

# Why and what to disclose when taking out insurance

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Insurance has been described as one of the most important concepts developed by mankind. It was developed because life as we all know, is full of risks, many of which are too onerous for the average person or business to manage which is the reason why companies are willing to take on that risk on your behalf, at a cost of course, which is known as a 'premium'. In calculating the premium, the insurer must be in a position to accurately assess the risk.

It is quite evident from our case law that failure to provide information at the time of taking out the insurance has severe consequences, ranging from the insurer avoiding your policy from inception to the insurer avoiding liability under the claim. One may ask why is it that people 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 required and correct information to their insurers. Perhaps the answer to this is that most people do not know what the law requires them to disclose.

Therefore, the question that one should ask is that what exactly does the law require a prospective insured to disclose before entering into a contract of insurance. When negotiating an insurance contract, parties are considered to be doing so in good faith. Both the insured and the insurer are required to be open and honest with each other and to make truthful representations. Any misrepresentation of fact is a breach of the duty of good faith.

South African law recognizes two types of misrepresentations namely: a positive misrepresentation and a negative misrepresentation which is also known as a non-disclosure.

A positive misrepresentation occurs when an insured represents a fact as being other than it is. This could either be a lie or a mistake. For example if a 45 year old insured answered the question, 'How old will you be at your next birthday?' by stating 45 years- in this case he would have misrepresented his age. The question that arises is whether the misrepresentation was material to the assessment of the risk.

A non-disclosure occurs when an insured fails, even without being specifically asked, to disclose information which is material to the calculation of risk: for example by failing to disclose that your vehicle is no longer being parked at gated premises at night.

The effect of a misrepresentation or non-disclosure is provided for in section 53 of the Short Term Insurance Act which simply states that an insurer can avoid liability under a contract of insurance if 'a reasonable, prudent person would consider that 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'.

## Conclusion

Insurance law can be complex and easily misunderstood which is why consumers should speak to their brokers or legal advisors if they are unsure whether certain information is necessary to be disclosed to their insurers, and whether the failure to disclose same might be classified as a material non-disclosure.

Remember: If in doubt – disclose!



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