

THE OMBUDSMAN'S BRIEFCASE



Issue No.4 of 2018

From The Editor's Desk
Page 1

News and Events
Page 1

Case Studies
Page 2-7

OSTI Cares
Page 8

Consumer Tips
Page 9

What does the
Ombudsman do?
Page 10

FROM THE EDITOR'S DESK

2018 has been an exciting and challenging year at OSTI, bringing to fruition the goals and the vision of the office. Here are some of OSTI's highlights for 2018:

2018

February

OSTI commenced an Internship programme, welcoming 4 interns.

April

OSTI launched its 2017 Annual Report.

July

OSTI moved offices to 1 Sturdee Avenue, First Floor, Block A, Rosebank.

July

OSTI launched its new branding and logo.

August

OSTI embarked on a paperless system.

October

OSTI launched its online application system - which now allows consumers to apply online for assistance.

As 2018 draws to a close, we take this opportunity to thank you all for your valued contribution and commitment to resolving short term insurance disputes. We wish you all a safe and prosperous festive season. Happy Holidays.



NEWS AND EVENTS:



OSTI'S PARTICIPATION AT MONEY SMART WEEK

OSTI was honoured to participate in the inaugural programme for Money Smart Week South Africa (MSWSA), supported by National Treasury, which took place from 8 to 12 October 2018. The focus of MSWSA was financial education for consumers. The MSWSA initiative was implemented and coordinated by the Financial Sector Conduct Authority (FSCA) together with various financial industry stakeholders.

Some of the Assistant Ombudsmen from OSTI attended the various venues in Soweto, Alexandra, Tembisa and Mamelodi to create awareness about OSTI, engage in question and answer sessions with consumers and enlighten consumers regarding OSTI's role in respect of the short term insurance industry as well as financial wellness in general.

MSWSA is a project of the National Consumer Financial Education Committee (NCFEC), of which OSTI is a part. This Committee is chaired by National Treasury with the FSCA as the secretariat.



Johan Janse Van Rensburg, Assistant Ombudsman, with Melissa Van Zyl (Call Centre agent) and Comfort Maluleka (PR Intern)



Valerie Mngadi, Assistant 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.



MISREPRESENTATION/NON-DISCLOSURE WHEN COMPLETING AN INSURANCE PROPOSAL FORM

RENASA INSURANCE

Mr M applied for cover in respect of a motor vehicle, household contents and personal liability with the insurer. The insurer's application form required Mr M to advise whether he had previously been insured and further required him to provide the details of his previous insurers. Mr M confirmed having previous insurance with Hollard Insurance and Mr M provided details for a vehicle accident he had registered with Hollard Insurance in May 2016. The proposal form required Mr M to disclose whether any insurer had ever cancelled or refused to insure him or imposed any restrictions for any risks he wished to insure. Mr M responded in the negative. Additionally the proposal form required Mr M to advise whether there was any material fact that may influence the risk for which he had applied for. Mr M also responded in the negative.

details when he completed the insurer's proposal form. A few months after the policy inception, Mr M removed the Audi A4 from cover and replaced it with a Jeep Cherokee instead.

Mr M registered a claim for an accident which occurred in November 2016, whilst he was driving the Jeep Cherokee. The insurer rejected the claim on the ground that Mr M had failed to disclose material information at the inception of the policy. During the validation of the claim the insurer established that Mr M had, had two previous insurance policies with Santam Insurance and Hollard insurance respectively. The insurer established that Santam Insurance had cancelled Mr M's policy in February 2007 on the grounds that he was a multi-claimant. The insurer also alleged that Mr M's previous policy with Hollard Insurance was cancelled by Hollard Insurance after it had discovered Mr M's previous cancellation with Santam Insurance. However according to the evidence submitted to this office, OSTI

was satisfied that Mr M had cancelled his policy with Hollard Insurance of his own accord before Hollard Insurance had informed him of its intention to cancel his policy.

Mr M submitted that he correctly answered the questions posed by the insurer on the proposal form. Mr M argued that the proposal form did not require him to disclose the cancellation of the Santam policy but instead enquired from him whether any insurer had ever cancelled or refused to provide cover for any risks which he wished to place on cover. In this regard Mr M argued that the vehicle he wished to place on cover was a brand new Audi A4 which had never been on cover with any insurer and had therefore never been cancelled or refused cover by any insurer. Mr M further argued that his previous policy was cancelled by Santam Insurance due to the non-payment of premiums and that this cancellation had occurred 9 years prior to him seeking cover with the present insurer.

The vehicle that Mr M wished to place on cover was a new Audi A4 and he accordingly provided this vehicle's

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.

The insurer submitted that the questions posed in its proposal form, enquiring if any insurer had ever cancelled, refused or restricted cover for any risks Mr M now wished to insure, did not refer to the specific items Mr M wanted to insure. The insurer argued that this question referred to the types of risks for which Mr M was applying for insurance cover, being a motor vehicle, household contents and personal liability. The insurer submitted that an insurer is interested in the insurance history of a potential policy holder and not in the specific items intended to be covered. It argued that there was a legal obligation on a prospective policy holder to make full and frank disclosures to an insurer to enable the insurer to properly evaluate the risk. The insurer stated that an insurer will however direct the potential policy holder to the type of information it considers relevant to its assessment of the risk. In this regard, the insurer also made reference to the objective test of disclosure that if a reasonable person would have considered the information material to disclose, then the prospective policy holder should disclose the information.

OSTI upheld the insurer's rejection of Mr M's claim for the following reasons:

When Mr M completed the proposal form and provided the details of his previous insurers, he only provided the details of his cover with Hollard Insurance and did not mention his previous policy with Santam Insurance. Whilst Mr M argued that Santam Insurance cancelled his policy 9 years prior and that an event that took place so long ago should not affect his current insurance, OSTI found that there were no time lines attached to the questions in the proposal form. Therefore Mr M should have disclosed, on the proposal form, that he was previously insured with Santam Insurance and should have provided the details of the claims and cancellation of the policy.

OSTI found that the wording in the proposal form did not refer to the actual items to be insured but referred to the risks associated with the items to be insured and for which insurance cover was being proposed.

A "risk" is defined in the *Short-Term Insurance Act 53 of 1998*, as amended by the Financial Services Laws General

Amendment Act, 2013, ("the Act") as "a possibility that a particular event may occur during the period for which a short-term insurance policy is operative." The risks, in respect of a motor vehicle, are, for example, of accidents, thefts, hijackings, hail damage etc.

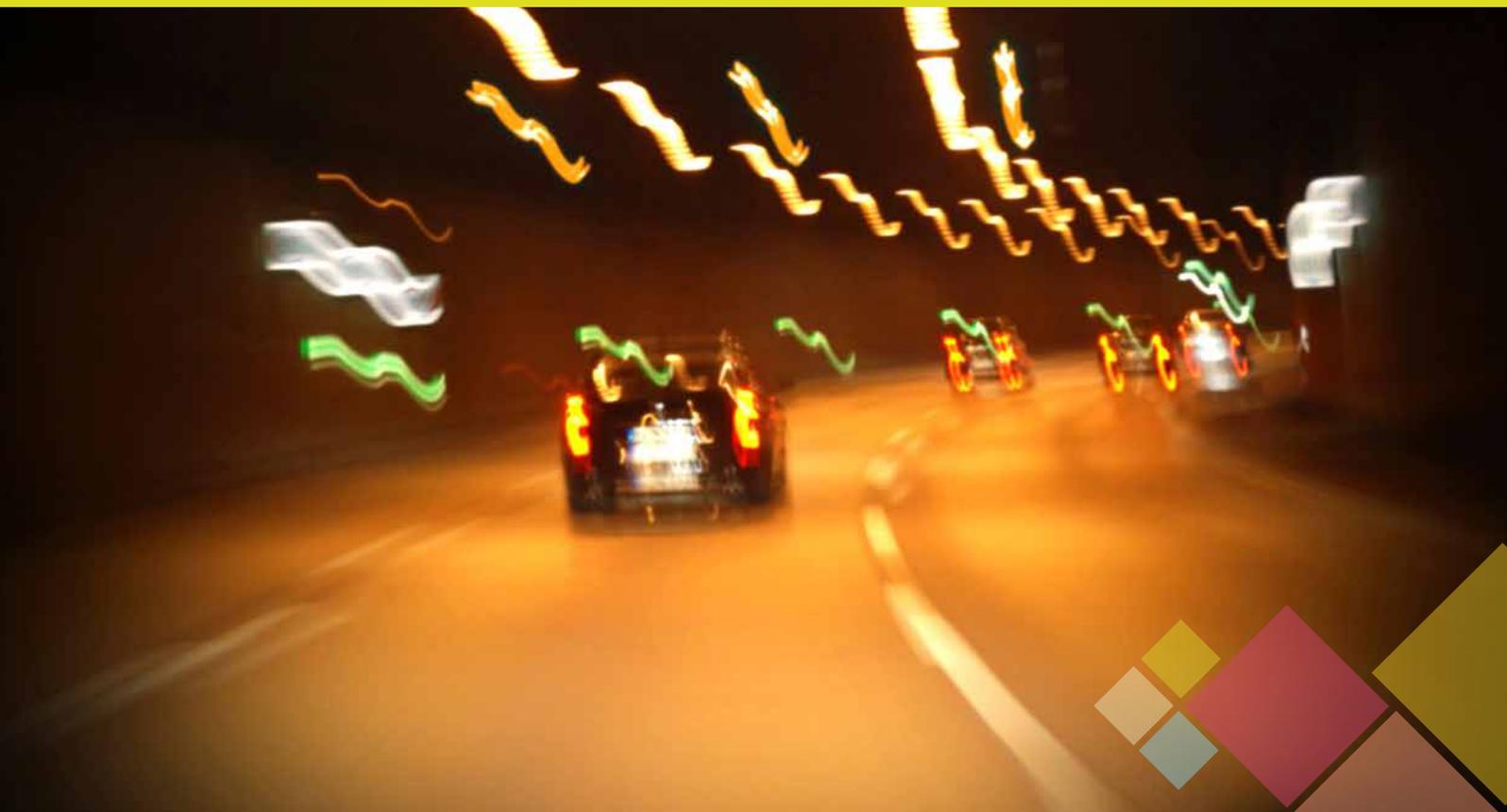
Even if Mr M had failed to understand the exact meaning of risks in the proposal form, he had still failed to disclose the details of his previous insurance cover with Santam Insurance and its cancellation of the policy.

The insurer advised that had it been aware of the previous cancellation of Mr M's policy with Santam Insurance, it would not have accepted Mr M on cover. Mr M's non-disclosure of the previous cancelled policy was therefore material to the insurer's assessment of the risk. The insurer submitted that the non-disclosure by Mr M prejudiced the insurer and induced it to enter a contract it otherwise would not have entered into.

OSTI was unable to assist the insured with his complaint and the matter was resolved in favour of the insurer.

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.



DRIVING UNDER THE INFLUENCE OF ALCOHOL

SANTAM INSURANCE

Mr A submitted a claim to the insurer in respect of damage to his vehicle, after his vehicle collided into the boundary wall of a private residence.

The insurer rejected the claim on the basis of a policy exclusion which excused the insurer from liability where the loss or damage arose whilst the vehicle was being driven by a driver who was under the influence of intoxicating liquor.

Prior to the collision Mr A had dinner at a restaurant. The restaurant owner confirmed that Mr A had not consumed any alcohol at the restaurant.

Just prior to his vehicle colliding with the boundary wall, Mr A narrowly avoided a collision with a microbus. CCTV footage revealed that as Mr A approached a three way stop, he ignored the stop sign and approached the intersection at high

speed. Mr A failed to stop and narrowly avoided colliding with a microbus that had entered the intersection before his vehicle. The accident was avoided only because the microbus applied its brakes. Shortly thereafter, Mr A was involved in the collision with the wall when he failed to navigate a corner and instead drove directly into the wall.

According to the owners' of the property, with whose wall Mr A collided, Mr A he did not appear to be under the influence of alcohol.

A towing operator, who attended the scene of the accident, stated that Mr A had asked him to quickly remove the vehicle because he did not want anyone to see him in the state that he was in. The towing operator further stated that Mr A also pleaded with the owners of the property to enter into a private arrangement regarding the repair of the wall. The towing operator stated

that he believed that Mr A was under the influence of alcohol. A security guard, who was on duty at the time of the accident, stated that Mr A was under the influence of alcohol because he was agitated, had bloodshot eyes, slurred speech, avoided contact with people at the scene and was unstable on his feet.

The insurer submitted that on a balance of probabilities Mr A was under the influence of intoxicating liquor at the time the accident.

Mr A denied the insurer's allegations and argued that he had not consumed alcohol on the night of the accident. Mr A argued that the accident occurred following a blackout, which was in all probability brought on by the reaction to medication that had been prescribed for his severe sinus infection.

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.

The insurer bore the onus of proving that Mr A drove his vehicle whilst under the influence of intoxicating liquor. In order to discharge this onus, the insurer had to demonstrate that Mr A did in fact consume alcohol on the night of the accident and that he was influenced by such consumption.

It is trite that a driver will be found to be under the influence of liquor when the skill and judgement normally required of the driver in the operation of a vehicle has been diminished or impeded as a result of the consumption of alcohol. *"The judgement of a driver will be impaired not only when his vision is dulled or his judgement blunted or his muscular reactions to communication from his brain made sluggish but also when the consumption of liquor has induced an exuberant over-optimistic frame of mind which causes him to take risks which he would not have taken but for the liquor he has consumed."* (Motor Law by W.E Cooper Volume One Page 554; R v Spicer 1945 AD 433; R v Spicer 1945 AD 433; R v Horn 1960 (4) SA 8 (T); Price v Mutual & Federal Insurance Co Ltd 2007 (4) SA 51 (SE); Swart v Mutual & Federal Insurance Co. Ltd (10352/2004) [2009] ZAWCHC 107 (4 August 2009).

Well-known indications of a person who is under the influence of alcohol include that the person *"was unsteady on his feet, that his speech was slurred, that he could not walk in a straight line or that his eyes were bloodshot."* (Minister of Safety and Security & Another v Swart 2012 (2) SACR 226 (SCA)).

In the unreported judgement in *Outsurance Insurance Company Ltd v Mkhize* (saflii at (2013) ZAGPPHC79)

the court observed that, *"Courts have accepted that slurred speech, lack of co-ordination in walking and other physical manifestations, such as gait, are symptoms of intoxication"* but cautioned that temporary abnormalities or symptoms such as being dazed, highly dilating eyes or red eyes, being disorientated are not axiomatic to intoxication. Rather each case must be decided on its own particular circumstances.

The insurer bears the onus of proving its allegations against an insured on a balance of probabilities. This standard must be distinguished from the standard applied in criminal cases, namely proof beyond reasonable doubt.

As this was a civil matter and not a criminal one, the insurer was not required to prove the fact that Mr A was driving under the influence of alcohol beyond a reasonable doubt but rather on a balance of probabilities. Confusion as to the standard of proof often leads to an insured concluding that it is sufficient to "poke holes" in the versions of the insurer's witnesses to create doubt or offer other possibilities without presenting an alternative probable version of his/her own.

In order to discharge its onus, the version presented by the insurer to substantiate the allegations in support of the rejection of the claim, must be found on the whole to be more probable or likely than that of the complainant.

In the present matter, the insurer relied on the statements of two independent witnesses who had described Mr A's demeanour as being that of a person who was under the influence of alcohol.

Both witnesses had stated that Mr A had slurred speech, bloodshot eyes and smelt of alcohol.

Mr A refuted this evidence and claimed that these manifestations were not as a result of alcohol but were instead brought on as a result of the medication that he had taken for severe sinus infection or alternatively because he was in shock.

When the evidence was considered holistically, the probabilities did not favour Mr A's version. The CCTV footage provided indicated that Mr A was driving in a reckless fashion shortly before the accident occurred and that he had narrowly avoided being involved in a collision with a microbus. Mr A offered no explanation for the way in which he was driving prior to the accident nor did he meaningfully challenge the insurer's assertion that his behaviour was indicative of someone driving whilst under the influence of alcohol.

If Mr A was indeed suffering from the side-effects of medication it was unlikely that he would drive recklessly and speed. It was more likely that he would slow down and drive cautiously. Both independent witnesses stated that Mr A admitted to being intoxicated and had asked for help in order to avoid the detection of his inebriation. Mr A failed to provide any meaningful challenge to this evidence.

OSTI found that the balance of probabilities favoured the conclusion that Mr A was driving under the influence of alcohol when the accident occurred. OSTI accordingly upheld the insurer's rejection of the claim.

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.



CELL PHONE POLICY- EXERCISING EQUITY

GUARDRISK INSURANCE CO LTD

All insurance policies, including policies for mobile devices such as cell phones and tablet, have terms and conditions. Most policies contain an exclusion where the mobile device is not used with the sim card that the device was initially insured with.

The reason behind such an exclusion can be business related but it also serves to limit the insurer's exposure to risk and enables the detection of fraud by the insurer.

This exclusion is often upheld by OSTI but in certain circumstances, we may be able to assist the insured.

Mr J submitted a claim to his insurer for his damaged cell phone.

The insurer rejected the claim on the basis that the sim card in use with the cell phone at the time of the loss was not noted on the policy. The policy allowed for up to 2 numbers to be listed on the schedule and stated that cover would only be provided when the device

was being used with a number listed on the schedule. The insurer argued that the insured had failed to register the number that was in use at the time of the loss and therefore the device was not covered by the policy.

Although the policy terms and conditions stated that the insurer would be entitled to decline liability for this claim, OSTI's Terms of Reference state that matters are to be dealt with using the criteria of law, equity and fairness. OSTI is empowered to resolve complaints and make rulings based on the law and equity. OSTI must have regard for the provisions of the policy and to the particular circumstances of each individual case and what it can also consider is what is fair and reasonable in those circumstances.

It was clear that Mr J had suffered a loss which fell within the ambit of the cover provided by the policy. In order to successfully rely on the exclusion it had relied to reject the claim, the insurer had to demonstrate that it had suffered prejudice as a result of the number in

use not being noted on the policy.

OSTI found that the insurer was unable to demonstrate any prejudice suffered.

The existence of the phone was not in dispute. The phone was not stolen but was damaged and therefore was in Mr J's possession. The date on which the phone was last used corresponded with the date on which the claim arose. Mr J provided proof that the number in use at the time of loss belonged to him. Based on the available evidence, OSTI was satisfied that there was no transfer of ownership of the cell phone or any other material factor that prejudiced the insurer.

OSTI was of the view that under these circumstances it would be unfair and inequitable for the insurer to reject the claim purely on the ground that the sim card in use at the time of loss was not listed on the policy. The insurer agreed to abide by OSTI's decision and settled the claim.

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.



CHALLENGING AN INSURER'S DECISION TO WRITE OFF A VEHICLE

OUTSURANCE INSURANCE COMPANY LIMITED

Mr K submitted a claim to his insurer for damages to his vehicle which occurred when a motorcycle collided with the rear of his vehicle. The insurer validated the claim and concluded that the vehicle should be written off, in this case that is the vehicle was uneconomical to repair. Mr K was dissatisfied with the insurer's decision and maintained that the vehicle was repairable.

The insurer submitted that the assessed damage to the vehicle amounted to R 96 142.32. Mr K obtained a quotation for repairs to his vehicle in the amount of R 54 068.40. The insurer stated that it had the right to determine how to settle the claim. The policy provided that the insurer could choose, when settling a claim, to pay cash, repair or replace the vehicle.

The insurer's assessor deemed the vehicle to be uneconomical to repair due to the extent of the damage and the cost of the replacement parts required to repair the vehicle.

The vehicle was financed and the insurer stated that it had an obligation to comply with the provisions of the South African Insurance Association (SAIA) Code of Motor Salvage in respect of financed vehicles.

The insurer stated that the quotation obtained by Mr K was based on the use of second hand parts and the repair of

the vehicle's roof, whereas the insurer's assessor had deemed it necessary to replace the roof and not repair it. The insurer submitted that the repair of the roof would compromise the structural integrity of the vehicle. The insurer relied on the below extract of the SAIA Code of Motor Salvage in support of its argument which states:

"THE PURPOSE OF THE CODE

The purpose of the code on Salvage ("Code") between the short-term insurance and banking industries, and specifically the SAIA and its members, the BASA and its members as well as the NMFA and its members, is to establish a common approach when dealing with motor salvage with the end goal being to assist in combating motor vehicle crime and specifically the cloning of motor vehicles to benefit all role players and ultimately the South African public. In addition, this Code also aims at ensuring that consumers are treated fairly with regard to the processes followed and decisions made related to accident damage and/or stolen recovered vehicles.

Insurers and banks have a moral duty to the consumers to safeguard them from unscrupulous operators who are selling and putting back in use unfit and unsafe motor vehicles as code 2 motor vehicles, which should have been deregistered. Should these activities not be addressed, unsafe motor vehicles may be put back on our roads in this way contributing to the high

accident figures on South African roads, while at the same time, contributing to motor vehicle crime."

Mr K proceeded to have the vehicle repaired and appointed an independent assessor to assess the damage and repairs to the vehicle. Mr K's assessor reported that the roof was indeed repairable and there was no damage to the support structure of the roof. Mr K's assessor stated that the repair work was of a satisfactory standard.

OSTI advised the insurer that where a vehicle is out of warranty, it is acceptable to use second hand parts to repair the vehicle. OSTI further advised that Mr K had provided sufficient proof to demonstrate that the vehicle was repairable within acceptable standards.

OSTI also pointed out to the insurer that should the vehicle be written off by the insurer and sold to a salvage contractor, it would inevitably be repaired and sold again to another consumer.

In this matter the repairs to the vehicle were of such a standard that Mr K received a guarantee on the repairs. OSTI decided that the insurer's decision to write-off the vehicle, was unfair and unreasonable especially as Mr K was able to repair the vehicle at a much lower cost than the insurer's assessed costs.

OSTI recommended that the insurer indemnify Mr K for the repairs to the vehicle less the applicable excess. The insurer agreed with the recommendation and the claim was settled as proposed.

OSTI CARES



The Santa Shoe Box project is a wonderful initiative which aims to provide underprivileged children in our communities with gifts over the festive season. These gifts include necessities such as soap, toothbrushes, school stationary etc. OSTI was once again excited to participate in the Santa Shoe Box Project. OSTI recognizes the value in uplifting our community and together our staff, donated 52 shoeboxes on 11 October 2018.

We hope that our contribution will bring a smile to a few more little faces this year.



CONSUMER TIPS



1

If you are going on a road trip this holiday, make sure that your vehicle and tyres are in roadworthy condition.

2

Check that your vehicle and any trailers are properly licensed.

3

Make sure that your driver's license is valid.

4

Test your tracking device on your motor vehicle.

5

Do not drink and drive.

6

Ensure that you take frequent stops if you are going on a road trip.

7

Remember to test your home alarm system to ensure that it is in working condition.

8

Things do not always go according to plan. Insure the cost of your holiday in case you are unable to travel due to unforeseen circumstances.



WHAT DOES THE OMBUDSMAN DO?

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

MISSION To resolve short-term insurance complaints fairly, efficiently and impartially.

ABOUT US

We resolve disputes between consumers and short-term insurers:

- as transparently as possible, taking into account our obligations of confidentiality and privacy;
- with minimum formality and technicality;
- in a cooperative, efficient and fair manner.

We are wholly independent and do not answer to insurers, consumer bodies or the Regulator.

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.

You can now also lodge a complaint online, please visit our website and click on "Lodge a Complaint" and follow the easy prompts

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 follow the prompts.

J7482 - PAPRIKA GRAPHICS / 0860 727 7452

WE ARE ON TWITTER



For the latest and most up to date news, follow us on @Ombud4ShortTerm

CONTACT US

If you would like to be added to our mailing list, please contact us:

Telephone: 011 7268900
Sharecall: 0860 726 890
Fax: 011 7265501
Email: info@osti.co.za
Website: www.osti.co.za

 Follow us @Ombud4ShortTerm

Address:
1 Sturdee Avenue, First Floor, Block A, Rosebank,
Johannesburg

We welcome your feedback and/or comments.

Copyright:

Copyright subsists in this newsletter. No part of the newsletter may be reproduced, transmitted or downloaded in any form or by any means without the permission of The Ombudsman for Short-Term Insurance.