AIDA - RIO CONGRESS 2018

DISCLOSURE DUTIES IN INSURANCE

General Reporter: Peggy SHARON

Please answer the questions and clarify whether your response is based on legislation, court judgments or directives of any regulatory/supervisory authority.
Finally, your remarks and comments from your point of view will be appreciated.

QUESTIONNAIRE

1. The Insured's Pre-Contractual Disclose Duty

a. Does your National Law impose a duty to answer questions put to the applicant/insured by the insurer?

Yes – this is the negotiation phase of the contract and there is no obligation yet on either party to contract, hence the insurer could refuse to provide cover if answers are not given on the basis of freedom of contract ('freedom not to contract'). If the question is whether answers must be truthful, then yes, a false answer would constitute a positive misrepresentation under South African law.[1] This would render the contract voidable if material.[2] In theory, an insurer may also be entitled to claim damages in delict if the misrepresentation is fraudulent or negligent.[3] There is no reported case example of this, however, suggesting that in practice, the usual remedy is to avoid the insurer's obligations under the policy.[4]

The wording of the policy may also help out here: a 'basis of the contract' clause may turn pre-contractual representation into affirmative warranties. Such warranties

---

[1] MFB Reinecke, JP Van Niekerk & PM Nienaber *South African Insurance Law* (2013) 145-150. See cases: Qilingele & Clifford; now resolved by 2003 amendments to the 1998 Acts.
[2] Reinecke et al op cit note 1 at 175.
[3] Ibid at 178. Dale Hutchison & Chris-James Pretorius (eds) *The Law of Contract in South Africa* 2ed (2012) 125-134.
[4] Reinecke et al op cit note 1 at 178.

would also be subject to a materiality test, however. (This materiality test, applying to both warranties and misrepresentation was introduced by statute in 1969 and has been refined since then by amendment.)[5] A policy may also expressly give an insurer the right to cancel for fraud, which would be the case with a deliberately false answer.

A non-disclosure at the proposal stage is treated in SA law as being a 'misrepresentation by silence' – this means that the position above also pertains to non-disclosures, provided that there was a legal duty on the insured to provide details.[6] More on this in 1(b) below.

b. Does your National Law impose upon the applicant/insured a duty to disclose information upon the applicant's own initiative? If so - under what circumstances?

As above, the duty of disclosure has historically been pegged to a duty of (utmost) good faith, following English law.[7] Since the Appellate Division decision in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* in 1985, however, the link to English law, as well as its doctrine of utmost good faith in insurance contracting has become more tenuous, although the duty of disclosure remains, now pegged to Roman Dutch law.[8]

An insured must disclose facts which are within her knowledge at the proposal stage of insurance contracting.[9] This is a pre-contractual duty, which extends into the post-contractual sphere only if expressly included in the insurance policy.[10] The South African common law does not require post-contractual disclosure.[11] The duty of disclosure is subject to a materiality test, as above, which means that an insured need only disclose information which a 'reasonable, prudent person' would think was

[5] The 1969 amendment was made to section 63 of the Insurance Act 27 of 1943. The provisions in both the Long-term Insurance Act 52 of 1998 (section 59) and the Short-term Insurance Act 53 of 1998 (section 53) were a re-enactment of the 1969 provision. Amendments were made to the 1998 materiality provisions in 2003, spelling out (inter alia) that the materiality test applied to both positive misrepresentations and non-disclosures, and that materiality was to be assessed according to the standard of the 'reasonable prudent person'. (That is not the 'reasonable insurer' or the 'reasonable insured'. This effected a statutory incorporation of the materiality standard laid down by the majority of the Appellate Division in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) 435F-I.) See further: Reinecke et al op cit note 1 at 166-169; Andrew Hutchison & Helena Stoop 'Misrepresentation in Consumer Insurance: the United Kingdom Legislature Opts for a "Reasonable Consumer" standard' (2013) 130 SALJ 705, 707-709.

[6] Reinecke et al op cit note 1 at 150-151.

[7] *Mutual & Federal Insurance Co* supra note 5 – see the majority judgment of Joubert JA for a comparative legal history of both South African insurance law in general and the South African duty of disclosure in insurance law.

[8] Ibid at 430.

[9] Reinecke et al op cit note 1 at 155, citing English case law as authority.

[10] Ibid at 179.

[11] Ibid.

material to the assessment of risk in question.[12] This statutory test limits the duty. In the recent case *Mahadeo v Dial Direct Insurance Ltd,* the materiality test was held not to extend much further than responding to questions asked by the insurer over the telephone.[13] This case should be viewed in the light of its facts, however, namely that it concerned a consumer policy, concluded over the telephone.

2. Scope of the Applicant's Disclosure Duty – Subjective or Objective?

Is the applicant's disclosure duty limited to the applicant's actual knowledge or includes also information which he or she should have been aware of?

The leading SA textbook, Reinecke et al, argue here that SA law is the same as English law, namely that the insured need only disclose information which is within her actual knowledge.[14] It should be noted, however, that the materiality test for a non-disclosure is objective.[15] Thus in sum, an insured need only disclose information subjectively known to her, but a failure to disclose such information will be subject to an objective materiality test in determining the resultant rights of the insurer.

3. The Insurers' Pre-Contractual Duties

a. Does your law impose on an insurer a pre-contractual duty to investigate the applicant's business in order to obtain the relevant information?

No. The duty of disclosure does not, however, require the insured to disclose information which is already within the knowledge of the insurer, or which ought reasonably to be so. Sometimes insurance is provided on a group basis by insurers (eg to employees of a particular business, or to debtors in a particular class). In such cases there is not even a proposal form and practically an investigation of the relevant business circumstances will be required by the insurer in order to assess its risk.

---

[12] Long-term Insurance Act 52 of 1998, section 59; Short-term Insurance Act 53 of 1998, section 53.

[13] *Mahadeo v Dial Direct Insurance Ltd* 2008 (4) SA 80 (W) paras 23-27.

[14] Reinecke et al op cit note 1 at 155-156. The authors do note (156-157) the possibility of constructive knowledge here, where the actual, but undisclosed, knowledge of an agent may be imputed to the principal insured. On constructive knowledge, see: *Anderson Shipping (Pty) Ltd v Guardian National Insurance Co Ltd* 1987 (3) SA 506 (A); *Barberton Town Council v Ocean Accident & Guarantee Corporation* 1945 TPD 306.

[15] The statutory test for materiality is worded as follows: 'The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, 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.' See section 59(1)(b) of the Long-term Insurance Act 52 of 1998; section 53(1)(b) of the Short-term Insurance Act 53 of 1998.

b. Does your law impose on an insurer a duty to ascertain the insured's understanding of the scope of the insurance, and to draw the insured's attention to exclusions and limitations?

The policyholder protection rules don't require this. The general Consumer Protection Act (which does contain a general duty to this effect in consumer contracts) doesn't apply to the insurance industry following the Financial Services Laws General Amendment Act 45 of 2013 (in force 28 Feb 2014).[16] The Financial Services Board intends to introduce financial industry specific rules in the future, as evidenced by its 'treating customers fairly' document.[17] One of the specific points addressed in this document is disclosure by insurers.[18] This is part of a broader SA move towards a 'twin peaks' system of financial regulation under the Financial Sector Regulation Bill 2016 (not yet in force).[19] This statute (if enacted) will empower the 'Financial Sector Conduct Authority' (one half of the 'twin peaks' to be created) to promulgate market conduct rules, which may impose such a duty.[20]

4. The Insured's Post-Contractual Disclosure Duty

a. Does an insured have the duty to notify the insurer of a material change in risk? If so - what is the scope of the duty?

Such a duty does not exist at SA common law.[21] This would be a fairly common provision to include in an insurance policy, however.

b. What is defined in your jurisdiction as a material change?

Given my answer to 4(a), I would speculate that the phrase 'material change' would be defined in the insurance policy by the insurer. Should this not be the case, I would argue that the standard insurance law test for materiality of 'representations' should apply: would a 'reasonable, prudent person' consider the information in question material to the assessment of risk?'[22]

---

[16] See: Tjakie Naudé & Sieg Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 5-19 – 5-20, who discuss the definition of 'services' within the context of the application provision (section 5) of the Consumer Protection Act 68 of 2008.

[17] Available at: http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf – accessed 20 July 2017.

[18] Ibid at 51-54.

[19] A copy of the draft Bill may be obtained at: www.pmg.org.za (accessed 21 July 2017).

[20] Section 106.

[21] Reinecke et al op cit note 1 at 179.

[22] See notes 5 & 15 above.

Note, however, that if this duty is imposed as term of the insurance policy, such term would probably be interpreted as a 'promissory' warranty. In *SA Eagle Insurance Co Ltd v Norman Welthagen Investments (Pty) Ltd* the Appellate Division interpreted the statutory materiality test not to apply to a promissory warranty, as this type of provision constitutes a term in the policy, not a 'representation' as required by the statutory test.[23] This rule has yet to be tested in the constitutional era of greater fairness in contracting. I submit that the statutory test nevertheless provides a readily available standard against which to judge any situation of materiality in insurance law.

5. The Insurer's Post Contractual Duty

Does your law impose on an insurer disclosure duties after the occurrence of an insured event (such as, the duty to provide coverage position in writing within a limited period, duty to disclose all reasons for declination etc.)?

Yes. The policyholder protection rules under both the Long-term and Short-term Insurance Acts impose this type of duty.[24] In each case there are detailed disclosure requirements for insurers when avoiding liability, as well as provisions on time bars and prescription. In addition, both the insurance Acts also require the insured to receive a written copy of the policy.[25] Note that these rules apply to all insurance contracts and not just in the consumer sphere.

6. Remedies in Case of Breach of the Insured's Disclosure Duties

a. What is the insurers' remedy in case an insured breached his/her pre-contractual disclosure duty ("all or nothing" rule or partial discharge)?

As above, breach of the duty of disclosure by the insured is treated as a misrepresentation by silence in South African law. Fault is not required for rescission.[26] In theory damages are claimable in delict by the insurer (for losses caused by fraud/negligence), by in practice this does not occur. A misrepresentation renders any contract voidable in South African law, although the discharge is not automatic but has to be invoked by the innocent party.[27] The discharge would be of the entire contract.

---

[23] *SA Eagle Insurance Co Ltd v Norman Welthagen Investments (Pty) Ltd* 1994 (2) SA 122 (A).

[24] Policy Holder Protection Rules (Long-term Insurance), 2004 GN R1129 of 2004 – see rule 16; Policy Holder Protection Rules (Short-term Insurance), 2004 GN R1128 of 2004 – see rule 7.

[25] Long-term Insurance Act 52 of 1998, section 48; Short-term Insurance Act 53 of 1998, section 47.

[26] For discussion and case citations, see Hutchison & Pretorius op cit note 3 at 124-125.

[27] Ibid at 122-125.

Reinecke et al submit that a partial discharge is possible in SA law, particularly where cover exists under several headings.[28] For a partial discharge, the voidable part would have to be divisible from the rest of the policy.[29] It must also be possible to sever such part.[30] Severance is determined based on a construction of the remainder of the contract to see whether it is able to stand without the severed part.[31]

b. What is the insurers' remedy in case an insured breached his/her post-contractual disclosure duty ("all or nothing" rule or partial discharge)?

As above, such a post-contractual duty only exists if imposed as a term of the policy. Hence breach thereof constitutes breach of contract. An insurer may then cancel the policy for breach (if material, or if a cancellation clause permits this).[32] Restitution (of premiums for example) would then have to occur, although the wording of the policy may limit this.[33] In an instance of fraud a return of the premiums is highly unlikely. A contract may not be partially cancelled.

[28] Reinecke et al op cit note 1 at 177.
[29] Ibid.
[30] Ibid.
[31] Ibid. For discussion of the test for severance in written contracts, see: *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 17-19. For a discussion of divisibility and severance in the general law of contract, see: Andrew Hutchison 'Reciprocity in Contract Law' (2013) 24 *Stell LR* 3, 25-28.
[32] Hutchison & Pretorius op cit note 3 at 324-325.
[33] Ibid at 327-328.