

Media Release  
22 February 2022

### **Insurance Ombudsman warns of rising claims disputes over ‘reckless’ driving clause**

22 February 2022 – An increasing number of motor vehicle accident insurance claims are being rejected and disputed on the strength of a clause in insurance policies, namely the reasonable precautions clause, the Ombudsman for Short-Term Insurance (OSTI) has announced.

Ayanda Mazwi, Senior Assistant Ombudsman, said that a report of complaint trends conducted by OSTI in November 2021 showed an increasing number of motor vehicle accident claims rejected by insurers based on the insured’s breach of a contractual duty of care. She, therefore, emphasised the importance of consumer awareness of this clause in insurance policies.

The clause requires that the insured must use all reasonable care and take reasonable precautions to prevent or minimise loss, damage, death, injury or liability. A breach of the clause by the insured may warrant the rejection of a claim.

Mazwi said there were various reasons why an insurer may invoke this clause, but it was mainly relied on in cases where the insurer alleges that the insured was driving above the regulated speed. The question then is whether insurers may reject a claim because the insured was speeding?

When deciding a dispute of this nature, OSTI will first consider whether the insured was, in fact, speeding. The insurer, as it is relying on a breach by the insured of a policy condition or on an exclusion, carries the burden of proving the breach or exclusion. It may rely on evidence such as data downloaded from the vehicle’s on-board computer vehicle tracking reports and experts in accident reconstruction.

OSTI will consider the reliability of this evidence before the matter can be decided. In a recent case before OSTI, an insurer was ordered to pay a claim after OSTI found that the conclusions put forward by an accident reconstruction expert were not based on accurate facts.

The expert in that case did not consider objective evidence at the accident scene and there were substantial inconsistencies in the measurements that he had used to calculate the speed. Data from the on-board computer and the vehicle tracking reports indicating the speed that the vehicle was travelling when the accident occurred are generally accepted.

If it is established that the insured was speeding, OSTI will then consider the legal principles applicable to the reasonable precautions clause.

An insurance policy may not, by default, exclude liability because the insured was negligent. The legal position is that the insurer must prove that the insured acted recklessly. In this context, speeding on its own does not necessarily mean that the insured was reckless. Rather, recklessness presupposes foreseeability on the part of the insured.

The insurer must put forward a convincing argument on which to conclude that the driver foresaw the possibility of an accident and deliberately courted the danger by taking measures which the driver knew were inadequate. Alternatively, the driver simply did not care that the measures were inadequate and therefore recklessly reconciled himself / herself with the danger. It is unlikely that a driver will admit recklessness. Therefore, it may be determined by inferential reasoning based on the facts of the case.

In another case considered by OSTI, the insured contested the calculation of speed by the insurer's expert but requested that the office decide on the issue of recklessness. OSTI analysed the incident description and conditions under which the insured was driving.

In his defence, the insured said that he was not familiar with the road; that visibility was poor because it was night-time; and the streetlights were not working. Photographs of the accident scene showed that the insured was driving in a built-up urban area towards a T-junction.

The insured stated that he had not seen the intersection ahead. When another vehicle suddenly approached from his left-hand side, he had to take evasive action which caused him to lose control and collide with a tree.

OSTI found that based on these observations alone, the insured should have exercised caution by regulating his speed to improve visibility and should have kept a proper lookout for obstacles on the road or a sudden emergency. In addition, the speed limit road sign (60km/h) was prominently placed some distance before the intersection. The insurer's accident reconstruction expert calculated that the insured was travelling at 104km/h at the time.

OSTI concluded that, if the expert's calculation of the speed was proven, the insured's conduct would be considered reckless. As a matter of probability, the insured's conduct was also found to be the cause of the accident because, had he observed the regulated speed, he would have been in a better position to see the intersection, stop and safely execute the turn. For these reasons, OSTI found in favour of the insurer.

ENDS

### **About the Ombudsman for Short-Term Insurance**

The Ombudsman for Short-term Insurance (OSTI) is an independent, non-profit industry ombud scheme. Short-term / non-life insurance includes motor, house owners (buildings), householders (contents), cell phone, travel, disability and credit protection insurance, and commercial insurance for small businesses and sole proprietors. OSTI's mandate is to provide the insuring public and the short-term / non-life insurance industry with a free, efficient and fair dispute resolution mechanism through an alternative dispute resolution process, applying the law and principles of fairness and equity.

OSTI is not a court of law. It examines the information and evidence placed before it by the parties to a dispute and makes recommendations that are guided by the legal position and

principles of fairness and equity. In rare instances where required, OSTI may make rulings. It does not, nor is it empowered to, procure evidence or witnesses, or investigate a complaint. OSTI, it must be stressed, operates independently of both the Financial Sector Conduct Authority and the Prudential Authority in its adjudication and dispute resolution process.

Issued by:

SERUFE INVESTMENTS

For interviews contact:

Thokozile Ndlazi

[Thokozile@serufeinvestments.com](mailto:Thokozile@serufeinvestments.com)

Or

Michelle Raphiri

[Michelle@serufeinvestments.com](mailto:Michelle@serufeinvestments.com)

On behalf of:

The Ombudsman for Short Term Insurance

1st Floor, Block A

1 Sturdee Avenue

Rosebank

Johannesburg

South Africa

2196

Office Tel: +27 11 726 8900

[www.osti.co.za](http://www.osti.co.za)