Municipality* (1985) (1) SA 419 (A), the court held that all contracts are subject to good faith and that this extends to the conclusion of insurance contracts. Accordingly, both the insurer and prospective insured are required to act in good faith at all times leading up to and throughout the duration of the contract.

Types of Misrepresentation

An insurance contract is subject to the general requirements for contractual validity, namely: consensus, legality, formalities, possibility, capacity and certainty. With specific reference to the element of consensus, parties to a contract need to reach consensus on the essential terms of the contract, failing which, the contract will be voidable. If

consensus is obtained in a wrongful manner, through misrepresentation, the contract will be voidable at the discretion of the innocent party.

Misrepresentations made in relation to insurance can take the form of positive misrepresentations or negative misrepresentations. A positive misrepresentation occurs when the (prospective) insured makes an incorrect statement that has to do with a material fact to the insurer. An example of this would be intentionally answering a question in the underwriting process incorrectly. A negative misrepresentation occurs when the (prospective) insured fails to disclose a material fact to the insurer. An example of this would be failure to disclose a medical condition known to the (prospective) insured at the time of completing the proposal form for life insurance.

If the insurer is induced to contract by the insured's misrepresentation of a fact (which is a material fact), the insurance contract will be voidable at the instance of the insurer and a claim for damages against the insured can also be made. The insurer could additionally choose to repudiate the claim and to uphold the policy with the insured.



In the case of *Qilingele v SA Mutual Life Assurance Society* 1993 (1) SA69 (A), the court, using the test developed in the *Oudtshoorn Municipality* case above deliberated whether a misrepresentation in the proposal form which led to the issuing of a policy was sufficient for the insurer to repudiate a claim. The court found that although there was no doubt as to the falsehood of the information provided in the proposal form, that in order to show that the repudiation and subsequent voidance of the policy was lawful, the insurer had to show that the misrepresentation was material in the eyes of the reasonable man and that had it known the truth, it would have declined to undertake the risk or would have, alternatively, undertaken the risk on different terms. The court, having found that the insurer discharged the onus incumbent upon it, ruled in favour of the insurer with costs and in doing so upheld the repudiation and voidance of the insurance policy.

Duty to Disclose

Our law does not place a general duty on contracting parties to disclose facts known to one of them, which may have the effect of impacting the consensus of the other party, however, there is an exception to this rule in cases where there is a relationship of trust between the parties whereby one party relies on a disclosure of facts given by the other party. The relationship between an insurer and the (prospective) insured is one of trust and therefore subject to the duty to disclose.

A misrepresentation will only have the impact of rendering the contract of insurance voidable at the discretion of the insurer if the said misrepresentation is deemed to be wrongful. The wrongfulness of a

misrepresentation is judged on the standard of reasonable man and based on the convictions of the community. An omission is wrongful if it is occasioned in breach of a duty incumbent on a party to act in a positive manner. It is important to note that a misrepresentation by omission is only considered wrongful if the relationship is subject to a duty to disclose and the non-disclosure relates to material facts.

The duty to disclose extends only to all facts which are material, subject to the following exclusions:

- Facts provided in a proposal form that have the effect of diminishing the risk;
- Material facts that fall into a class of information previously waived by the insurer;
- Material facts of which the insurer already has knowledge; and
- Material facts that are covered by either an express or implied warranty in the contract of insurance.

Treating the Customer Fairly

While insurers are able to cancel or void contracts of insurance due to wilful misrepresentation on the part of the policy holder, it is important to note that insurers must act in a manner that is fair and considers the rights of the public. The Financial Services Board (which is now the Financial Services Conduct Authority) adopted the concept of Treating the Customer Fairly (TCF) to promote the fair



treatment of customers and to entrench the principles of TCF into the culture of the industry which has been known for its previous alleged mistreatment of customers.

The principles of TCF are suitable advice, clear communication, culture and governance, product design and performance standards.

Relevant to this article are the the principles of culture and governance and clear communication. In terms of culture and governance, insurers are required to promote the fair treatment of customers which goes to the heart of the companies' culture. Clear Communication refers to an insurer's duty to provide clients with clear and understandable advice in plain language and to keep them adequately informed at all stages of negotiations/contracting.

TCF requires insurers to apply their minds to all matters where potential prejudice could be caused to a customer and otherwise, and further requires insurers to place customers' needs at the heart of their business.

Conclusion

Contracts of insurance are regarded by our law as contracts of good faith, a duty which extends to both the insurer and to the policy holder. As such it is important that both parties act honestly and that prospective policy holders disclose any and all relevant information to their insurer to avoid a misrepresentation that could result in the voidance of the insurance policy.

Insurance law can be complex and easily misunderstood. If you as a consumer are in doubt as

to whether certain information is necessary to be disclosed to your insurer and whether same might be classified as a misrepresentation by omission, speak with your broker or legal advisor before proceeding.

Similarly, should you have any disputes with your insurer, we suggest that you approach a lawyer with knowledge in insurance law to assist you.



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