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# Insurance & Reinsurance **2025**

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# South Africa



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## 1 Regulatory

### 1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Financial Services Conduct Authority and the Prudential Authority.

### 1.2 What are the key requirements/procedures for setting up a new insurance (or reinsurance) company?

The Guidelines for Registration as Long-term or Short-term Insurer in Terms of Section 9(1) of the Long-term Insurance Act or the Short-term Insurance Act provide all the key requirements and procedures in detail (accessible via the following link: [https://www.fsca.co.za/Regulatory%20Frameworks/Guidance%20Notes/GuideLTST9\(1\)RegInsurer08.doc](https://www.fsca.co.za/Regulatory%20Frameworks/Guidance%20Notes/GuideLTST9(1)RegInsurer08.doc)).

### 1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

No, a foreign insurer cannot write business directly. However, it is possible for the foreign insurer's South African-based subsidiary to write business if the subsidiary is appropriately licensed in accordance with the provisions of the Insurance Act. There are certain provisos in this regard including whether the South African-based subsidiary will write insurance business itself or with the foreign entity. Even in that instance, there will need to be appropriate licences in place.

Lastly, it is worth stating that various Lloyd's underwriters are licensed to conduct certain classes of insurance business.

### 1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

No. All of the legal rules currently in place are intended to ensure financial soundness of insurance companies and to ensure that policyholders are treated fairly. While the regulations, particularly the Policyholder Protection Rules, in relation to both long-term insurance and short-term insurance, may be very detailed, they serve a critical role in ensuring fair treatment of policyholders.

### 1.5 Are companies permitted to indemnify directors and officers under local company law?

Companies are permitted to indemnify their directors and officers. There are, however, some exceptions, such as cases where the memorandum of incorporation dictates otherwise, where the directors and officers are liable to the company itself, etc.

### 1.6 Are there any forms of compulsory insurance?

Yes, there are many forms of compulsory insurance – for example, the insurance cover that is provided by Medical Protection Society Ltd for medical practitioners. This cover is procured under the auspices of the South African Medical Association.

There is also the Road Accident Fund, which provides compensation to road accident victims pursuant to the Road Accident Fund Act.

Employers are also required, pursuant to the Compensation for Occupational Injuries and Diseases Act 130 of 1993, to contribute towards insurance for the benefit of any employees who become injured/die from work-related reasons/causes.

Many other forms of compulsory insurance are also available.

## 2 (Re)insurance Claims

### 2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

It depends on how one views it. There has been a long-held opinion that the law is more favourable to policyholders and that the Treating Customers Fairly principles and rules are more favourable to policyholders to the detriment of insurers. On the other hand, one must consider that insurance contracts are consumer contracts, and it is to be expected that the laws and regulations around such contracts will be designed to protect consumers – especially as they have historically been exploited.

### 2.2 Can a third party bring a direct action against an insurer?

No. There is no direct relationship between a third party and an insurer. Therefore, a third party cannot bring action directly against an insurer.

### 2.3 Can an insured bring a direct action against a reinsurer?

No. An insured has no direct contractual relationship with the reinsurer.

### 2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

An insurer has several remedies in cases of misrepresentation or non-disclosure by the insured. These include avoiding the contract, terminating it or rescinding it to nullify its legal effects. In cases involving fraud or negligent misrepresentation, the insurer may also claim damages in addition to these remedies.

### 2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Generally, yes, there is such a duty, although the line of questioning by the insurer or the broker at the underwriting stage does play a role.

### 2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Yes, there is an automatic right of subrogation. This principle is intended to avoid unjust enrichment on the part of the insured.

## 3 Litigation – Overview

### 3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The superior courts – starting with the high courts, then the Supreme Court of Appeal and, lastly, the Constitutional Court. The value of the dispute does play a role; however, the complexity and the novelty of the issues involved are also important considerations. South Africa does not have a jury system.

### 3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

There are no court fees applicable. There are legal fees for legal representatives. There are other associated legal costs and expenses.

### 3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

It differs from one jurisdiction to another. It can take anything between three and five years.

## 4 Litigation – Procedure

### 4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

- (a) The courts can grant applications to compel discovery or further/better discovery. The courts can also order a party to allow the other party to inspect certain documents.
- (b) The courts do not have the power to order discovery and/or inspection of documents from non-parties to the action. Documents necessary for litigation may be secured by issuing subpoenas or via the Promotion of Access to Information Act 2 of 2000, depending on the nature of the documents required and from whom they are being requested.

### 4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Yes, such documents are privileged.

### 4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The courts do not have the powers to require witnesses to give evidence before the hearing, but they do have the power to require witnesses to give evidence at the hearing at the request of one of the parties to the hearing.

### 4.4 Is evidence from witnesses allowed even if they are not present?

Yes, this is permissible. The Uniform Rules of Court also allow evidence to be adduced in the form of an affidavit.

### 4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

There are no restrictions on calling expert witnesses, as long as they are necessary and will assist the court to reach an appropriate decision. It is not common to have court-appointed experts.

### 4.6 What sort of interim remedies are available from the courts?

The following interim remedies are available: interdicts; search orders; freezing orders; pre-action or non-party disclosure orders; and interim payment orders.

### 4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Litigants have a right to appeal. A court decision may be

appealed on one of the following non-exhaustive grounds: error or incorrect application of the law; or if the decision is not aligned with the evidence. Assuming that the court of first instance is the high court with a single judge, a dissatisfied party may appeal to the full bench (comprising three judges in the high court), then the Supreme Court of Appeal and then, finally, the Constitutional Court.

#### 4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Yes. The current rate is 15.5% pursuant to Section 1(2) of the Prescribed Rate of Interest Act 55 of 1975, as amended.

#### 4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Ordinarily, a successful party will be awarded costs in their favour. However, this is not absolute. In some cases, considerations such as the complexity of the dispute, the worthiness of litigating the matter, the nature of the dispute, the parties involved, etc. play a role. There are advantages in making an offer to settle prior to trial.

#### 4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

No, they cannot.

#### 4.11 If a party refuses a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

There are no obvious consequences, as the parties are not compelled to consider alternative dispute resolution.

## 5 Arbitration

#### 5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The courts do not play any role if the parties decide to arbitrate. Where a party is dissatisfied with the conduct of the arbitration, they have the right to bring an application to court to review the arbitrator's conduct on the grounds of procedural irregularities (which may, for example, consist of the manner in which the arbitrator is conducting the arbitration).

#### 5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

It is not necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable. The Arbitration Act, however, stipulates that the

wording should provide for the referral to arbitration of any existing dispute/future dispute relating to any matter specified in the contract.

The Policyholder Protection Rules relating to non-indemnity insurance prohibit an arbitrator clause that provides that any dispute pertaining to the policy can only be resolved by arbitration.

#### 5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Generally, no. However, in rare instances, the principles of justice and public policy may allow a party to get out of an arbitration clause.

#### 5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

According to the Arbitration Act, a court may grant interim relief by making orders in respect of the following: (a) security for costs; (b) discovery of documents and interrogatories; (c) the examination of any witness before a commissioner; (d) giving of evidence by affidavit; (e) the inspection or the interim custody or the preservation or the sale of goods or property; (f) an interim interdict or similar relief; (g) securing the amount in dispute; (h) substituted service of notices; and (i) the appointment of a receiver.

#### 5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The Arbitration Act does not have such requirement. However, the International Arbitration Act requires sufficient reasons to be provided. The parties may agree that reasons are necessary/required.

#### 5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

If there is no contractual agreement on the right to appeal to the courts, the arbitrator's award will be final. However, arbitrations conducted pursuant to the Arbitration Act or International Arbitration Act may be reviewed or set aside where there have been procedural irregularities.

## 6 Hot Topics

#### 6.1 In your opinion, are there any current hot topics which relate to insurance and reinsurance issues in your jurisdiction? If so, please set out briefly any which are of particular note.

There are currently no hot topics besides the fact that there has been a notable increase in the number of court judgments pertaining to general insurance disputes.



**Mtho Maphumulo** graduated from UKZN with several distinctions, academic awards and Dean's Commendations. During his studies, he served active leadership roles in many student organisations, including the Black Lawyers Association Student Chapter and Students for Law and Social Justice. Upon completion of his LL.B. degree, he joined Adams & Adams, wherein he served his two years of articles.

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- Regulatory Authorities and Procedures
- (Re)insurance Claims
- Litigation
- Arbitration
- Hot Topics