CR 28 – Funeral Insurance

Whether a child who has been adopted in terms of the customary law can be regarded as legally adopted in terms of the Child Care Act 74 of 1983.

Background

1. The complainant had applied for a funeral policy on 11 December 2011 and in the application form he reflected the name of the deceased under the heading "Children". Under the rubric "Reason for different surname if applicable" the words "mother's surname" were written. The complainant claimed the benefit which applied on the death of a child.

2. The deceased was born to the complainant's sister, on 10 July 1997 and died on 24 January 2014.

3. The complainant claimed the "immediate family benefit" which extended to "your own, step or legally adopted unmarried child who is younger than 21". There was an "extended benefit" for somebody who did not qualify for the immediate family benefit but an extra premium was payable. The complainant's case was that the deceased was his legally adopted child.

4. Metropolitan Life denied the complainant's case, but offered to re-construct the policy to provide the extended benefit cover for the deceased, from which premiums of R66 per month had to be deducted from January 2012 to January 2017, which "leaves us with a balance of R5 974", which it offered to the complainant on a few occasions. The complainant rejected this offer.

5. Throughout the complaint resolution process the complainant was assisted and represented by a relative, who is a teacher.

6. The insurer again made an offer of R5 974 and indicated that this was the cover amount "unless the complainant can provide us with legal adoption documents". (The complainant later accepted the payment but with the proviso that he would be able to take the matter further).

7. As will be seen hereinafter very considerable effort, energy and time were expended by the complainant's representative and the insurer on stating the cases of the parties on the issue whether the complainant legally adopted the deceased.

8. In the submission by the complainant's representative he summarised the complainant's case by saying that an affidavit by the deceased's mother and a document signed by Induna on a letterhead of the Traditional Council should serve as "tangible evidence" that the complainant had "customarily adopted" the deceased and that "there was agreement between (his) parents that (the deceased) is going to be the child of (the complainant) according to customary law". The submission contained a great deal of information about "customary adoption" and references to South African "customary adoption cases". The complainant's representative explained that the Department of Home Affairs did not allow the registration of the deceased "with both surnames" and that a decision was taken in "the best interest of the child to register him with his

biological father's surname". The reasoning behind this decision was explained. The submission concludes with a request for the respectful recognition of the cultural rights of persons in our country.

9. We obtained a copy of the judgment in **Maneli v Maneli** (14/3/2 – 234/05) [2010] ZAGPJHC 22; 2010 (7) BCLR 703 (GSJ) (19 April 2010), which was referred to by the complainant's representative.

10. On 10 May 2017 the insurer submitted as follows:

> "As such, Metropolitan cannot accept the adoption as a legal adoption until the adoption has been confirmed by the Children's Court and the deceased registered by the Department of Home Affairs as the adopted child of the complainant."

As pointed out in paragraph 15, below, the insurer ultimately abandoned its stance that, for its validity, an adoption under customary law requires confirmation thereof by the Children's Court. Therefore, there would be no review of the submissions by the parties on this issue.

Provisional ruling

11. The complaint was considered at a meeting of the Adjudicators in this office on 1 June 2017 at which the Ombudsman presided and his Deputy was present. Following that meeting a provisional ruling was made on 2 June 2017, upholding the complaint and directing the insurer "to pay the full benefit of the cover to the complainant". In order to explain the subsequent developments in the complaint resolution process it is necessary to point out the following aspects of the provisional ruling:

    11.1 In paragraph 6 the following was said:

> The complainant rejected the insurer's offer and stated that the child was adopted in terms of the customary law. He argued that the child was therefore legally adopted and relied on the High Court judgment in Maneli v Maneli where the court held that the words "for the adoption of children" enunciated in the preamble of the Child Care Act No 74 of 1983 should be read and interpreted purposively not to exclude adoption by customary law as it is not contrary to the law of general application. It was held further that a minor child adopted in terms of Xhosa customary law should be deemed to be legally adopted in terms of the common law and the Constitution.

    11.2 Paragraph 8 read as follows:

> After considering all the evidence before it, the meeting noted that it is not in dispute that the deceased was adopted by the complainant in terms of the customary law. The only dispute is whether the Maneli judgment requires such an adoption to be confirmed by the Children's Court and that the minor child concerned to be registered by the Department of Home Affairs as the adopted child as contended by the insurer.

    11.3 Paragraph 9 read thus:

> It was a unanimous decision of the meeting that this was not the issue before the court at all. However, the issue was whether the Magistrate's conclusion that the respondent had a legal duty to maintain the minor child he and the applicant had adopted in terms of the Xhosa customary law and whether she was entitled to develop the customary law in terms of the Constitution of the Republic of South Africa.

12. On 3 July 2017 the complainant's representative wrote to the office to record certain financial losses which the complainant had allegedly sustained. It was

clear that these losses had not yet been quantified, but **prima facie** they appeared to be of a nature which might fall within the ambit of our Rule 3.2.5 which, broadly speaking, deals with compensation for poor service. There were also facts that were germane to the adoption issue, and matters which required further investigation by the insurer. The death certificate of the deceased reflected that he died of unnatural causes.

13. On 3 July 2017 the insurer challenged the correctness of the provisional ruling and, in doing so, made the following principal submissions:

    13.1 The conclusion quoted in paragraph 11.2, above, was incorrect.

    13.2 "The validity of the customary adoption is in dispute".

    13.3 "All the requirements for a customary adoption were not met".

    13.4 That the reasoning referred to in paragraph 8, above, "does not indicate a formal transfer from one family to another but rather a type of foster care relationship".

    13.5 No evidence was provided that the deceased's biological father "terminated or abandoned the parent/child relationship or agreed to customary adoption".

    13.6 "The complainant did not provide evidence to show that it was publicly proclaimed that the complainant accepted parental responsibilities for the deceased."

    13.7 "No evidence was provided to show that the child was registered as the child of the complainant as the adopted child with the Department of Home Affairs."

    13.8 In summary, the insurer submitted "that the dispute on whether the requirements of a valid customary union adoption have been met can more appropriately be dealt with by a court of law".

    13.9 The insurer persisted with its submission that a customary adoption "requires confirmation of adoption by the Children's Court to be enforceable".

14. On behalf of the complainant two letters of support by the tribal leaders were produced and the complainant's stance about customary adoption issue was succinctly put as follows:

> … I would be very happy if you can consider this complaint and make a final ruling that the South African Constitution expressly recognises the importance of customary law and commands respect for African legal heritage. The inclusion of the right to culture and customary law (ss 15(3), 30 and 31 of the Constitution) alongside the equality clause (s 9 of the Constitution) in the Bill of Rights provides a strong basis for the preservation of cultural adoptions in the Children's Act. Section 15(3) of the Constitution provides for legislation that recognises systems of personal or family law under any tradition; section 30 provides that everyone has the right to participate in the cultural life of their choice and section 31 provides that persons belonging to a cultural community may not be denied the right to participate in

and enjoy their culture. Section 211(3) of the Constitution provides that the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. Since the Constitution clearly validates customary law, it is submitted that the right to practice traditional adoption is protected by the Constitution and should be accorded the same respect as common law."

15. In its response, dated 8 September 2017, to the submissions referred to in paragraph 14, above, the insurer said this:

> "Previously we held the view that every adoption (customary adoptions included) must be confirmed by the Children's Court Act in order to be a legal adoption. The complainant's communication to your office was most helpful in explaining his position. We again applied our minds on this and are satisfied that customary adoptions fall outside of the adoption process as envisaged in the Child Care Act. We are therefore satisfied that an order of the Children's Court is not required for valid customary adoptions to be legal adoptions. We thank the complainant as well as your office for assisting us in reaching this position."

16. In its letter referred to in paragraph 15, above, the insurer nevertheless persisted with its stance "that based on the evidence at hand all the requirements for a customary adoption were not met and as such the deceased was not legally adopted". The insurer raised the following further issues:

    16.1 It challenged the jurisdiction of this office in this matter. This issue would be considered in paragraph 28, below.

    16.2 Alternatively to the point referred to in paragraph 16.1, above, the insurer called in aid our Rule 3.3.3 and averred that this complaint could more appropriately be dealt with by a court of law.

    16.3 The insurer then averred that there were disputes of fact about the validity of the customary adoption and that even if some evidence was provided it "would still not be able to test the evidence if in dispute". This was specifically said in relation to the absence of evidence "by the person that performed the traditional rites and rituals".

    16.4 The insurer said it had "raised numerous points on which we dispute the validity of the customary adoption" and then asserted:

> "We are merely expected to accept an alleged adoption not registered by the Department of Home Affairs on which serious non adherence to customary adoption requirements were raised. Should a court make a declaratory order confirming the adoption as a valid adoption in terms of customary law or the adoption is registered at the department of Home Affairs we will accept it as a legal adoption.""

    16.5 In conclusion the insurer reminded the complainant "that the onus is on him to, on a balance of probabilities, show that a valid customary adoption occurred".

17. In his response, dated 18 September 2017, the complainant's representative referred to the Australian Law Reform Commission Report on the proof of aboriginal customary law; to a paper of the South African Law Commission on "Harmonisation of the common law and the indigenous law" and to section 1 of the Law of Evidence Amendment Act, 45 of 1988, which deals with judicial notice

of indigenous law. He then submitted, with reference to our Rule 5.1, that "based on the evidence we submitted to your office, the occurrence of customary adoption in terms of customary law was more likely than not".

18. On 13 October 2017 the matter was again discussed at a meeting of the Adjudicators in the office at which the Ombudsman was present. On that day the parties were advised as follows:

> "This case was discussed once again at a meeting of adjudicators which took place earlier today, presided over by Judge R McLaren. It was found that there is a dispute of fact in this matter which cannot be resolved on the papers alone. As such, it was decided that this complaint can best be determined by hearing of evidence in terms of our Rule 5.3. I therefore request the parties to this matter to confirm whether they agree to a hearing or not."

19. Rule 5.3 provides as follows:

> "Notwithstanding Rule 5.2, if the Ombudsman and all the parties concerned are in agreement that a complaint or a material and conclusive dispute of fact can best be determined by the hearing of evidence, it may be so determined."

20. On 14 October 2017 the complainant agreed to a hearing with a request "that such hearing of evidence be conducted in Isizulu language because all our witnesses speak Isizulu language only".

21. On 17 October 2017 the insurer advised that "we do not agree to a hearing".

22. On 22 October 2017 the complainant's representatives made certain submissions in response to the insurer's refusal to attend a hearing.

23. On 24 October 2017 this matter was yet again considered at a meeting of the Adjudicators at which the Deputy and the Ombudsman were present. At the meeting we discussed the unusual development in this matter, namely the refusal by the insurer to attend a hearing in terms of Rule 5.3. The Ombudsman was mandated to discuss the matter with the insurer.

24. On 25 October 2017 the Ombudsman carried out the mandate referred to in paragraph 23, above, and the insurer undertook to revert to him, which it did in the letter referred to in paragraph 25, below.

25. In its letter, dated 3 November 2017, the insurer again raised the jurisdiction issue and said "we trust that this will be considered as part of your determination".

    25.1 The insurer explained its refusal to attend a hearing as follows:

> "We agree with the decision of the meeting of adjudicators as held on 13 October 2017 that there is a dispute of fact which cannot be resolved on the papers alone. For this reason we are of the view that in the event that your Office does have jurisdiction the complaint can more appropriately be dealt with by a court of law. It is for this reason that we do not agree to a hearing."

    25.2 The insurer elaborated as follows on its reasons for disputing the validity of the customary adoption:

> "In addition to the reasons previously provided for us disputing the validity of the customary adoption we would like to highlight the below:
>
> 1. In the application for the policy dated 11/12/2011 (a copy is attached hereto), under clause 4, the complainant states that the reason why the deceased's surname differs from his is because the deceased has his mother's surname. Obviously this is not true as the deceased has his biological father's surname and his mother never married his biological father…..;
>
> 2. This raises the question why the complainant would misrepresent this when the application form specifically asked him to explain the difference in surname? It would have been very easy at that stage to state that the child is an adopted child and that it is the surname of his biological father. Instead the complainant chose to misrepresent that it is the child's mother's surname and thereby implying that it is his biological child;
>
> 3. No evidence was provided by the Induna that the traditional ritual was performed; and
>
> 4. No date was provided or place where the traditional rites and rituals were performed."

25.3 Their stance in this matter was as follows:

> "It is our position that taking into account the dispute of fact which cannot be resolved on the papers a determination cannot be made that the complainant on a balance of probabilities showed that a valid customary adoption occurred and as such a determination cannot be made against Metropolitan."

25.4 In conclusion the insurer said that "should a court confirm the customary adoption we will give effect to it". It appeared that this statement was at odds with the insurer's stance, as set out in paragraph 15, above. See also paragraph 27.6, below.

26. On 14 November 2017 the complainant's representative furnished a comprehensive response to the letter referred to in paragraph 25, above. It is not feasible to attempt to summarise all the legal submissions made on behalf of the complainant. Reference is made only to the following pertinent paragraphs of and statements in this letter:

26.1 In paragraphs 2b and 2c on page 1 it is submitted, correctly in our view, that African customary law "must be seen as an integral part of our law" and that "it depends for its ultimate force and validity on the Constitution…. African customary law is a body of law by which millions of South Africans regulate their lives and must be treated accordingly".

26.2 A useful summary of the requirements for a valid customary adoption is set out as follows in paragraph 2d on page 1:

> Professor Maithufi describe the process of customary adoption as follows: The relatives are called to a meeting where the envisaged adoption is to take place. After this meeting, the adoption has to be reported to the traditional leader of the area....The formalities relating to the agreement... are aimed at indicating that the adopted child has been formally transferred from one family to another...Even in cases where the adoption was not reported to the traditional leader, the adoption would still be valid if due publicity was given to the process... The validity of an act of adoption in terms of customary law largely depends upon the agreement between these families. A traditional ceremony which may involve the slaughtering of small livestock is normally held to mark the adoption. (I P Maithufi (2001) in SALC (2002): page 25).

26.3 In paragraphs 2e, 2f and 2g on page 1 it is submitted, correctly in our view, that "customary adoption, in terms of customary law, has the same legal consequences as state adoption"; it cannot be said that only adoption under Children's Act is recognised by the office of Ombudsman "and that it will be inappropriate for this office to rule that it cannot recognise a customary adoption".

26.4 In paragraph 2i on page 1 authority is quoted for this submission:

> "This is in contrast with customary law, as cultural adoptions are concluded without resorting to the courts."

26.5 In paragraph 2k on page 2 the following is said:

> On the issue of whether the requirements of valid customary adoption was met or not, the office of Ombudsman shouldn't confuse itself by listening to the Insurer or the complainant, because the office of Ombudsman can help itself by focusing on the processes as described by Professor Maithufi, and the same is mentioned on the case of [Maswanganye v M Baloyi N.O and Another (62122/2014 [2015] ZAGPHC 917 (04 September 2015), the office of Ombudsman must consider those processes and compare it with the evidence at hand, then the answer will be clear.

26.6 With regard to the insurer's submissions that it was not in a position to "test the evidence" relating to the alleged adoption of the deceased (as to which, see paragraph 16.3, above) it was said that the complainant thought that the insurer "was demanding the opportunity to cross-examine our evidence verbally". It was then submitted that, by refusing to attend the hearing, the insurer "threw away" its "right to cross-examine evidence confirming customary adoption".

26.7 Of the proposed hearing in terms of Rule 5.3 the following was said in paragraph 3l on page 2:

> My lord, the hearing of evidence was going to be very helpful to the complainant and to your Office, because the language was going to be that of complainant of which is IsiZulu and there would be no risk of distortion through interpretation, the meeting of adjudicators was going to have accurate translation and evaluation, which capture and reflect the true position concerning this customary adoption and proving customary adoption was going to be easy and within the means of most Black African families.

26.8 In response to the insurer's submission about the manner in which the application form was completed (as to which, see paragraphs 2 and 25.2, above) it was argued that the complainant did not fill the application form himself as it was written in English, a language, which he could not speak read or write. It was alleged that the application form was filled by the insurer's representative.

27. On 30 November 2017 the insurer responded to the letter referred to in paragraph 26, above. In summary, the insurer made the following submissions:

27.1 The issue to be determined is the factual dispute whether the alleged customary adoption met all the requirements to be a valid legal customary adoption.

27.2 The insurer again raised the jurisdiction issue, which it formulated as follows:

> "It is our contention that this factual dispute does not relate to the marketing, conclusion, interpretation, administration or termination of Metropolitan policy. As such it is our contention that your office does not have jurisdiction in the matter. We kindly request for this to be considered as part of your determination.
>
> For this reason it is our view that rule 3.3.3 applies, which stipulates that the office will not consider a complaint if it can more appropriately be dealt with by a court of law. "

27.3 The insurer challenged the correctness of previous statements by the complainant about the names of the children reflected on the application form.

27.4 The insurer submitted that the statement by the complainant to the insurer's representative "merely means that the child is illegitimate but acquired rights and privileges from his mother's side".

27.5 The insurer also relied on our Rule 5.2 which provides as follows:

> "If the Ombudsman is of the opinion that a material and conclusive dispute of fact cannot be resolved on a balance of probabilities and with due regard to the incidence of the onus, the parties concerned shall be advised that a determination in favour of the one or the other party cannot be made."

27.6 "Once a court confirms the adoption we will treat it as a legal adoption." It appeared to us that this statement is at odds with the insurer's stance, as set out in paragraph 15, above. See also paragraph 25.4, above.

28. **Jurisdiction**

28.1 This issue was mentioned in paragraphs 16.1, 25 and 27.2, above.

28.2 Rule 2 of the Rules which regulate the procedure in this office deals with "Jurisdiction" and Rule 2.1 provides as follows:

> "Subject to Rule 2.2, the Ombudsman shall receive and consider every complaint which arises from the use by the complainant of the services of a subscribing

> member and every complaint by a complainant who is or claims to be a policyholder, a successor in title**,** a beneficiary, a life insured or a premium payer, against a subscribing member concerning or arising from the marketing, conclusion, interpretation, administration, **implementation** or termination of any long-term insurance contract marketed or effected within the Republic of South Africa."

The reason why we supplied the emphasis in Rule 2.1 appears from paragraph 28.4, below.

28.3 As will clearly appear from paragraphs 1 to 27, above, the complainant claims the insured benefit on the footing that the deceased was correctly insured as his legally adopted child. The insurer denies that the complainant is entitled to that benefit and asserts that the complainant is only entitled to a lesser benefit which applies to the deceased as an extended family member. The reason for the insurer's stance is that it denies that the complainant legally adopted the deceased.

28.4 In the paragraph of the insurer's letter, dated 30 November 2017, which is quoted in paragraph 27.2, above, the word "implementation", which appears in Rule 2.1, is omitted.

28.5 In our view the complaint arises from the "use by the complainant of the services of" the insurer, namely the issuing by the insurer to the complainant of the policy in question.

28.6 We are also of the opinion that the complaint arises from the conclusion of that policy, inasmuch as it forms the basis of the complaint and it founds any legal cause of action which the complainant has against the insurer.

28.7 The complaint also concerns the interpretation of the policy, more specifically the meaning of the expression "legally adopted child".

28.8 Finally, it appears to us that the complaint concerns or arises from the implementation of the policy. We say this because the essence of the complaint is that the insurer is not implementing the policy correctly or that, by its failure to pay the policy benefit for which the complainant applied, the insurer is failing to implement the policy.

28.9 For the above reasons we conclude that this office has the requisite jurisdiction to deal with the above complaint.

29. On 5 December 2017 the complainant's representative responded as follows to the insurer's letter referred to in paragraph 27, above:

29.1 In respect of the insurer's submissions quoted in paragraphs 27.2 and 27.6, above:

> "This is in contrast with customary law, as cultural adoptions are concluded without resorting to the courts (Metiso v Padongelukfonds 2001 3 SA 1142 (T); Kewana v Santam Insurance 1993 4 SA 771 (TkA); Thibela v Minister van Wet en Orde 1995 3 SA 147 (T); Maneli v Maneli 2010 7 BCLR 703 (GSJ)). The requirement of a judicial order encourages customary law to continue to be

viewed through the lens of common law, rather than seeing it as an integral part of our law with reference to the Constitution (Alexkor v Richters- veld Community 2004 5 SA 460 (CC) para 51). The requirement of judicial order modified or replaced adoption under customary law which remains enforceable in terms of the Constitution. Prof. Maithufi argues that due to the publicity that accompanies adoptions in customary law, the adoption should be regarded as valid even in cases where there is no court order of the magistrate's court of the district in which the child resides: obtaining such an order would, of course, facilitate proof of the adoption, but should not be regarded as a sine qua non for a valid customary law adoption."

29.2 In respect of the insurer's submission referred to in paragraph 27.3, above:

29.2.1 "The policy owner said to the Metropolitan life sales representative during the application stage, the Deceased is my child because of the custom known as, **Umlanjwane yingane kaninalume**, in English of which means **illegitimate child belong to maternal side [Mother's surname].** Subsequently the Metropolitan sales representative wrote [Mother's surname] in his attempt to explain that the child belongs to mother's surname according to customary law."

29.2.2 "Judge McLaren, the insurer is quoting us out of context, in an attempt to paint the picture that we are not honest or we are not speaking the truth. My lord it is worth observing that on our letter we wrote to the insurer on 03 February 2017 we did not mentioned this statement. This statement came out after we have received a letter from insurer dated 31 March 2017, that state: 'during standard checks and validation done, it came to light that the child was not the biological child of the policy owner. The deceased was the policy owner's sister's child.' In response to the insurer statement made on 31 March 2017 we wanted to clarify that out of all covered children of the principal member the deceased is the only child that have different biological parent surname with the policy owner….."

29.2.3 "Nowhere in the application form is it stated that children have their mothers surname or belong to their mothers surname, the people who can clarify this are the people who fill in the application form, because the application form state only 'Mothers surname'."

29.3 In respect of the insurer's submission referred to in paragraph 27.4, above:

"My lord, it is worth to propose at the outset that expert advice is necessary here rule 3.1; I will begin by highlighting this example so that my lord you will easily understand. Some words or idiomatic expression in IsiZulu (African language) if you translate it to English turns not to mean the same thing (distortion through interpretation), eg. **Ukuthatha inkomo nekonyana in isiZulu**, to be easily understood by English speaking person is step-parenting, oe gapa le namane in Sepedi. For English speaking person to only focus to this idiomatic expression (oe gapa le namane in Sepedi) as step-parenting, he/she will never fully understand it, you need to understand it in African language perspective, then you will get the true position of this custom. That is why you will find that those who speak English they will say **ukuthatha inkomo nekonyana in isiZulu,** this does not mean that the child is adopted. It merely means the man/woman who is married to your biological mother/father but who is not your real mother/father.

The meaning of this custom in African language perspective is that it is very difficult to lead a cow away from its herd or kraal in the absence of its calf. It is better to lead the cow and allow the calf to automatically join in the removal from one herd or kraal to other, loosely translated it say 'You lead it with its calf'. The requirements of this custom adoption is usually that the relatives of both the

groom and the bride are called to a meeting where the envisaged customary marriage and adoption are to take place (Maithufi 2001 De Jure 391), and the family council, groom and bride will agree to the marriage, as well as the adoption of the bride's child or children from her previous relationship(s) (Boonzaaier 295; Thibela para 150A–B). Under customary law, marriage and the adoption of children are private matters between the families' concerned (Mofokeng (2009) 107; Bennett (1991) 377; Maithufi 2001 De Jure 391), and the children must be minors (ML v KG paras 16–17). Bogadi/lobolo will be paid for both the bride and her child or children from her previous relationship(s) (SA Law Reform Commission: Project 90 60; Hartman 88–89; Boonzaaier 295; Thibela para 150A–B). Then my lord you need to look at the custom idiomatic expression together with it requirements and conclude that there was customary adoption of the child.

The true position of this custom [umlanjwana yingane kaninalume] is that it is impossible for a child to grow up without or in the absence of someone in the maternal surname who will became a parent of the illegitimate child particularly if the biological mother is no longer part of the maternal surname. The illegitimate child will grow up properly if there is someone in the maternal surname who will be the parent of illegitimate child because biological mother is no longer the part of maternal surname [The biological mother, she might be passed away or get married with another man]. Loosely translated it say 'The illegitimate child is the child of one of the maternal side relative'. Then my lord you need to look at this idiomatic expression, together with what happed during lobolo agreement custom of ……..

My lord it is worth noting that in isiZulu language, it does not differentiate the words biological child and adopted child, in isiZulu all [biological child and adopted child] it means **Ingane yakhe,** the adopted child and biological child is the same all is **Ingane yakhe**. This is what the complainant told metropolitan representative that the deceased is **ingane yakhe** in IsiZulu biological child and adopted child is the same [Ingane yakhe]."

30. Final Determination

30.1 The matter was again considered at a meeting of the Adjudicators in the office at which the Ombudsman presided on 14 December 2017.

30.2 In paragraph 16.5, above, we drew attention to the insurer's submission about the incidence of the onus of proof. That submission is undoubtedly correct – see page 244 of **Life Insurance in South Africa** by Nienaber and Reinecke.

30.3 Our Rule 5.1 provides as follows:

> "The Ombudsman shall resolve material disputes of fact on a balance of probabilities and with due regard to the incidence of the onus."

30.4 There exists a dispute of fact about the legality of the complainant's alleged customary adoption of the deceased.

30.5 At the heart of that dispute lies the alleged failure by the complainant to comply with the customary law requirements for a valid customary adoption.

30.6 The insurer refused to attend a hearing in terms of our Rule 5.3 at which the dispute of fact would have been investigated.

30.7 The insurer relied on our Rule 3.3.3 and asserted that the complaint can more appropriately be dealt with by a court of law.

30.8 In deciding the issue raised in paragraph 30.7, above, one must have due regard to the cumulative effect of the following facts, all of which should be considered in the light of our Mission, notably Rules 1.2.2 and 1.2.3:

- The very modest amount of the benefit which the complainant claims.
- The locality where the complainant and his witnesses reside.
- The locality where the insurer conducts its business.
- The logistics involved in litigation of the nature favoured by the insurer.
- The cost of that litigation, at which a number of witnesses will testify in Isizulu, with the need for an interpreter.
- The likely financial position of the complainant.
- The delay which that litigation will entail.
- The fact that the insurer refused to attend a hearing at which it could have investigated those issues about which it requires clarity or about which it has doubts or reservations.

30.9 We think it is fair to assume that the insurer's reliance on our Rule 5.2 is in the alternative to its reliance on Rule 3.3.3. Rule 5.2 is quoted in paragraph 27.5, above.

30.10 With regard to the onus of proof and the said dispute of fact, we point out that the mere existence of the dispute of fact does not mean that the complainant cannot discharge his onus of proof on a balance of probability.

30.11 The meeting was of the unanimous view that the complainant presented an impressive and persuasive body of evidence which points unerringly to a conclusion that the complainant's customary adoption of the deceased complied with the requirements to establish the legality thereof.

30.12 At the meeting referred to in paragraph 30.11, above, it was unanimously resolved that the following final determination be made:

- This office has the requisite jurisdiction in the above complaint.

- It is declared that the insurer is obliged to assess the complainant's claim on the footing that the deceased was his legally adopted unmarried child.

31. Furthermore, at the meeting referred to in paragraph 30.11, above, it was unanimously resolved as follows:

    31.1 The insurer must investigate the question whether the complainant is entitled to the policy's accidental death benefit in relation to the deceased and it must report to this office by no later than 15 January 2018 on the outcome of those investigations.

    31.2 The insurer is requested to investigate the question whether the complainant is entitled to compensation in terms of Rule 3.2.5 and it must furnish its submissions to this office by no later than 15 January 2018.

Outcome

32. The insurer applied for leave to appeal which was granted, but thereafter the insurer withdrew the appeal. The insurer paid the balance of the claim and the parties concluded a settlement regarding the compensation referred to in paragraph 31.2 plus interest.

33. The insurer pointed out that there was no accidental death benefit, application to the policy. This was accepted as correct by the complainant and the office.

34. In regard to this the complainant was under the mistaken impression, due to an error by the insurer's representative, that the cover for "children" was R20 000. This mistake was only corrected at the time the complaint was resolved. The insurer paid an *ex gratia* amount to the claimant of R10 000.