THE LEGAL IMPLICATIONS OF THE DUTY TO DISCLOSE, MISREPRESENTATION AND GOOD FAITH IN INSURANCE POLICIES

by

Luyanda Nkwenkwe Dumisa

(13401018)

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1. INTRODUCTION AND AIM OF THE STUDY.

In South African law, all contracts are contracts of good faith.[1] However, good faith is not a validity requirement or an essential feature of an insurance contract.[2]

An insurance contract is subject to the general requirements for contractual validity, namely contractual capacity, consensus, legality, Possibility of performance and formalities.[3] First and foremost, the parties to a contract must reach a real consensus on all the terms of the contract.[4]

If consensus is obtained through misrepresentation, duress or undue influence, the contract is rescindable at the discretion of the innocent party.[5]

The legal position in South African contract law is that a party has no pre-contractual duty to disclose all material facts.[6] However, in the insurance law context, a policyholder (the insured) is required to disclose all material facts relevant to the risk that he or she seeks the insurer to underwrite.[7]

The conclusion and validity of an insurance policy is dependent on the information provided by the policyholder.[8] Generally speaking, the insured is expected to disclose because the material facts or circumstances impacting the risk are within the exclusive knowledge of the prospective policyholder.[9]

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[1] *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* (1985) 1 SA 419 (A) page 433 A-D.

[2] *Brisley v Drotsky* (2002) 4 SA 1 (SCA) page15 and 22.

[3] Hutchison *et al The Law of Contract in South Africa* (2017) 14.

[4] Reinecke *et al South African Law of Insurance* (2013) 116.

[5] Hutchison *et al* (2007) 118.

[6] *ABSA Bank Ltd v Fouche* (2002) 1 SA 176 (SCA) at paras 4,5 and 9.

[7] Reinecke *et al* (2013) 135-136.

[8] Reinecke and Nienaber "Mis -or- Non-Disclosure: Reconstructing the Policy" OLTI Publications (2006) https://www.ombud.co.za/publications/papers-and-presentations/page/2 (accessed 10 June 2021).

[9] Reinecke *et al* (2013) 142.

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The basis for the pre-contractual duty to disclose imposed on prospective policyholders is based on the legal convictions of the community (*boni mores*).[10] The *boni mores,* in the insurance context, refers to the natural sense of fairness, which requires the policyholder, in his capacity as the person who has exclusive knowledge of the facts or circumstances of the risk, to disclose and not to misrepresent them to the insurer.[11]

The policyholder's duty to disclose and not to misrepresent arises from the operation of law and not as a requirement to act in good faith.[12] It first requires the policyholder to disclose information that is relevant and material to the risk to be insured. This is the information the insured would otherwise not have to disclose in other contractual settings.[13]

The insured is expected to disclose material facts without being asked [14] and irrespective of whether he or she regards those facts as material.[15]

The primary common-law remedy for the insurer in cases of fraudulent, negligent, and innocent misrepresentation and non-disclosure, is rescission of the policy and a concomitant refusal to pay the claim.[16]

Policyholders are prejudiced by not making adequate disclosure and representation even if they were unaware that the information was material for the assessment of the risk insured.[17]

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[10] *Idem* 225.

[11] Reinecke *et al* (2013) 136.

[12] *Mutual and Federal Insurance Ltd v Oudtshoorn Municipality* 433 A-D.

[13] Reinecke *et al* (2013) 134.

[14] Park *The Duty of Disclosure in Insurance Contract Law* (1996) 10.

[15] *Idem* 11.

[16] *Fansba Vervoer (Edms) Beperk v Incorporated General Insurance Ltd* (1976) 4 (W) 977.

[17] Hasson "The Doctrine of Uberrima Fides in Insurance Law- A Critical Evaluation" (1969) 615.

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This prejudice is informed by the "test" which is applied by courts. However, voluntary disclosure by the policyholder is not the only way for the insurer to get the relevant information.[18]

The policyholder's protection framework requires the insurer to be active in the pre-contractual negotiations.[19]

It is against this background that the South African Financial Services Board's "Treating Customers Fairly principles (TCF)" were developed.[20] The TCF principles are outcome-based voluntary market conduct regulatory and supervisory principles.[21] These principles ensure that providers of financial products and services, such as insurers, treat their customers fairly[22] throughout the insurance contract's life cycle.[23]

This dissertation aims to investigate the legal Implications of innocent misrepresentation or innocent non-disclosure by the policyholder within the context of the requirement to treat customers fairly.

1.2 Methodology

When analyzing non-disclosure in the context of innocent misrepresentation and innocent non-disclosure by the policyholder, a comparative study will be made. The

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[18] *Ibid*.

[19] National Treasury "Treating Customers Fairly in the Financial Sector-A Market Conduct Policy Framework for South Africa" December 2014 http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf (accessed on 10 June 2021).

[20] Financial Services Board "Treating Customers Fairly: The Roadmap" 31 March 2011 https://www.fpi.co.za/documents/Advocay/FSB_TCF_Roadmap_Final_March_2011.pdf.

[21] *Ibid*.

[22] *Ibid*.

[23] *Ibid*.

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United Kingdom and Zimbabwean legal systems will be compared with the position in South African insurance law.

Relevant legislation, case law and writings of legal scholars in the field of insurance law will be examined in the context of the TCF principles.

A literature survey will be done to facilitate the formulation of a set of principles that could be used to guide the development of South African law.

A brief discussion will be made on the post-sale impact of non-disclosure and misrepresentation and how the Insurance Ombudsman deals with it in applying its equity jurisdiction.

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2 MISREPRESENTATIONS AND NON-DISCLOSURES

2.1 Introduction

Generally, South African contract law makes no provision for a duty to volunteer information either in favour or not in favour of the other contracting party.[24] However, in the insurance domain, a policyholder is legally required and is expected to disclose all material facts or circumstances that may impact the assessment of the risk for which insurance is sought.[25]

A contract qualifies as an insurance contract if its main purpose is to transfer a risk from the policyholder to the insurer in exchange for a predetermined premium.[26] The insurer will render the policyholder a sum of money or its equivalent on the occurrence of a specified uncertain future event insured against.[27]

The assessment of the risk and the determination of the quantum to be paid in order to conclude an insurance contract depends on the relevant information supplied by the policyholder.[28] A fair representation and disclosure of the information is crucial for reaching a consensus on the insurance policy.[29]

This means that the insured has a pre-contractual duty to volunteer (disclose) material facts relevant to the assessment of the risk. The pre-contractual duty is not an essential requirement to conclude an insurance contract. Consequently, misrepresentation and non-disclosure of facts or circumstances material to the assessment of the risk remain a challenge

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[24] Joubert *General Principles of the Law of Contract* (1987) 95.

[25] *Cater v Boehn* [1558-1774] All ER reprint 183.

[26] *Lake v Reinsurance Corporation Ltd* (1967) 3 SA 124 (W) 130.

[27] Reinecke *et al* (2013) 75.

[28] *Ibid*.

[29] Reinecke *et al* (2013) 137.

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2.2 Utmost good faith

The insurance contract is the best-known example of a contract of utmost good faith (*uberrimae fidei*).[30] In South African law, however, the concept of utmost good faith was subsequently rejected on the basis that there are no degrees of good faith.[31] When good faith was still a requirement the parties to an insurance contract were required to act in good faith and disclose all material facts relating to the envisaged contract. The parties in the insurance contract, like any other contract, were expected to deal with each other honestly and cooperatively, specifically regarding facts that were material to the risk sought to be undertaken by the other. The parties had to display good faith in their dealings during the pre-contractual stage of the insurance contract.[32]

The Constitutional Court in *Beadica 231 CC v Trustees for the time being of the Oregon Trust*,[33] held that abstract values such as good faith do not provide a free-standing basis upon which the court may interfere in contractual relationships; that its application, like any other constitutional value, is moderated by the rules of contract law. A court should not enforce contractual terms where the term or its enforcement would be contrary to public policy.

The requirement to act in good faith complements the duty to disclose. It is not a stand-alone requirement like the duty to disclose because the duty to disclose refers to the duty that is imposed by the law on the insured to disclose all material facts regarding the risk to be underwritten.

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[30] *Idem* 140.

[31] *Idem* 142.

[32] *Ibid*.

[33] CCT109/19 [2020] ZACC 13 see 79–80.

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2.3 Breach of duty of disclosure or to disclose

Misrepresentation or non-disclosure in insurance contracts constitutes wrongfulness as a breach of a legally imposed duty on the policyholder.[34] In other words, a misrepresentation is delictual because it is a breach of the duty that is legally imposed on the insured.[35]

Misrepresentation is a false presentation or non-presentation of information relating to the risk by the policyholder, which induced the insurer to conclude the insurance contract.[36] The Misrepresentation may either be innocent, fraudulent or negligent. To be challenged, the misrepresented information should be wholly false or inaccurate, or misleading to the insurer.[37]

2.3.1 Negative and positive misrepresentation and non-disclosure

Misrepresentation may either be negative (an act of omission) or positive (an act of commission).[38]

The non-disclosure of information is a form of misrepresentation by omission, in that the policyholder withholds information while he has a legal duty to disclose it.[39] A positive misrepresentation occurs where a policyholder expressly makes a false statement in reply to the questions posed by the insurer.[40] The latter can take place in the form of words or conduct which encourages the formation of false impressions by the insurer.[41]

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[34] Reinecke *et al* (2013) 136.

[35] *Idem* 135.

[36] Birds and Hird *Birds' Modern Insurance Law* (2004) 137.

[37] Reinecke *et al* (2013) 146.

[38] Reinecke *et al* (2013) 135.

[39] Joubert (1987) 94.

[40] Birds and Hird (2004) 101.

[41] Joubert (1987) 92.

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The false impression can be about the existence of a thing, its characteristics, or its general state.[42]

A misrepresentation is an improper means of obtaining consensus. In common law, it constitutes a breach of duty, and whether it is fraudulent, negligent, or innocently made, it renders the policy rescindable at the instance of the insurer.[43]

The disclosure of relevant information is required without being asked for and despite the policyholder's thoughts on its relevance to the risk.[44] The policyholder is also required to disclose material facts (1) he or she knows, (2) is expected to know (3) or facts he or she should have inquired about.[45] The knowledge of material facts can be imputed to the insured if he or she ought to know such facts in the ordinary course of his or her business.

For the insurer to succeed with rescinding a policy based on pre-contractual misrepresentation, the insurer would have to show that the policy was induced by the misrepresentation - the misrepresentation which was both untrue and material to the assessment of the risk it has insured.[46]

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[42] *Ibid*.

[43] Hutchison *et al* (2017) 120.

[44] Park (1996) 10.

[45] Reinecke *et al* (2013) 157.

[46] *Fansba Vervoer (Edms) Beperk v Incorporated General Insurance* 977; *Clifford v Commercial Union Insurance Co of SA Ltd* (1998) 4 SA 150 (SCA)156; *Visser v 1 Life Direct Insurance* (1005/13) (2004) ZASCA 193.

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2.3.2 Fraudulent, negligent, and innocent misrepresentation and non-disclosure.

The effect of misrepresentation and non-disclosure is to induce the insurer to conclude the policy or to influence the terms of the policy.[47] Misrepresentation and non-disclosure go against the dictates of good faith even when either is innocently made.[48]

The reason is that the *boni mores,* that is, the legal convictions of the community, impose a legal duty on the policyholder to make full disclosure and not to misrepresent facts to the insurer.[49] For misrepresentation and non-disclosure to be wrongful, it must, according to the judgment of ordinary members of the insurance community, be so bad that it attracts legal liability.[50]

A misrepresentation can be intentional (fraudulent), negligent, or innocent, depending on the level of fault on the part of the policyholder.[51]

Since disclosure is a pre-contractual duty, misrepresentation takes place at the policy negotiation stage.[52] The policy concluded on the strength of misrepresentation remains in existence because the parties have reached a consensus, albeit wrongfully, i.e. based on a misrepresentation.[53]

The insurance policies induced by misrepresentation are therefore not void but are avoidable. The insurer has the option to avoid the policy-induced by either the fraudulent, negligent or innocent misrepresentation.[54]

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[47] Joubert (1987) 92.

[48] *Idem* 90.

[49] *Idem* 96.

[50] Reinecke *et al* (2013) 146.

[51] Hutchison et al (2017) 129.

[52] Reinecke *et al* (2013) 135.

[53] Hutchison *et al* (2017) 91.

[54] Joubert (1987) 91.

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The common factor is the presence of misrepresentation and not the absence of good faith.[55] The duty to disclose is not based on utmost good faith or just sheer good faith, as it can still be breached with good intentions in innocent or negligent misrepresentation, but it is based on the precepts of the law.[56] Good faith is a factor relevant when assessing wrongfulness in the material facts misrepresented and/or non-disclosed.[57]

2.3.3 Facts or circumstances material to the risk insured.

The materiality of the information is relevant when determining the wrongfulness of the misrepresentation and/or non-disclosure of information,[58] the same as good faith.[59] The insured is required to present and disclose all material facts to the insurer. Failure to do so is wrong.[60]

Section 53(1) of the Short-Term Insurance Act and section 59(1) of the Long-Term Insurance Act state that information is regarded to be material if a prudent and reasonable person would consider the misrepresented or non-disclosed information to be material in the assessment of the risk insured. In terms of both the latter statutes the test in respect of both positive and negative misrepresentation is not whether the reasonable person would have disclosed the fact in question, but whether the reasonable person would have considered the fact in question reasonably relevant and material to the risk and its assessment by an insurer.[61]

In *Mahadeo v Dial Direct Ltd*, the insured sued the insurer for payment under an insurance policy. In terms of this policy, the insurer had agreed to cover the insured in

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[55] Reinecke *et al* (2013) 144.

[56] *Mutual and Federal Insurer Co Ltd v Oudtshoorn Municipality* 433.

[57] Reinecke *et al* (2013) 161.

[58] *Ibid*.

[59] *Ibid*.

[60] Reinecke *et al* (2013) 136.

[61] *Mahadeo v Dial Direct Insurance Ltd* 2008 (4) SA 80 (W) 1.

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the event of loss or damage to his insured vehicle. The insured vehicle was subsequently involved in a collision during the existence of the policy, but the insurer refused to pay the insured under the policy.[62]

The insurer's refusal to pay the insured was based on the fact that the latter did not disclose material facts or that he misrepresented facts. The insured did not disclose that he had previously suffered a loss on or about 24 January 2003. The insured's non-disclosure resulted in him qualifying for a six-year claim free bonus instead of a two year one. The non-disclosure was material in the assessment of the risk and the calculation of the premium. Because of the abovementioned non-disclosure, the insurer was entitled to avoid the motor section of the insurance policy.[63]

In the alternative, the insurer argued that the insured was obliged to provide it with true and complete information. The insured's breach of this obligation entitled the insurer to avoid the policy and also entitled it to refuse to pay the insured.[64]

It was not in dispute that in 2003, the insured's vehicle sustained minor damages arising from the insured driving through a pothole and that the insured was indemnified by his previous insurer. The insurer contended that this was not disclosed by the insured. However, what was in dispute was the fact that the pothole incident occurred on or about 24 January 2003 as claimed by the insurer.[65]

The dispute between the parties related to answers that the insured gave on two questions posed by the insurer's sales consultant. These questions were whether the insured suffered any previous accidents and whether he was previously the victim of car theft.[66] The insured argued that he did not mention the pothole incident because

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[62] *Idem* 2.

[63] *Ibid.*

[64] *Ibid*.

[65] *Idem* 5.

[66] *Idem* 7.

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he did not regard the incident as an accident. He stated that in his mind, an accident referred to a collision between two cars or a car with an object. He was also not asked about any previous claims or losses. It was not divulged to him that he would qualify for a claim-free bonus of six years based on his claim-free history. Had he been informed of this, he would have disclosed the pothole incident.[67]

The court held that because of how the questions were asked, the notional reasonable person would not have known that the insurer considered all previous claims relevant.[68]

The court further held that the insured's contention that he did not consider the pothole incident to have amounted to an accident could not be rejected as false.[69]

The insurer conceded that the sales consultant deviated from the computer-generated questions at the negotiation stage of this policy and that the relevance of the questions was not fully explained to the insured. This resulted in the fact that the notional reasonable person in the position of the insured would not have disclosed the pothole incident.[70]

The court concluded that the insurer failed to establish that the pothole incident or the insurance claim arising from it had occurred on 24 January 2003 or within two years of the sales conversation.[71]

The court concluded that the insured was entitled to be covered by the insurer in terms of the insurance contract. The insured was awarded the associated interest and costs.[72]

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[67] *Idem* 11.

[68] *Idem* 27.

[69] *Idem* 23.

[70] *Idem* 27.

[71] *Idem* 35.

[72] *Idem* 36.

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The test for the materiality of facts is objective.[73] It is concerned with whether the facts presented embrace both the circumstances of the insurer and the policyholder.[74] The question is whether a reasonable person, on a balance of probabilities, would have regarded the misrepresented and/or non-disclosed facts as material to the assessment of the risk.[75] Put differently, the question is whether a reasonable person would have regarded the misrepresented and/or non-disclosed facts to be material in the assessment of the risk.[76]

This test is applied to determine whether the insurer was induced to enter into a policy agreement that he would not have entered into at all, or perhaps he would still have entered but on different terms or premiums.[77]

In *Bason v Hollard insurance Life Insurance,*[78] the court held that an insurer has the right to rescind the contract where the policyholder misrepresented a material fact. The aim behind the test for materiality of misrepresentation and/or non-disclosure is to protect the policyholders against a claim rejection by the insurer based on trivial non-disclosure and/or misrepresentation. Hence the burden of proving materiality lies with the insurer.[79]

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[73] Reinecke *et al* (2003) 163.

[74] *Idem* 164.

[75] *Ibid*.

[76] Van Niekerk" The Test for Materiality in Insurance Law: The Reasonable Person in Context" (2004) *SA Merc LJ* 115.

[77] *Ibid*.

[78] (2018) 4 ALL SA 77 (GJ) 72.

[79] *Fansba Vervoer (Edms) Beperk v Incorporated General Insurance Ltd* 977, *Clifford v Commercial Union Insurance Co of SA Ltd* 156, *Visser v 1 Life Direct Insurance* 193.

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2.4 Treating Customers Fairly (TCF) principles in pre-contractual negotiations and good faith

The conduct of institutions in the non-banking financial services sector is controlled by the Financial Service Conduct Authority (the FSCA). The FSCA aims to oversee the market conduct of the above financial institutions to ensure that the institutions treat customers fairly.[80]

Further, the focus of the Financial Advisory and Intermediaries Services Act (FAIS Act)[81] is to regulate the rendering of financial advisory and intermediary services to financial customers. Furthermore, the FAIS Act aims to ensure that financial and intermediary services comply with treating customers fairly in accordance with the TCF principles through the setting of standards and procedures.[82]

The General Code of Conduct (GCC) for financial services providers was published in terms of the FAIS Act,[83] whilst the Policyholder Protection Rules (PPRs) provide significant consumer protection measures. The GCC instrument was ushered by the FAIS Act into the sector to complement the law in the protection of customers in the insurance industry.[84]

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[80] Millard "The impact of the Twin Peaks Model on the Insurance Industry" 2016 *PER/PELJ* 2. The FSCA is established in terms of s 56 of FSR Act 9 of 2017.

[81] Act 37 of 2002.

[82] Section 16(1)(e) of the FAIS Act 37 of 2002.

[83] Section 8(1) and 13 (1) of the FAIS Act 37 of 2002.

[84] Hatting and Millard *The FAIS Act Explained* (2010) 17-18.

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The PPRs[85] are promulgated in terms of the Short-Term Insurance Act (STIA)[86] and the Long-term Insurance Act (LTIA).[87] They were published on 15 December 2017.[88]

The PPRs have transformed the supervision and regulation of the insurance industry.[89] They mandate the insurance industry to treat its customers fairly within the context of market conduct regulation.[90]

The TCF initiative morally compels financial services providers (insurers included) to consider how they conduct their business. It requires them to incorporate fairness throughout the product life cycle.[91]

For insurers to comply, the TCF principles provide for six outcomes-based results in the insurance life cycle. The discussion below will demonstrate the impact of the TCF principles and those provided by other instruments on insurers - from the pre-contractual stage to the claim stage.

2.4.1 Outcome 1

Customers should be confident that they are dealing with firms where the fair treatment of customers is central to the firm's culture.[92]

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[85] Section 55 of Short-Term Insurance Act 53 of 1998 and s 62 of Long -Term Insurance Act of 1998.

[86] Short-Term Insurance Act (STIA) 53 of 1998.

[87] Long-Term Insurance Act (LTIA) 52 of 1998.

[88] Millard "Cofi and T(CF): Further Along The Road To Twin Peaks and Fair Insurance Industry" (2018) *PER/PELJ* 383.

[89] Millard and Kuschke "Transparency, Trust and Security: An Evaluation of The Insurer's Pre-Contractual Duties" (2014) *PER/PELJ* 7. (this article was published in 2014, and yet the PPRs came in 2017)

[90] Georgosouli "The FSA's 'treating customers fairly' (TCF) initiative: What is so good about it and why it may not work" 2011 *Journal of Law and Society* 417. (this article was published in 2011, and yet the PPRs came in 2017)

[91] Long-Term Insurance Act and Short-Term Insurance Act Policyholder Protection Rules rule 1.4 (PPRs).

[92] PPRs rule 1.4 (a).

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The insurer must make the policyholder aware that it is a reputable insurer.[93]

In its firm, the insurer must entrench a culture of treating customers fairly throughout the product life cycle.[94] In so doing, it must avoid conflicts of interest in the rendering of insurance services.[95] Insurers must pledge to render insurance services directly or through an intermediary honestly, with due skill, care, and diligence and in the interest of customers.[96]

The STIA and the LTIA require that only authorised financial services providers may sell or market insurance products or services.[97] The advertised or marketed product should not be fraudulent, untrue, or misleading.[98] It can be pointed out that honesty, skill, care, and due diligence requires that the insurer must probe the policyholder to obtain material facts relevant to the risk.[99]

2.4.2. Outcome 2

Products, services marketed and sold in the retail market should be designed to meet the needs of customers.[100]

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[93] TCF Roadmap 21.

[94] PPRs rule 1.4 of both the sets of PPRs.

[95] Moolman *et al Financial Advisory and Intermediary Services Guide* (2010) 168.

[96] Section 8 of the GCC.

[97] Item 1 of Schedule 3 to Insurance Act 18 of 2017. This Act came to introduce a legal framework for microinsurance to promote inclusion, to replace certain parts of the Long-Term Insurance Act, 1998 and the Short-Term Insurance Act,1998. To also provide for matters connected therewith.

[98] Millard (2018) 384.

[99] Section 4(3) of the GCC.

[100] PPRs rule 1.4(b) of both sets of the PPRs.

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The services and the products provided by insurers are expected to live up to the promise that they set to achieve.[101] The promise in the insurance context is to pay the claim upon the occurrence of the insured event.[102]

The review of a product's performance requires that the product line should be evaluated continuously to determine its performance.[103] All relevant information must be disclosed in this regard[104] to ensure that insurance products are meeting the needs of their targeted policyholders and continue to deliver fair outcomes for policyholders.[105]

Policyholders should not be prejudiced by poor products and poor customer service.[106] Unsatisfactory services and poorly designed products may lead to undesirable misrepresentation and non-disclosure of relevant facts relating to the risk. This may result in the rejection of claims on account of the policyholder not making a full representation and the non-disclosure of previous minor incidents.[107]

2.4.3 Outcome 3

Rule 1.4 of the PPRs mandates that customers be given clear information and kept appropriately informed before, during and after the time of contracting.[108]

In addition, section 3 of the GCC mandates insurance firms to provide the policyholders with adequate advice regarding the disclosure of material facts and the

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[101] National Treasury "Treating Customers Fairly in the Financial Sector-A Market Conduct Policy Framework for South Africa" page 48.

[102] Reinecke *et al* (2013) 85.

[103] PPRs rule 15.1(a) and (b) of short-term insurance PPRs.

[104] Section 8(1)(d) of the GCC.

[105] *Ibid*.

[106] Section 8(2) of the GCC.

[107] *Ibid*.

[108] PPRs rule 1.4(c) of the PPRs.

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consequences of not doing so.[109] The firms must also solicit the information that they deem material from the insured.[110] The records of the pre-contractual negotiations must be kept safe.[111]

2.4.4 Outcome 4

Rule 1.4 of the PPRs further provides that where customers receive advice, the advice should be useful, and it must consider the customers' circumstances.[112]

In terms of section 8 of the GCC, an insurer is expected to try to obtain material facts which are relevant to the risk by considering the policyholder's financial situation, product experience and objectives.[113] Giving advice to the policyholder must therefore relate to the purchase of the financial product.[114]

The FSB requires insurance firms to monitor pre-contractual discussions to ensure that relevant information gets obtained by their agents or employees when transacting with policyholders.[115]

2.4.5 Outcome 5

Furthermore, Rule 1.4 of the PPRs requires that customers be provided with products that achieve what insurance firms would have led them to believe. Insurance companies should also ensure that associated services are of an acceptable standard and are in accordance with what customers were led to believe.[116]

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[109] Section 3(1)(i)-(iv) of the GCC.

[110] Section 8 of the GCC.

[111] *Ibid.*

[112] PPRs rule 1.4(d) of both sets of the PPRs.

[113] Section 8(1)(a) of the GCC.

[114] TCF "Treating Customers Fairly: The Roadmap" 2011

[115] *Ibid*.

[116] PPRs rule 1.4(d) of both sets of the PPRs.

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The National Treasury also requires the insurer to give the policyholder clear information regarding the policy in plain and simple language.[117] This outcome is akin to outcome 3 mentioned earlier. The view of the Treasury is that when these outcomes are appropriately pursued by insurers, they will reduce rescission of insurance policies on the grounds of innocent misrepresentation at the claim stage.[118]

2.4.6 Outcome 6

Lastly, Rule 1.4 of the PPRs envisages that customers should not face unreasonable post-sale barriers to switch or change products, switch providers, submit a claim or make a complaint.[119]

Rule 7 of the PPRs requires that the time bar clause be set to manage time frames for the institution of claims against the insurers.[120] Forthwith, the rule requires the insurer to either accept, rescind, or dispute a claim or the quantum of the claim within a reasonable time.[121]

In *Barkhuizen v Napier*,[122] the insured sued the insurer in the High Court two years after his claim was rejected by the insurer. The insured's claim was rejected by the insurer because he did not institute his claim within 90 days as required by the terms of the insurance policy.[123] The applicant contended that the time bar clause violated his rights enshrined in section 34 of the Bill of Rights and constituted a violation of public policy.[124]

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[117] National Treasury "Treating Customers Fairly in the Financial Sector-A Market Conduct Policy Framework for South Africa" December 2014

[118] *Ibid*.

[119] PPRs rule 1.4(f) of both sets of the PPRs.

[120] PPRs rule 7.4(a)-(c) of both sets of the PPRs.

[121] PPRs rule 7.4(c)(ii) of both sets of the PPRs.

[122] 2007 (5) SA 323 CC.

[123] *Idem* 3.

[124] The Constitution of the Republic of South Africica,1996.

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The High Court found that the time bar clause violated the insured's constitutional rights.[125]

The Supreme Court of Appeal in this matter found that the time bar clause did not infringe the insured's right and that the clause was not against public policy.[126]

The Constitutional Court found that the insured was aware of the time bar clause after his claim was rejected and that the time bar clause was adequate and reasonable.[127] Thus, it did not violate the insured's right and the clause was not against the public policy, which is one of the values of a democratic society.[128]

The insurer must explain the rights of the policyholder on rescission of a policy. The insurer must provide the policyholders with the details of an appeal process in the event that the policyholder is not satisfied with the insurer's decision. The insurer must also comply with the process of appeal of the Ombudsman in terms of the Financial Services Ombud's Scheme Act (where applicable).[129]

Good faith requires the parties in the insurance contract to deal with each other honestly and openly. The policyholder as an individual does not always have a textbook knowledge of what constitutes material facts relevant to the risk.[130] However, voluntary disclosure of information by the policyholder is not the only way of acquiring the material facts relevant to the risk.[131]

It is submitted that insurers have a corresponding duty to solicit material facts from policyholders. The corresponding duty of the insurer is derived from acting in good

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[125] *Barkhuizen v Napier* at page 9.

[126] *Idem* 17.

[127] *Idem* 85.

[128] *Idem* 90.

[129] 37 of 2004.

[130] Hasson (1969) 615.

[131] Park (1996) 10.

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faith. Good faith creates an expectation that the insurer must try to extract material facts from the policyholder instead of solely relying on the policyholder to voluntarily disclose what he or she thinks is material.[132]

In terms of the TCF principles, insurers must put questions that will alert the insured to disclose additional facts or circumstances relevant for the assessment of the risk insured.[133] Where disclosure takes place within the context of the practice and policy of a specific insurer, such an insurer must explain the risk basis to the policyholder.[134]

It is the responsibility of an insurer much as it is that of the insured to avoid being placed in a position to rescind a policy for innocent misrepresentation and/or non-disclosure at the claims stage.[135]

The overall analysis of these outcomes is that they morally compel insurer firms to put in place resources towards treating customers fairly. The duty to disclose and not to misrepresent can best be served if the insurer puts in an effort to solicit material facts.[136]

The discussed outcomes acknowledge the fact that policyholders do not always possess all knowledge of what constitutes material facts - as opposed to the insurer.[137] Some facts are ascertainable by ordinary diligence and care or are common to the parties.[138]

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[132] Van Niekerk “Goodbye to the Duty of Disclosure in Insurance law: Reasons to Rethink, Restrict, Reform or Repeal the Duty (Part 2)” 17 *SA Merc LJ* (2005) 336.

[133] Black, Hopper, Bond & Smith "Making A Success of Principles Based Regulation" (2007) 193.

[134]Financial Services Board "Treating Customers Fairly: The Roadmap" 2011.

[135] Black & Hird (2004) 137.

[136] Ombuzz "Non-Disclosure: Closing Your Eyes to Light" Issue 24 (2013). https://www.ombud.co.za/publications/newsletter?email_id=29 (10 June 2021).

[137] *Commercial Union Insurance Co of SA Ltd v Lotter* (1999) 2 SA 147 (SCA) 150.

[138] Hutchison *et al* (2017) 139.

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Section 7 of the General Code of Conduct makes provision for a reasonable and appropriate general explanation of the nature and material terms of the contract between policyholder and insurer.

2.5 The Remedies

Misrepresentation and/or non-disclosure is actionable irrespective of whether it is accompanied by fraudulent, negligent or innocent intentions.[139]

A distinction should be drawn between *dolus dans locum contractui (dolus dans)* and the *dolus incidens contractui (dolus incidens). Dolus dans* is a misrepresentation giving rise to the conclusion of a contract that would not have been concluded if it was not for the misrepresentation and/or non-disclosure.[140] *Dolus incidens,* on the other hand, is a misrepresentation giving rise to the conclusion of a contract on prejudicial terms because of the misrepresentation and/or non-disclosure.[141]

Dolus dans entitle the insurer to rescind the policy and to claim delictual damages arising from the consequences of misrepresentation.[142] The contract would not have been concluded at all if it was not for the misrepresentation.[143]

Dolus incidens entitles the insurer to claim damages and not rescission.[144] This is an incidental misrepresentation, which had it not been for it, the contract would have still been concluded, although on different terms or premium.[145]

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[139] Joubert (1987) 91.

[140] Hutchison *et al* (2017) 127.

[141] *Ibid*.

[142] *Ibid.*

[143] *Ibid*.

[144] *Ibid*.

[145] *Ibid*.

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The insurer, as the party that is induced to contract by the policyholder's misrepresentation, has the remedy of rescission (cancellation) of the insurance policy and may claim for damages.[146] To succeed in claiming damages, the insurer will have to prove that it was induced to conclude the policy by the misrepresentation or non-disclosure of facts.[147]

2.5.1 Rescission

The common law remedy of rescission of the contract is available where the misrepresentation and/or non-disclosure is the cause of the conclusion of the contract.[148]

The insurer has the right to rescind the policy without proving fraud, negligence, or innocence on the part of the policyholder.[149]

A *dolus dans* misrepresentation induces the insurer to conclude the contract, which it would not have concluded at all.[150] This misrepresentation is contrary to the *boni mores* or law.[151]

In the case of non-disclosure of material facts, the insurer's complaint is based on the breach of the legal duty to disclose material facts.[152] The policyholder's legal duty requires them to disclose material facts without being asked.[153]

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[146] Hutchison *et al* (2017) 126.

[147] *Trust Bank of Africa Ltd v Frysch* 1977 (3) SA 562 (A) 588. See also, Hutchison *et al* (2017) 126.

[148] Hutchison *et al* (2017) 127.

[149] Joubert (1987) 97.

[150] *Idem* 98.

[151] *Idem* 94.

[152] *Ibid*.

[153] Joubert (1987) 95.

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If the insurer rescinds the contract based on misrepresentation, it has to return the premiums received unless the contract contains a forfeiture clause.[154] However, a *dolus incidens* (incidental) misrepresentation calls for proportional remedies when it appears that the insurer would have still entered the contract had it not been for the misrepresentation.

It was suggested in *Pillay v South African Life Assurance Co Ltd*,[155] that where it appears that there was a misrepresentation made, and the insurer would have still entered the contract on different terms or premium, had it not been for the misrepresentation, the policy should be reconstructed to the new terms or adjusted premium that would have been made.[156]

This is known as the *Didcott* principle because of the surname of the judge in the case who suggested the reconstruction of the policy where it appeared that the insurer would have still contracted. The *Didcott* principle seeks to proportionally adjust the policy to what would have been agreed to by the parties. This adjustment is theoretical and not actual.[157] According to this principle, a question is asked what would have been the insurance contract terms or premium had there been no misrepresentation or non-disclosure. This is meant to benefit both parties. What contract would the parties have entered into had it not been for the misrepresentation and/or non-disclosure?[158]

For example, if the insurer would have charged a higher premium had the insured not made a misrepresentation, the insurer would be entitled to proportionately reduce the benefit. In the event the insurer would have excluded a particular claim, such claim

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[154] *Idem* 98. Reinecke *et al* (2013) 177.

[155] 1991 (1) SA 363 (D) 367.

[156] *Ibid*.

[157] Reinecke "Remedies for Misrepresentation Inducing a Long-Term Insurance Contract: The Didcott Principle" (2009) 21 *SA Merc LJ* 391.

[158] *Ibid*.

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would be excluded. If the excess would have been imposed, the policy would be reconstructed as if the exclusion had been made part of it.[159]

2.5.2 Damages

Damages can be claimed for the patrimonial loss suffered by the insurer because of the misrepresentation and/or non-disclosure.[160]

The patrimonial loss arises because of economic or financial loss.[161] The insurer has the right to claim damages for fraudulent and negligent misrepresentation but not for innocent misrepresentation.[162] The claim for damages because of misrepresentation or non-disclosure is based on delict.[163] The elements for delictual liability must be present, including fault.[164]

The wrongful misrepresentation must have been made by the policyholder or its agent. The insurer must have been induced by the misrepresentation to enter into the contract, and he or she must have suffered patrimonial loss because of it.[165]

The insurer's right to claim damages is not limited by the reason that the insurer should not have been so easily misled or so easily defrauded by the misrepresentation.[166] The claim for damages may be instituted even where the policy was not rescinded.[167]

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[159] *Idem* 392.

[160] *Pillay v South African Life Assurance Co Ltd* 367.

see also, Hutchison *et al* (2017) 129.

[161] *Idem* 133.

[162] *Brink v Humphries & Jewell* (Pty) Ltd 2005 (2) SA 419 (SCA) at 421 G.

[163] Joubert (1987) 98.

[164] Hutchison *et al* (2017) 129.

[165] Reinecke *et al* (2013) 137.

[166] Hutchison *et al* (2017) 130.

[167] Joubert (1987) 100.

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This is to put the insurer in the position he would have been in had it not been for the misrepresentation which caused the patrimonial loss.[168]

In determining damages, a comparison is made between two scenarios, firstly where the insurer would not have entered into a contract at all and secondly, where the insurer would have entered into a contract despite the misrepresentation.[169] In the first scenario, where it appears that the insurer would not have contracted at all had it not been for the misrepresentation, the insurer must be put in the position he was in before the contract was concluded.[170] In the second scenario, where it appears that the contract would have been entered into although, on different terms or premium, a comparison is made between the value given and the value that would have been given had it not been for the misrepresentation.[171]

The overall consideration of these remedies, particularly in relation to *dolus dans* and *dolus incidens,* suggests that the rescission of the policy for reasons related to misrepresentation or non-disclosure should not be easily invoked.

Where the misrepresentation is made, and it is related to *dolus incidens,* the insurer should opt for the damages to restore the economic balance that has been disturbed by the effects of misrepresentation.[172]

Insurers, on the other hand, prefer rescission of the contract even where severance was to be applied by removing the challenged parts (impacting on the terms or premium) from the rest of the policy.[173]

The proportional remedies are in line with the TCF principles and should be adopted in cases where there is no fraudulent misrepresentation.

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[168] Hutchison *et al* (2017) 130.

[169] Joubert (1987) 100.

[170] *Ibid*.

[171] Hutchison *et al* (2017)131.

[172] *Idem* 136.

[173] Reinecke *et al* (2013) 120.

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3 COMPARATIVE ANALYSIS IN THE CONTEXT OF MISREPRESENTATION AND NON-DISCLOSURE

3.1 Introduction.

South African common law has been supplemented by English law in matters unique to insurance law.[174] For this reason, amongst others, English law is a non-binding source of South African insurance law.[175]

As a result, English law has persuasive authority in insurance law cases,[176] especially in matters where there are little or no precedents in South African law.[177]

Since the incorporation of s 2(2) of the United Kingdom (UK) Misrepresentation Act, 1967 English law clothed courts with the necessary jurisdiction to order damages instead of rescission for innocent misrepresentation. Recently, the UK Insurance Act 2015 has made it clear that an insurer is no longer entitled to rescind the policy unless the breach of the duty of fair representation is deliberate or reckless.[178]

A comparative approach in this regard will be valuable in developing South African insurance law for suitable application in cases of innocent misrepresentation and non-disclosure. In this regard, the United Kingdom and Zimbabwean insurance law will be juxtaposed to South African insurance law.

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[174] Reinecke *et al* (2013) 16.

[175] *Idem* 19.

[176] *Ibid*.

[177] *Ibid*.

[178] S14 of the UK Insurance Act 2015.

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3.2 The United Kingdom

In the UK various legislative frameworks operate within the insurance industry. The provisions from these statutes work hand in hand and must all be consulted. Historically, in the United Kingdom, insurance contracts were viewed as contracts of utmost good faith.[179] The insured was expected to act in utmost good faith and not to make misrepresentations of material facts.[180]

However, in UK Insurance law there are exclusions to the general duty of disclosure of certain facts in the absence of an inquiry.[181] These are facts that diminish the risk,[182] facts or circumstances which are common knowledge to the parties or are easily ascertainable,[183] situations where the duty to provide the information is waived,[184] or circumstances that are not required to be disclosed in terms of an express or implied warranty.[185]

Previously, in the UK the fraudulent, negligent and innocent misrepresentation entitled the innocent party to rescind the contract.[186] Over the years, legal reforms took place. The promulgations were meant to deal with whether the insurer could rescind a contract of the like in its totality/entirety.[187]

[179] Bird and Hird (2004)100.

[180] S17 of the UK Marine Insurance Act 1906.

[181] S 3(5) of the UK Insurance Act 2015.

[182] S 18(3)(a) of the UK Marine Insurance Act 1906.

[183] S 18(3)(b) of the UK Marine Insurance Act 1906.

[184] S 18(3)(c) of the UK Marine Insurance Act 1906.

[185] S 18(3)(d) of the UK Marine Insurance Act 1906.

[186] S 18 of the UK Marine Insurance Act 1906.

[187] S 2 of the UK Misrepresentation Act 1967 and S 18 of the Marine Insurance Act 1906.

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3.2.1 The Insurance Act 2015

The Insurance Act 2015 (the UK Insurance Act) distinguishes between insureds' who are individually insured[188] and those who are not.[189] The aim is to differentiate between the knowledge held by the insured as an individual and that held by a company. The required knowledge is based on what the person or a person responsible for the insureds' insurance knows.[190] For example, in the case of a company, it is based on what the insureds' senior management or person responsible for its insurance knows.[191]

The UK Insurance Act applies to "non-consumer insurance contract and variations" only.[192] The UK Insurance Act abolished the power of the insurer to void the contract for reasons relating to the breach of utmost good faith.[193] According to the latter Act, the insured must make a "fair presentation" of risk to the insurer.[194] The duty of a fair presentation includes facts that could be revealed by a reasonable search of information by the insured or its agents.[195] However, the insured is not liable for fraud committed against it by its agents.[196]

The fair presentation must be a substantial account of material facts or circumstances of the risk[197] in a manner that is reasonably clear and accessible to a prudent insurer.[198]

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[188] S 4(2) of the UK Insurance Act 2015.

[189] S 6(1) of the UK Insurance Act 2015.

[190] S 4(1) of the UK Insurance Act 2015.

[191] S 4(5) of the UK Insurance Act 2015.

[192] S 2 of the UK Insurance Act 2015.

[193] S 14 of the UK Insurance Act 2015.

[194] S 3 of the UK Insurance Act 2015.

[195] S 4(6) and s 4(7) of the UK Insurance Act 2015.

[196] S 6(2) of the UK Insurance Act 2015.

[197] S 3(3)(c) of the UK Insurance Act 2015.

[198] S 3(3)(b) of the UK Insurance Act 2015.

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The fair presentation of facts or circumstances must influence the decision of a prudent insurer to take the risk or to determine its terms or premium.[199] It should give the insurer a chance to understand the risk and to solicit material circumstances of the risk.[200]

3.2.2. The UK Consumer Insurance (Disclosure and Representation) Act 2012

The UK Consumer Insurance (Disclosure and Representation) Act 2012 (the UK 2012 CIDR Act) applies to consumer insurance contracts only.[201] The latter Act defines consumer insurance as "insurance entered into by an individual wholly or mainly for a purpose unrelated to the individual's trade, business or profession".[202]

The UK 2012 CIDR Act abolished the pre-contractual duty based on utmost good faith in respect of consumer insurance.[203] Nevertheless, the latter maintained that the insured must act reasonably when making a presentation because fraudulent misrepresentations are deemed to be lacking reasonable care.[204]

Further, the Act requires the insured to answer the insurer's questions carefully and honestly.[205] The questions are posed during the determination of whether the insured has taken reasonable care not to make a misrepresentation. The test is objective in nature.[206]

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[199] S 7(3) of the UK Insurance Act 2015.

[200] S 2 of the UK Insurance Act 2015.

[201] S 1 of the UK 2012 CIDR Act.

[202] *Ibid*.

[203] S 2(4) of the UK CIDR Act.

[204] S 3(4) of the CIDR Act.

[205] S2(2) of the CIDR Act.

[206] S 3(3) of the CIDR Act.

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The determination of a reasonable standard expected in terms of s3(3) of the UK 2012 CIDR Act would include an analysis of the type of consumer insurance contract,[207] its target market,[208] the policy's literature,[209] the publicity material that is authorised by the insurer, [210] the clarity of the insurer's questions and whether there was an intermediary or agent used.[211]

3.2.3 Remedies

Under the UK Marine Insurance Act 1906, the remedy that was available to the insurer for breach of utmost good faith was to void the contract and a refusal to pay the claim.[212]

In addition to the remedies mentioned above, other remedies are available for insurers. These consist of a new range of proportionate remedies to choose from.[213]

A new range of proportionate remedies exists for the insurer to choose from. The choice of the remedies depends on the liability of the insured.[214] Where it is the insured in the wrong. A contract may be divisible so that while one part of it may be affected because of misrepresentation, the remainder of it may be valid and binding.[215] The latter requires an objective determination of whether the innocent party would have concluded the contract had it not been for the misrepresentation or the non-disclosure.[216]

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[207] S 3(2)(a) of the CIDR Act.

[208] S 3(2)(b) of the CIDR Act.

[209] S 3(2)(c) of the CIDR Act.

[210] S 3(2)(d) of the CIDR Act.

[211] S 3(2)(e) of the CIDR Act.

[212] S 18 UK Marine Insurance Act 1906.

[213] S (2) of the CIDR Act.

[214] S 8(1) of the UK Insurance Act 2015.

[215] *Ibid*. see also ss 2 - 6 of the UK Insurance Act 2015.

[216] S 8(1) of the UK Insurance Act 2015.

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The UK Misrepresentation Act introduced an action that was based on contract law and the law of tort of deceit (delict) were a misrepresentation had caused the insurer to suffer patrimonial loss.[217] The insurer who entered into a contract after a misrepresentation was entitled to rescind the contract without alleging or proving fraud.[218] If he happened to suffer loss because of misrepresentation, then he was entitled to damages.[219] This means that the insured who made a misrepresentation was liable to pay damages irrespective of fraud, negligence, or innocence.[220]

The breach of the duty can be made deliberately or recklessly by the insured.[221] A qualifying deliberate breach is made if the insureds were aware that they were in breach of the duty.[222] On the other hand, a qualifying reckless breach is made if the insured did not care whether he or she was in breach of the duty.[223]
The inclusion of contractual terms that exclude or limit the liability of the insured is prohibited.[224] Such terms have no binding or legal effect on the parties.[225]

3.2.4. Rescission and voidance of the contract

Under the UK Insurance Act 2015. A qualifying deliberate or reckless breach of the duty entitles the insurer to void the insurance contract and to keep the paid premiums.[226] The insurer is required to show that the breach of the duty was deliberate

[217] Hutchison *et al* (2017) 129.
[218] S 1 of the UK Misrepresentation Act 1967.
[219] S 2(1) of the UK Misrepresentation Act 1967.
[220] *Ibid*.
[221] S 8(4) of the UK Insurance Act 2015.
[222] S 8(5)(a) of the UK Insurance Act 2015.
[223] S 8(5)(b) of the UK Insurance Act 2015.
[224] S 3 of the UK Misrepresentation Act 1967.
[225] *Ibid.*
[226] S 8(1) of the UK Insurance Act 2015.

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or reckless and that it induced him or her to enter the insurance contract that he would not have entered into at all.[227]

Where the insurer would not have entered into the contract at all had it not been for the deliberate or reckless misrepresentation, the insurer may rescind the contract.[228] The insurer would also be entitled to keep the premium it had received.[229] The insurer must show that the non-disclosure or misrepresentation was the actual inducement to enter into the contract.[230]

3.2.5 Other breaches

Where the insurer would not have entered into the contract at all had it not been for neither deliberate or reckless breach of the duty, he may void the contract and refuse to pay the claim.[231] However, an insurer is not entitled to keep the premiums.[232] Contrary to schedule 1(2) of the UK Insurance Act 2015, the insurer would not be entitled to the latter where the breach would neither be deliberate nor reckless.[233]

3.2.5.1 Varying the terms of the contract

Where it appears that, had there been no breach of the duty, the insurer would have insured the risk, but on different terms, the contract will be treated as if it had been entered into on those terms.[234]

3.2.5.2 Proportionate reduction of the claim.

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[227] S 8(1)(a) of the UK Insurance Act 2015

[228] Schedule 1(2)(a) of the UK Insurance Act 2015.

[229] Schedule 1(2)(b) of the UK Insurance Act 2015.

[230] *Pan Atlantic Insurance Co. Ltd v Pine Top Insurance Co. Ltd* (1993) 3 W.L.R 479.

[231] Schedule 1(4) of the UK Insurance Act 2015.

[232] Schedule 1(4) of the UK Insurance Act 2015.

[233] *Ibid*.

[234] Schedule 1(5) of UK Insurance Act 2015.

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At times it may appear that there was no breach of the duty, but in the circumstances, the insurer would have insured the risk for a higher premium. If the latter is the case, the insurer is entitled to proportionately reduce the claim. The proportional reduction applies to past and future claims under the policy.[235]

It should be noted that where the insurer would have entered the contract on different terms and at a higher premium, the insurer is entitled to apply both remedies.[236]

The above discussion demonstrates that the United Kingdom is committed to keeping its insurance law evolving to reflect the current aspirations and realities of customers. It has done so by constantly simplifying what at the time it considers needs to be disclosed. The approach compels the insurer to probe for information instead of receiving unrelated information.[237]

The insurer who does not ask questions despite being made alert as a prudent insurer to ask questions to the insured to reveal material circumstances should not escape liability to pay the insured under the policy for reasons related to innocent misrepresentation.[238] The insured could not be expected to identify what the insurer specifically wants to know or what the insurer thinks is material.[239] The court in *Botes v Hewitt* held that the insured is not bound to communicate facts or circumstances which are within the ordinary professional knowledge of the insurer. The insured cannot be expected to communicate facts relating to the general course of a particular trade because all these things are supposed to be within the knowledge of the person conducting the insurance business, and the insurer doesn't need to be specifically informed of them.[240]

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[235] Schedule 1(6) of the UK Insurance Act 2015.

[236] *Ibid*.

[237] S 2(2) of the CIDR Act.

[238] Hasson (1969) 615.

[239] *Botes v Hewitt* (1867) L.R.Z.Q.B 595.

[240] *Idem* 611.

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It stands to reason then that the insurer has a corresponding duty to probe for more material facts once the customer has made a fair representation or took reasonable care not to misrepresent. Modern-day insurers have advanced means of determining risks that insureds do not have. Hence insurers are expected to ask relevant questions for the assessment of the risk and the premium.[241]

3.3 The Zimbabwean Insurance law

3.3.1 Introduction

The Lancaster House Constitution stipulated that Zimbabwe was to be governed by laws applicable in the Cape of Good Hope as of 10 June 1891.[242] This brought the official adoption of Roman-Dutch law into Zimbabwe. The Roman-Dutch law had already been infused by English law in areas on which Roman-Dutch law was silent.[243]

From the Eighteen century and up until recently, English law regarded insurance contracts as contracts of utmost good faith (*uberrimae fidei*).[244]

The non-disclosure of material facts or circumstances about the risk entitled the insurer to avoid the contract.[245] This was so even if the insured was not asked about the misrepresented or undisclosed facts or circumstances.[246] The insurer could void

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[241] Pfumorodze, Khumalo and Kamwendo "Statutory Intervention on the Duty of Disclosure in the Insurance Contracts in Botswana (2015) *Botswana University Law Journal* 64.

[242] S 89 of the Lancaster House Constitution 1979. A Lancaster House Constitution is an agreement that was concluded on 21 December 1979 at Lancaster House in Britain. The Lancaster House Constitution brought an end to the illegitimate, white-dominated government that ruled in Rhodesia since 1965 and in the newly formed Zimbabwe.

[243] Reinecke *et al* (2013) at 81.

[244] Davis *Gordon Getz: The South African Law of Insurance* (2002) 111.

[245] *Brownlie v Campbell* 1880 (5) App Cas 955 (HL) 956.

[246] *Ibid*.

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liability where the non-disclosure was innocent, and the policyholder did not know that it had a duty to disclose material facts without being asked about them.[247]

The General Laws Amendment Act (Chapter 8:07) of 1959 (the General Laws Amendment Act) in section 3 provides jurisdiction on all questions relating to maritime and shipping law for which the High Court has jurisdiction. Further, the section provides that the law of Zimbabwe shall be the same as the law of England, so far as the law of England is not repugnant to, or inconsistent with, any enactment.

3.3.2 Changes to the legal position

Section 3 of the General Laws Amendment Act of 1959 was amended by the Insurance Amendment Act Chapter 24:07,[248] which provides that "English law shall not apply to any contract of fire, life or maritime insurance entered into or after the date of commencement of the Insurance Amendment Act, 2004".[249] The result of this amendment was the change in the binding effect of English insurance law in Zimbabwean insurance law.

The Insurance Amendment Act, 2004 has substantially changed the common law position regarding the duty to disclose material facts. The latter Act has now placed on the insurer a statutory duty to alert the insured of the insured's pre-contractual duty of disclosure and the consequences of non-disclosure.[250]

The position taken by the latter Act means that before entering, renewing, varying, or reinstating a policy, an insurer must inform the insured, in writing, that the insured must disclose every fact or circumstance that would materially affect the calculation of the risk insured.[251]

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[247] *Lion of Zimbabwe Insurance Co Ltd v Tabex* 1993 (2) ZLR 112.

See also, *Kelly v Pickering* (1980) ZLR 60 67.

[248] 3 of 2004.

[249] S 13 of the Insurance Amendment Act (Chapter 24:07) of 2004.

[250] S 83A (1) of the Insurance Amendment Act (Chapter 24:07) of 2004.

[251] S 11 of the Insurance Amendment Act (Chapter 24:07) of 2004.

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The Insurance Amendment Act has changed the common law position to the effect that the insurer must inform the insured to disclose all material facts or circumstances. Failure to comply with this duty negates the remedy to void a policy for non-disclosure unless the non-disclosure was fraudulent.[252]

3.4 Treating Customers Fairly: Comparing Zimbabwe and UK insurance Legislative Principles.

The Insurance Amendment Act 2004 addresses the possible voidance of a policy by the insurer who fails to inform the insured that he or she is obliged to disclose material facts or circumstances. This Act retains the passive role of the insurer when it comes to probing for the disclosure of material facts of the risk to be insured.[253]

The Insurance Amendment Act, 2004 is silent on the test for materiality of fact or circumstance to be disclosed. The court in *Lion of Zimbabwe Insurance Co Ltd v Tabex*[254] held that facts are material if they will influence the mind of a prudent, reasonable, and experienced insurer in the ordinary course of business relating to the type of policy in question. This test looked at the material facts from the insurer's position.[255]

Madhuku previously wrote that a progressive test had to be adopted in Zimbabwean insurance law. In the author's opinion, the test had to consider both the insurer and the insured's circumstances.[256] The test should not favour the insurer or the insured.[257]

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[252] S 83A (2) of the Insurance Amendment Act (Chapter 24:07) of 2004.

[253] *Ibid*.

[254] (1993) SA 147 (SCA) 154.

[255] Reinecke *et al* (2013) 164.

[256] Madhuku "The Up and Down Fortunes of the Insured: Is There A Distinction Between Representation and Disclosure" (1994) *SALJ* 478.

[257] *Ibid*.

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Accordingly, materiality had to be determined from the perspective of a reasonable person or average prudent person.[258] Consideration had to be made on whether a reasonable or prudent person would have considered the misrepresented or undisclosed facts to be reasonably related to the determination of the risk, premium or terms of the contract.[259]

The United Kingdom, on the other hand, is more progressive in treating customers fairly in both consumer insurance and non-consumer insurance. It is a statutory requirement that the insurer has to play an active role to ascertain what facts or circumstances are material to the risk after a fair presentation was made by the insured.

The Zimbabwean law only requires the insurer to properly alert the insured of its duty of disclosure.[260] This is not enough - the insurer must proactively solicit information rather than merely rely on the insured to dump information.[261] It appears that in Zimbabwe, the insurer may escape liability on the grounds of misrepresentation or non-disclosure irrespective of whether it is fraudulently, negligently or innocently made.[262]

The South African remedies, although not statutorily enforced, are similar to those of the United Kingdom. Once the TCF principles are uniformly applied in South Africa, we will achieve the standard set out in the United Kingdom, which is that of distinguishing between deliberate and reckless misrepresentation on the one hand and innocent misrepresentation on the other.

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[258] *Ibid*.

[259] *Ibid*.

[260] S 83A of the Insurance Act (Chapter 24:07) 2004.

[261] Madhuku (1994) *SALJ* 479.

[262] *Ibid.*

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4. THE OMBUDSMAN'S IMPLEMENTATION OF THE TCF OUTCOMES

4.1 Introduction

The discussion that follows draws from the South African insurance ombudsman (Ombuds) determinations and how it implements proportional remedies in the quest to treat customers fairly.

The Ombudsman for short-term and long-term insurance now have a new single Ombudsman since 01 January 2020. This new Ombudsman adjudicates both short-term and long-term insurance complaints.[263]

Rule 7.4 of the PPR requires the insurer to have an effective internal process to handle complaints.[264] Policyholders may escalate their insurance disputes to court if they cannot resolve them with their insurers.[265] However, the fear is that the latter approach could be a costly and protracted process.[266] The Ombudsman is the alternative to the court system but not a substitute for it.[267] Among other factors, the Ombudsman's jurisdiction allows it to consider what is fair and reasonable instead of merely strictly applying the law.[268]

The Ombudsman office determines disputes by theoretical reconstruction of either the long-term or the short-term insurance policies that may have been entered into. As a result of the non-fraudulent and non-material misrepresentation. The Ombuds in

[263] Press release "Joint Ombudsman for the office of the Ombudsman for Long-term Insurance and the office of the Ombudsman for Short-term Insurance" https://www.osti.co.za/media/1361/press-release-november-2019-joint-ombudsman-for-olti-osti-updated-on-25-11-2019.pdf (accessed 16 July 2021).

[264] PPRs rule 7.4(a)-(c) of both sets of the PPRs.

[265] National Treasury "Treating Customers Fairly in the Financial Sector-A Market Conduct Policy Framework for South Africa" 2014 at page 48.

[266] *Ibid*.

[267] *Ibid*.

[268] *Ibid*.

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executing its functions acts objectively and equitably, taking into consideration the interests of both parties.[269]

Rule 18. 10 of the PPRs requires the insurer to try and resolve a complaint before the Ombudsman can be approached by the insured when a policy is rescinded and a claim is refused.[270] Further, the rule directs that the policyholder must not be unduly delayed from accessing the services of the Ombudsman.[271] The policyholder must institute his claim within the time frame provided by the policy.[272] The insured must avoid pursuing a complaint dishonestly and unreasonably. The insured must be mindful of the prescription of the claim in terms of the Prescription Act,[273] which provides that if three years or more have elapsed from the date on which the complainant became aware or should reasonably have become aware that he or she had cause to complain, the claim prescribes unless the failure to do so was due to circumstances for which in the opinion of the Ombudsman, the complainant could not be blamed.[274]

Insurance-related disputes as far as the law of evidence is concerned, is part of civil law.[275] The onus of proof in civil law matters is that of proving one's case on a balance of probabilities as opposed to the criminal law, where the standard of proof is beyond a reasonable doubt.[276] The Ombudsman accounts to the public through its annual report.[277]

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[269] Reinecke (2009) *SA Merc LJ* 395.

[270] PPRs Rule 18.10.2(b) of both sets of the PPRs.

[271] PPRs rule 18.10.2(a) of both sets of the PPRs.

[272] *Barkhuizen v Napier* 90.

[273] Act 68 of 1969.

[274] S 12 of the Prescription Act 1969.

[275] Ombuzz Issue 24 "Non-Disclosure: Closing Your Eyes to Light" August 2013. https://www.ombud.co.za/publications/newsletter?email_id=29 (accessed 10 June 2021)

[276] Reinecke *et al* (2013) 169.

[277] Rule 8 of the Ombudsman Terms of reference, https://www.ombud.co.za/about-us/rules/rules-english (accessed 10 June 2021).

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4.2 The Principle of fairness and Proportional Remedies.

Whether an insurer should be entitled to rescind a contract where it would have entered into the contract had there been no innocent misrepresentation or non-disclosure, is a question that can be resolved by the Ombudsman through the application of law and the principles of fairness.
The principles of fairness entitle the Ombudsman to apply proportional remedies to achieve an equitable result for both parties.[278] The latter suggests that the Ombudsman does not only apply the law to a set of facts but considers what is fair to the parties in dispute.[279] The cornerstone of an effective policyholder protection framework is an appropriate policyholder recourse network.[280]

In addition, the Ombudsman is empowered to apply alternative dispute resolution methods.[281] He or she first attempts to resolve disputes through conciliation, mediation, and recommendation.[282] Where these methods fail, a determination of the dispute in the manner the rules prescribe follows.[283]

Once the latter manner of determination of issues is activated, the law is applied first to determine the dispute on its facts, circumstances, and available evidence.[284] To succeed at rescinding the contract, the insurer must show that the misrepresentation was material,[285] and that it induced the contract.[286]

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[278] Ombuzz Issue 24 "Non-Disclosure: Closing Your Eyes to Light" (2013).

[279] *Ibid.*

[280] National Treasury “Treating Customers Fairly in the Financial Sector-A Market Conduct Policy Framework for South Africa” December 2014

[281] *Ibid*.

[282] Ombuzz “Resolution by Mediation and Conciliation" Issue 36 July 2017. https://www.ombud.co.za/publications/newsletter?email_id=46 (accessed 10 June 2021).

[283] *Ibid*.

[284] Millard "The Impact of the Twin Peaks Model on the Insurance Industry (2006) *PER/PELJ* 11.

[285] Reinecke *et al* (2013) 137.

[286] *Ibid*.

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The objective test is applied to determine the merits of the case on a balance of probabilities. The Ombudsman supports the view that the reasonable person or prudent person in the objective test is neither the actual insured nor the actual insurer, but (1) a hypothetical reasonable and prudent bystander (2) with knowledge and appreciation of facts an insurer would consider in assessing the risk, terms or premium.[287]

The common law remedy for fraudulent, negligent, and innocent misrepresentation or non-disclosure is rescission and refusal to pay the claim. Where it is found that the conclusion based on the law is unjust, then the *Didcott* principle is relied upon to achieve fair results.[288] The proportional remedies are applied to each case to achieve a fair and reasonable outcome that suits both parties.

The Ombudsman does not only consider the law and the results that automatically flow from an application of the law. The Ombudsman is entitled to apply the PPRs, the provisions of the General Code of Conduct and the equitable principles in its decision.[289]

In terms of the principles of fairness, the Ombudsman may request the insurer to consider the claim where it would have entered into the contract had it not been for the non-material misrepresentation and non-disclosure. This is in consideration of whether the insurer would be entitled to rescind the entire contract or only the part affected by the misrepresentation (if the contract is divisible).

Consideration should be made where a contract of insurance is divisible into two separate parts.[290]The insurer would be entitled to rescind the part that had been

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[287] *Mutual and Federal Insurance Ltd v Oudtshoorn Municipality* 433.

[288] National Treasury “Treating Customers Fairly in the Financial Sector-A Market Conduct Policy Framework for South Africa” December 2014

[289] Reinecke and Nienaber "Mis -or- Non-Disclosure: Reconstructing the Policy" OLTI Publications (2006) https://www.ombud.co.za/publications/papers-and-presentations/page/2 (accessed 10 June 2021).

[290] Reinecke *et al* (2013) 120.

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affected by misrepresentation.[291] Where it is established that the insurer would not have entered the contract even if there was no misrepresentation or non-disclosure, the insurer is entitled to rescind the entire contract. This position is not the same as a fraudulent misrepresentation and non-disclosure which can give rise to a claim for damages by the insurer.

Where it is found that the insurer would have entered into the contract but on different terms or adjusted premium had it not been for the misrepresentation, the contract can still be enforced. The insurance contract, under those circumstances, would be treated as if it had been concluded on the reconstructed terms or the adjusted premium. The application of the *Didcott* principle would enable the policyholder to be allowed to claim based on the insurance contract but in terms of the reconstructed terms or the adjusted premium.[292] These are terms or adjusted premiums that the insurer would have agreed to had there been no innocent misrepresentation and/or non-disclosure.[293]

The application of the civil law approach to resolving disputes allows the Ombudsman to recognize and treat customers fairly in the sense that those customers must not have hurdles in making claims or where there is a dispute, it is resolved equitably.[294]

This study agrees that rescission should not be allowed in cases where the insurer would have entered into the contract had it not been for the innocent misrepresentation or non-disclosure. Rescission as a remedy should be reserved for fraudulent and negligent misrepresentation like in the cases of the deliberate and reckless qualifying breach in the United Kingdom.[295]

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[291] *Ibid*.

[292] Reinecke and Nienaber "Mis -or- Non-Disclosure: Reconstructing the Policy" OLTI Publications (2006) https://www.ombud.co.za/publications/papers-and-presentations/page/2 (accessed 10 June 2021).

[293] *Ibid*.

[294] *Muller v Sanlam Life insurance Limited* (2016) ZASCA 149.

[295] Reinecke *et al* (2013) 178.

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Unfortunately, the rulings of the Ombudsman do not set precedents. They are not binding on the entire insurance industry nor within the office of the Ombudsman on similar cases. They merely serve as future guidelines.[296] Notwithstanding, insurers are bound by the decision of the Ombudsman and cannot withdraw from its complaint processes. while the policyholder can withdraw from the complaint process.[297] The proceedings remain confidential.[298] If either party is not happy with the outcome, they may approach the courts.

[296] OSTI-https://www.osti.co.za/lodge-a-complaint/frequently-asked-questions (Accessed on 10 June 2021).

[297] *Ibid.*

[298] *Ibid.*

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5 CONCLUSION AND RECOMMENDATIONS

In all the jurisdictions that this study has consulted the insured has a pre-contractual duty to disclose material facts for the assessment of the risk by the insurer.[299] Information that is exclusive to the policyholders should be accessible to the insurer through an exercise of ordinary due diligence.[300]

The insured is expected to disclose facts or circumstances in a clear and accessible manner to the insurer. The insured's exclusive knowledge of the material facts or circumstances places the policyholder in a favourable position compared to the insurer.[301] The latter is the reason why an insured is required to disclose. However, the challenge is that the insured do not know the exact facts or circumstances that will influence the decision of the insurer in accepting the policy, its terms or premium.[302] The insurer is at an advantage because it has various methods and means to obtain information that it considers material and relevant. This is because risks are no longer individually assessed formally.[303]

Traditionally, a fraudulent, negligent, or innocent misrepresentation or non-disclosure entitled the insurer to rescind the policy and allow it to refuse to pay the claim.[304] The latter regulatory approach resulted in injustice for policyholders in instances where it appeared that the insurer would still have entered into the insurance policy, albeit, on different terms had it not been for the breach of the duty to disclose.[305]

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[299] Park (1996) 12.

[300] Church "*Jierrer v Outsurance Company Limited* (2015) 3 All SA 701 (KZNP)" (2016) *De Jure* 360.

[301] *Ibid.*

[302] *Ibid*.

[303] *Mahadeo v Dial Direct Insurance Ltd* 5.

[304] S 18 of the UK Marine Insurance Act, 1906.

[305] *Botes v Hewitt* 595 where Mellor J held at 603 that "I cannot help thinking that to enable a person proposing an insurance to speculate upon the maximum or minimum of information he is bound to communicate, would be introducing a most dangerous principle into the law of insurance".

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In Zimbabwe, the policyholders must disclose all material facts or risk circumstances without being asked whether they appreciate the facts or circumstances as material to the risk.[306]

In South Africa, insurers are no longer permitted to close their eyes[307] Insurers are encouraged to safeguard themselves against possible innocent misrepresentations or non-disclosures of material facts or circumstances.[308]

Innocent misrepresentations and non-disclosures can be prevented at the pre-contractual stage by soliciting material information or circumstances of risk from the policyholder.[309] This will prevent policy underwriting at the claim stage. Insurers have various methods and means available to obtain information.[310] The insurers today are increasingly prepared to accept risks through a telephone call or electronic means.[311]

An insurer is expected to ask a prospective policyholder relevant questions to uncover material facts influencing the risk.[312] Should the insurer not solicit material facts, it would not be allowed to rescind the policy on the grounds of innocent misrepresentation or non-disclosure.[313]

The TCF principles are designed to protect the consumers and to improve fair market conduct in the insurance sector.[314] These principles do not seek to repeal the duty of

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[306] *Nicolas G Jones v Environcom Limited (2) Environcom England Limited and MS PLC t/a Miles Smith Insurance Brokers* (2010) EWHC 795(Comm).
Commercial Union Insurance Co of SA v Lotter (1999) 2 SA 147 (SCA) 149.

[307] Birds &Hird (2004) 137.

[308] *Ibid*.

[309] *Ibid*.

[310] Pfumarodze, Khumalo and Kamwendo (2015) *University of Botswana Law Journal* 64.

[311] Park (1996) 11.

[312] Van Niekerk (2005) *SA Merc LJ* 326.

[313] *Ibid.*

[314] PPRs rule 1.4 of both sets of the PPRs.

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the policyholder to disclose material facts but call for the imposition of a voluntary duty on the insurer to solicit additional facts or circumstances that are significant to the risk. The insurer must provide clear information and keep the policyholder appropriately informed before, during and after the point of sale.[315]

The insurer is required to act in a manner that ensures fair treatment.[316] Acting in good faith is not a self-standing rule but an underlying value that is given an expression through existing rules of law.[317] In this instance, good faith is submitted to be given effect by the existing TCF principles as a value that underlies our insurance law.[318]

This can be achieved through transparency with the information that the insurer regards to be material facts or material circumstances to the risk insured.[319] It is not enough for the insurer to properly notify the policyholder of the duty to disclose all material facts as is the case in Zimbabwe. The insured is required to make further enquiries in the quest to obtain material facts or circumstances relevant to the risk.[320]

Considering the above, it is recommended that both South Africa and Zimbabwe should look at UK jurisdiction for guidance in terms fairly dealing with fraudulent and negligent misrepresentations and or non-disclosures as they should be treated in the same manner as deliberate and reckless qualifying misrepresentations and or non-disclosures. These kinds of misrepresentations or non-disclosures should be met with a rescission as a first remedy.

However, neither deliberate nor reckless standards should be applied to innocent misrepresentation and non-disclosure. This could be done in cases where the insurer would still have entered into the contract were it not for the innocent misrepresented

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[315] PPRs rule 1.4(c) of both sets of the PPRs.

[316] PPRs rule 1.4(a) of both sets of the PPRs.

[317] *Brisley v Drotsky* 32.

[318] Tuckers Development Corporation v Hovis 1980 (1) SA 645 (A) 651C.

[319] Millard and Kushcke (2014) 6.

[320] Van Niekerk (2005) *SA Merc LJ* 336.

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or non-disclosure of material fact to the risk insured. The policyholder's duty of disclosure should be counterbalanced by the insurer's duty to solicit facts or circumstances material to the assessment of the risk insured.[321] The duty of disclosure should be limited to answering questions on the proposal form relating to the nature and extent of the risk.

An insurer must obtain the relevant information instead of relying on rescinding the policy because of innocent misrepresentation or non-disclosure by the policyholder.[322] This prevents a quick sale and the first real assessment of the risk at the claim stage.[323]

The harmonization of South African and Zimbabwean insurance laws would be beneficial for the insurance industry in the Southern African Development Community (SADC). In this regard, we can take note of developments in the UK as well as TCF principles as applied in South Africa.

[321] *Idem* 326.

[322] Reinecke and Nienaber "Mis -or- Non-Disclosure: Reconstructing the Policy" OLTI Publications (2006)

[323] National Treasury “Treating Customers Fairly in the Financial Sector-A Market Conduct Policy Framework for South Africa” December 2014

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