Case 35 – Funeral Benefits

Background

1. The complainant wrote to us after Sanlam Developing Markets ("SDM") refused to pay a claim under three funeral policies. The complainant had taken out a funeral policy in 2013, 2015 and in 2016 covering her family and included the deceased as a life insured and paid a premium for him. The deceased had not been a family member but had been cared for by the complainant from 2009 until his death on 1 February 2018 after he was stabbed during a robbery.

2. The complainant had explained her relationship with the deceased as follows:

   "I hereby request Sanlam to understand my relationship with 'A'.*

   I, 'Z', started living with A's family in 1981. Her grandmother died after 'A' was born and followed his mother later. I took her parents and aunts as my sisters. I helped them as they were experiencing hardships.

   On December 2009, he requested to go on holiday with my kids to my home. His relative agreed. After that he refuse to go back home complaining of unfair treatment. I told his relatives and also reported to the Headman.

   I took him to Blythswood High School when he was in grade 10.

   He failed and I sent him to Lamplough High School and he proceeded to grade 11 where he dropped out.

   He tried to look for employment at Butterworth but all was in vain. He came back and requested for circumcission.

   I was also responsible for that. I never want to differentiate him from my kids. According to our tradition, an orphan is treated the same way as the kids he live with.

   He called me aunt and later called me mum."

3. The aunt of the deceased explained the circumstances that led to the complainant taking care of the deceased as follows:

   In 1981 the 'M' family in Lusutu Kumpeta (location) welcomed Miss 'Z' to stay with us in our home (as a tenant) to enable her to be closer to her work in 1981. She did not only become a tenant but was like a family member. She became supportive to the family throughout.

   Unfortunately, the parents of 'A' passed on. 'A' was the grandchild to the 'M' family. Due to some financial constraints in 2009 we handed over 'A' to Ms

* *Names were changed to ensure confidentiality*

'Z' who became a parent to him. She supported him financially with everything ie food, clothing, sickness, education. We had no complaints as the family, she cared for him since 2009 until he passed on.

To prove that she did not have any regrets for caring for 'A' as her son she paid all the funeral expenses in remembrance of all the time they spent together.

We are disappointed now when you are not assisting her. (A translation from Xhosa)

4. The deceased's sister and brother confirmed in affidavits that the complainant had taken care of the deceased as described above. The headman in the district (Butterworth area) also confirmed in an affidavit that the deceased had been under the complainant's care.

5. The complainant also provided evidence that she had contributed towards the funeral. The complainant explained that in addition to the contribution she made to the funeral she planned to use funeral policy money for the unveiling of the tombstone as well as fencing the area to provide protection from animals that had damaged the grave.

6. In the application forms the complainant had covered the deceased (and her other children) by name and described the deceased as "nephew" at first, and then later as "child" and had paid a separate premium for each of the lives assured, including for the deceased. SDM refused the claims on the basis that the complainant had described the deceased as a family member when there had not been a blood relationship. SDM had refunded premiums paid in respect of the deceased.

7. Our office suggested to SDM that they should consider equity/fairness given the circumstances of the relationship between the complainant and the deceased. The insurer was not prepared to make a concession. Their view was that there had been a material misrepresentation and that SDM would not have accepted the risk had they known of the true relationship. They also emphasised that payment outside the terms of the policy would be unfair and that it would be unfair discrimination if this policyholder was treated differently from other policyholders. They referred to the 1932 case of *Kahn v African Life Assurance Society Ltd* where it was stated:

"An insurance company is an institution with settled rules and customs, fixed tariffs and so forth. A proposal form, therefore, duly signed, is an application to the company to issue a policy on its usual terms and according to its usual conditions."

8. The complaint was discussed at an adjudicator's meeting and a provisional determination was issued as follows:

    1. The meeting was of the view that the response of 23 August 2018 from SDM demonstrates a lack of understanding of the application of our equity/fairness

jurisdiction. On SDM's understanding there would never be room for the application of our equity/fairness jurisdiction. Our Rule 1.2.4 specifically states that the Ombudsman has to ensure that

"1.2.4 he or she accords due weight to considerations of equity;"

and

"1.2.7 subscribing members act with fairness and with due regard to both the letter and the spirit of the contract between the parties…."

2. Misunderstandings about our equity/fairness jurisdiction were addressed in an article in our 2012 Annual Report, mentioned below. We accordingly refer to the following which could assist the insurer in achieving an understanding of the application of equity/fairness in our office:

1997 Annual Report page 17

"Contract Law: Fulfilling the Reasonable Expectations of Honest Men" a lecture delivered by Lord Steyn

2012 Annual Report pages 24 and 25.

3. As regards this particular complaint the meeting made the following points:

- Given the circumstances of this case, supported by statements from the complainant and others, which statements have not been contested by SDM, it appears that the complainant and the deceased had a relationship which had the following features:
    - There was mutual affection between the complainant and the deceased;
    - The complainant explained that the deceased at first called her "aunt" and later on "mum";
    - The complainant regarded the deceased in the same light as her own children;
    - The complainant took care of the deceased in the same way as she did her own children;
    - The fact that the complainant contributed to the funeral expenses, is not disputed.
    - The deceased did not have any other parent or guardian who took care of him in this way;

- It appears from the correspondence that the complainant regarded the deceased as part of her family, even though there was no legal adoption. (This is in accordance with the values of ubuntu).

4. Furthermore, it is clear that ubuntu is part of our law. As was stated by Moseneke DCJ in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012(1) SA 256(CC):

   "Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and carried in it the ideas of humaneness, social justice and fairness and envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity."

   It would be unjust in the circumstances of this case, if the insurer did not demonstrate the spirit of ubuntu by paying the claims which would have been payable had the complainant been the biological mother of the deceased.

5. The adjudicator meeting was of the unanimous view that in this particular case, given the circumstances of the complainant in relation to the deceased, the insurer should in fairness pay the claims under the policies, less the amounts already paid.

6. The ruling set out above is of a provisional nature. In accordance with our usual practice each party is given an opportunity until 14 December 2018 to place new information before us and to make new representations to us before we proceed further with the complaints handling process. Any response received from a party will be regarded as that party's only response, unless otherwise indicated.

   If we do not hear from any party by 14 December 2018 we will assume that neither party challenges the provisional ruling.

9. SDM then responded as follows as they did not accept the provisional determination:

   "We respect the view of the adjudicators meeting, and the sincere compassion of it.

   From our part, we again thoroughly and responsibly discussed this case at a high-level meeting of an extensive group of role-players. Our unanimous conclusion is that, taking all considerations into account, this claim should not be paid – no matter how much one's heart goes out to the bereaved policyholder.

This case has been well mulled, by your office and by us, and we do not want to labour it further unnecessarily. Therefore, we rest with a concise reply.

1. This policy product was meticulously designed, actuarially, to provide insurance cover to a circumscribed group of persons.

2. The policy contract spells out clearly, in plain language, which persons may be covered – in particular also who can be covered as a *child* of the policyholder.

3. The complainant included the deceased as her *child*. This was an intentional misrepresentation. She knew the deceased was not her child. She herself says that the deceased at first called her "Aunt".

4. This was also a material misrepresentation, as meant in section 59 of the Long-term Insurance Act.

5. We acknowledge and endorse your equity jurisdiction and responsibility – and understand what it comprises. There are many instances where equity meaningfully could be applied, within the parameters of the policy contract, and without changing the contract to one it was not designed and meant to be. In fact, we regularly apply such equity of own accord.

6. In our respectful view, however, it needs to be borne in mind always that equity is not an exact and rigid concept. Equity (fairness) remains an abstract value, as noted in for example *SA Forestry Co Ltd v York Timbers Ltd*, and an inappropriate application could result in untenable legal and commercial uncertainty.

7. In our sincere view it will not be equitable to pay the claim in this case. An intentional misrepresentation cannot, we respectfully submit, be condoned by an application of equity.

8. The question of principle inevitably also arises: Should this claim be enforced, who must foot the bill? To require the brotherhood (pool) of policyholders to absorb this expense in our view would not be equitable. They played by the rules of this policy product, and did not put a foot wrong. But, likewise, to require the shareholders of the insurer to shoulder this expense, in our view also would not be equitable. They also have not put a foot wrong. We are not sure what your view is about this?

9. The hard truth is that the complainant is the only party who has put a foot wrong. She did not play by the rules of this policy product, as did the brotherhood of policyholders.

10. We are at one with you about ubuntu. Ubuntu gave birth to Sanlam a hundred years ago, and still is our reason for existence (*reason d'etre*), as we spread our wings steadily throughout Africa.

11. Although the word *ubuntu* arose in Africa (a Nguni word), the concept since early mankind has vested as an universal concept and value of humanity. In fact, ubuntu gave rise to insurance thousands of years ago when people pooled resources to ameliorate the unforeseen misfortune of one of the pool.

12. We whole-heartedly agree that, as insurer, as stipulated in your rule 1.2.4, we must *act with fairness and with due regard to both the letter and the spirit of the contract between the parties.* But, in our respectful view, it cannot be in the spirit of particularly a contract of insurance, which fundamentally is a pool contract (compact), to wilfully disregard the rules of the compact, and thus achieve a benefit which the pool contract was not designed and meant to cover.

13. That, we respectfully submit, also would not be in the spirit of ubuntu. Many descriptions have been given of ubuntu, for example eloquently by the Honourable Judge Moseneke in the *Everfresh Market Virginia* case that you refer to.

14. A fundamental feature of ubuntu, which Judge Moseneke also highlights, is that of the *collective unit*, which has been described as "I am because we are". But, as one of a collective unit, one must, as Judge Moseneke mentions, have respect and conform to the basic norms of the collective unit.

    Transposed to insurance, this means all participants must honour the rules of the insurance compact. Ubuntu, in its very essence, cannot entertain a willful breach of the rules of the insurance compact (the collective unit), by an intentional misrepresentation. The insurance compact can succeed only if all play by the rules. To paraphrase the above description of ubuntu in an insurance context, "I am because we are; and we are because we regard our rules".

15. Equity, in our respectful view, implies also equal treatment. It is not at all clear to us why the complainant should be treated differently, and not like other clients have been treated all along. The fact is, if we, when this policy was applied for, had known that the deceased was not the complainant's child, we would not have accepted the deceased as a life insured on this policy. We then would have advised her to take out another suitable policy for the deceased, and if she wanted, we could have arranged for an intermediary to contact her about that. That is how other clients go about this."

Final determination

10. The complaint was again discussed at an adjudicator meeting and the unanimous decision was that the claims should be paid.

11. The following is pertinent:

    10.1 It appeared to the meeting that SDM was of the view that equity/fairness could only be applied within the confines of the actual policy provisions. If that is so, there would be no need for an equity/fairness

jurisdiction. It is precisely when the application of the policy provisions leads to an unfair/inequitable result that it is necessary to exercise our equity jurisdiction, as in this complaint.

10.2 In Annual Reports in the past we have, *inter alia*, stated:

"Common misconceptions about the office's equity jurisdiction:

That the office can only exercise its equity jurisdiction within the law, and that it is bound by the terms of the policy. Many insurers hold the view that no solution can ever be equitable if it conflicts with a term of the policy contract, and in any event that it cannot find application for as long as the insurer has not breached the policy contract. This approach is of course incorrect because equity would thereby be rendered irrelevant. The fact is that it is where an application of the law itself, which obviously includes the terms of the policy contract, would lead to an unfair result that considerations of equity become relevant.
That prejudice to the insurer or other policyholders precludes the office from exercising its equity jurisdiction.

…….

That treating every policyholder exactly the same means that the insurer is acting fairly.

…..

That the office can only apply its equity jurisdiction where the insurer has done something wrong in dealing with the policyholder, or, conversely, that where the policyholder has erred the office cannot apply its equity jurisdiction."

10.3 We urge SDM, as we have previously done, to familiarise themselves with our approach to equity as demonstrated in our case studies on our website and as explained in our Annual Reports. The misconceptions we refer to in 10.2 still exist, as demonstrated by SDM's responses.

10.4 SDM insists that it was an intentional misrepresentation by the complainant and that there can be no equity applied in this case. The complainant explained how she viewed the deceased and how their relationship developed from the deceased regarding her as his aunt to calling her "mum". She has also explained that the intermediary who sold the policies did not point out that there had to be a blood relationship between her and the deceased. We therefore do not agree with the insurer's stance in these particular circumstances.

10.5 The view of the meeting was that, based on documentation, there was no fraudulent intent on the part of the complainant when she described the relationship as she did. She described the *de facto* relationship. There is no evidence that this was a situation where the complainant had

no connection with the deceased or where there was no insurable interest and the complainant was intent on financial rewards for herself on the deceased's death.

10.6 The office is aware of the fact that fraud occurs in the insurance industry when policyholders insure the lives of people where there is no insurable interest, by describing the relationship between the parties incorrectly, in the hope of benefitting from the death of someone who has no relationship with the policyholder. In our view this is not such a case. It is true that there was no blood relationship between the deceased and the complainant and that she had not formally adopted the deceased. However, from the evidence on file the complainant had treated the deceased as her own child, providing for him, including providing funeral cover, as she did for her other children. We do not create precedent with our decisions. However, where circumstances such as these pertain we will always consider whether we should invoke our equity jurisdiction.

10.7 We feel sympathy and compassion for our complainant because of the loss she suffered, but those feelings did not inform our decision. What informed our decision was fairness. SDM is correct that fairness is not an exact and rigid concept. It is, however, part of our jurisdiction and has been since 1998; it is prescribed as a requirement for financial ombudsman schemes in terms of the Financial Ombud Schemes Act, 2004; it is part of the requirements for such schemes in terms of Chapter 14 (to be effective 1 April 2019) of the Financial Sector Regulation Act, 2017; it is part of the Treating Customers Fairly approach included in the Policyholder Protection Rules; and fairness is one of the fundamental principles that the International Network of Financial Services Ombudsman Schemes recommends for financial ombudsman schemes. It is therefore clear that equity/fairness is part of the financial services landscape and has been part of our jurisdiction for more than 20 years without resulting in "untenable legal and commercial uncertainty".

10.8 Although it is acknowledged that the 1932 case from which SDM had quoted has application in insurance, it must also be accepted that consumer protection has developed since 1932. Insurers cannot ignore such developments. There is now more protection for consumers than there was in 1932. Such protection takes into account the disparity in bargaining power in most insurance contracts and the technical nature of insurance contract provisions. This is particularly relevant in the funeral insurance market.

10.9 Our final determination is accordingly that SDM should pay the claims (less premiums refunded) plus interest by **22 February 2019.**