THE INSURANCE BILL OF 2015: PROTECTING BOTH INSURER AND INSURED

It is only prudent never to place complete confidence in that by which we have even once been deceived.

- Descartes

It is fair to say that the South African insurance industry is undergoing significant changes. Late last year, National Treasury announced that the controversial regulations on the demarcation between health insurance policies and medical schemes would be published in final form sometime in the second quarter of 2015. More recently, on the 17th of April 2015, National Treasury and the Financial Services Board issued a request for public comment in relation to the Draft Insurance Bill of 2015 ("the Bill"), which aims to achieve a *"seamless transition"* into the Twin Peaks model of governance envisaged in the Financial Sector Regulation Bill.

According to National Treasury, the 2008 global financial crisis was a sobering affirmation of the need for enhanced prudential and market conduct standards for banks as well as insurers – not only to improve their financial soundness, but also to support consumer protection and financial security.

In the wake of the crisis, the G20, International Monetary Fund and the Financial Stability Board implemented higher prudential standards for banks through a comprehensive set of reform measures known as "Basel III", whereas prudential standards for insurers were largely facilitated in Europe through the Solvency II regulations. In South Africa, Basel III was implemented via legislation enacted in 2013, while the Financial Services Board developed an equivalent prudential framework for the insurance sector called the Solvency Assessment and Management ("SAM") framework – a risk-based supervisory framework which seeks to improve policyholder protection and financial stability.

The Bill, in its current form, focuses on establishing prudential standards for group-wide supervision, governance, licensing, risk management and internal controls. The argument is that, by committing to international standards, financial institutions are able to operate in other countries with greater ease, as regulators are also able to apply equivalent regulatory standards and cooperate with one another.

It is important to note that the Bill constitutes framework legislation, meaning that it is designed to be an "empowering" or "enabling" statute that sets out the minimum provisions and powers necessary to regulate insurers, whilst delegating the power to make secondary legislation as well as the authority to implement and enforce the Bill to the Financial Services Board.

Furthermore, the long-standing definition of insurance policies under both the Long Term Insurance Act and Short Term Insurance Act will be amended by the Bill. The new definitions are cast in the widest terms possible, presumably to introduce flexibility and to cater for emerging and unconventional insurance products which the draftsmen of the existing Acts may not have conceived of.

At present, a "long-term policy" is defined as an assistance, disability, fund, health, life or sinking fund policy (or a combination of any of these). However In terms of the Bill, a long-term policy means any *"arrangement"* under which a person, in return for the payment of a premium, assumes a specified risk from another person by undertaking to—

1. pay that other person (read: or his estate, or another identified person) a lump sum or specified sums of money at specified intervals; or
2. render a service which serves either to make good a full or partial patrimonial loss (or liability for patrimonial loss) of that other person on the happening of an uncertain or unplanned life event, disability event or death event relating to that person; or which serves as "solace" for a non-patrimonial loss of that other person.

The arrangement referred to above may also include an agreement in terms of which a person agrees to pay another person, or that person's estate, a lump sum or specified sums of money from the start of the arrangement, or on or from a fixed or determinable date or at the request of the policyholder.

Similarly, the present definition of a short-term policy (which is defined as an engineering, guarantee, liability, miscellaneous, motor, accident and health, property or transport policy) in the Short Term Insurance Act will be amended to mean a *"non-life insurance policy"* as defined by the Bill. Simply put, non-life insurance policies are those which involve an undertaking by an insurer to pay a lump sum or specified sums of money at specified intervals, or to render a service or effect a reinstatement which serves to make good a full or partial patrimonial loss – or liability for patrimonial loss – on the happening of an uncertain or unplanned event (excluding a life, disability or death event).

The Bill also seeks to ascribe meaning (albeit a broad meaning) to the term "non-patrimonial loss", which is defined as *"distress in some form or another"* flowing from the impairment of an interest in a person's life or wellbeing (including unhappiness or mere inconvenience, it seems) where the interest relates either to the own life and wellbeing of the person or that of his/her permanent life partner, spouse or civil union partner; or to the life and wellbeing of a third party where close ties based on family, dependence or employment exists between the person and the third party. The Courts have in the past had to grapple with the question of whether a same-sex partners could be regarded as “family” in terms of an insurance policy (see *Farr v Mutual and Federal Insurance Co Ltd* 2000 (3) SA 684 (C)). No doubt this definition will, once enacted, put those uncertainties to rest once and for all.

Insurers would be well-advised to consider the provisions of the Bill carefully, particularly in view of the classes and sub-classes of insurance business introduced in Schedule 2 of the Bill. There are no less than eight classes of life insurance business, with a total of thirty one sub-classes. On the other hand, short term (now called “non-life”) insurance business has been divided into eighteen classes with twenty sub-classes. In terms of section 23 of the Bill, an insurer, other than a micro-insurer, must be licensed to conduct non-life or life insurance business, and <u>may not</u> be licensed to conduct both. In addition to this requirement, the insurer must be licensed to conduct one or more of the classes or sub-classes of insurance business set out in Schedule 2 in respect of the kind of insurance business it will conduct.

But what are the implications of the Bill for the so-called Man in the Street? The stated objectives of the Bill are, amongst other things, to enhance the protection of policyholders and potential policyholders, as well as to increases access to insurance for all South Africans. According to National Treasury, a well-functioning micro-insurance market is essential to financial inclusion, as it allows low-income households access to a myriad of affordable, good-value, formal financial products that are appropriate to their needs. To that end, National Treasury is hopeful that the Bill will give effect to its Micro-Insurance Policy Document released in July 2011, which is intended to support the development of an inclusive insurance sector through the regulation and supervision of micro-insurance providers.

Financial stability at household level is essential to growth and prosperity for individuals, companies and communities, says National Treasury. It goes on to assert, in its Memorandum on the Objects of the Insurance Bill, that *“without the protection against unexpected loss provided by insurance, even those households and businesses that have established some financial security may find themselves in poverty”*.

It is anticipated that the Bill, as well as the new definitions highlighted above, will become effective as from the 1st of January 2016.

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