

## **Case 27 – Funeral policy – definition of wider family member**

*Funeral claim declined as life covered as second cousin – does not meet definition of “cousin” in terms of the policy*

### **Background:**

1. The policy, a Solutions Funeral Essential Plan, commenced with effect from 1 December 2011.
2. The complainant submitted a funeral claim for a wider family member who passed away on 17 April 2015.
3. The cover at the time of death amounted to R17 250.00.
4. The deceased was insured as the complainant’s cousin.
5. “Cousin” is defined in the Policy as:  
  
*“Cousin who is the child of the Policyholder’s aunt or uncle”.*
6. At claim stage it was established that the deceased was the complainant’s second cousin by virtue of the fact that complainant and the deceased’s grandmothers were sisters.
7. Sanlam declined the claim and relied on the definition of “cousin” as contained in the policy and the fact that the onus was on the complainant to familiarise herself with such definitions.
8. Sanlam refunded the premiums contributed in respect of the deceased.
9. The complainant alleged that at application stage, the broker was aware that the deceased was her second cousin, that he advised her that the deceased could be covered as a cousin.
10. The complainant had contributed towards and borrowed money from a relative for the funeral.

### **Provisional Determination:**

11. The matter was discussed at a meeting of the adjudicative staff on 3 December 2015 under the chairmanship of the Ombudsman, Judge McLaren. The office made a provisional determination on the following basis:
  - Contractually, Sanlam may decline the claim.
  - The complainant had assisted financially with the funeral.
  - The term “cousin” includes second cousins in certain cultures.
  - Policyholders would not necessarily check a definition of a common usage term such as “cousin” before insuring a life.

- Whilst the broker's alleged advice was a matter for the FAIS Ombud, the brokerage in question was no longer in operation with its licence having lapsed in 2012.
  - The expectation of a reasonable, honest man / policyholder in the same circumstances would be that a person thought of as a cousin, but whose actual relationship was that of second cousin, is covered in terms of the policy.
12. The meeting agreed that in terms of fairness, the claim should be reconsidered and paid.
13. Sanlam disputed the provisional determination. It argued that:
- The application form was designed in such a way that it is inserted inside the terms and conditions of the policy.
  - That at sales stage, the complainant had been given the terms and conditions of the policy.
  - That the terms and conditions clearly stated what Sanlam considered a cousin to be.
  - That whilst they agreed that in certain cultures a second cousin may be a cousin, this is not the case with Sanlam and hence the reason why the definition of cousin had been defined in the terms and conditions.
  - That consensus existed between the complainant and Sanlam.
  - That the complainant, at application stage, had declared that the information provided by her was true and complete and that she had acknowledged receipt of the policy document.
  - That the complainant had, by way of the compliance check list, confirmed that the broker had disclosed the type, extent and limitation of the benefits.
  - That Sanlam was committed to treating its customers fairly and for that reason, was unable to ignore its policy terms and conditions.
14. The matter was again discussed at an adjudicator meeting on 11 March 2016. The meeting agreed to refer to the matter to the FAIS Ombud to investigate the advice given at sales stage.
15. The FAIS Ombud dismissed the matter.
16. An attempt to resolve the matter telephonically with the insurer was made on 1 August 2017.
17. The telephone conference yielded the following:
- The insurer maintained that whilst research and trends, towards the end of 2015, early 2016, had identified the need to expand the definitions of wider family, this did not extend to second cousins, as in terms of insurable interest, the basis on which Sanlam determined which lives could be insured, the interest/relationship was too remote.

- The insurer confirmed that the training provided to agents and brokers had been enhanced, that a Family Tree had been devised to assist with the explanation and classification of family relationships.
- The insurer's stance on the payment of the claim remained unchanged.

**Final Determination Discussion:**

18. The matter was again discussed at an adjudicator meeting on 25 August 2017.

19. The meeting unanimously agreed and upheld the provisional determination for the following reasons:

- Contractually, Sanlam may decline the claim.
- The complainant had assisted financially with the funeral.
- The term "cousin" includes second cousins in certain cultures. This is the market in which the product was marketed and sold.
- Policyholders would not necessarily check a definition of a common usage term such as "cousin" before insuring a life.
- The fact that research and trends at the end of 2015, early 2016, showed a need for the definitions to be extended together with enhanced training and training aids. The meeting agreed that an inference could be drawn that as the complainant's policy was sold in 2011, prior to this, it is likely that the training had been inadequate and therefore the sale would have been done without the necessary guidance regarding relationships and that based on this, that her version of events, when balanced against that provided by the insurer, was more probable.
- That in terms of fairness / equity, as referred to below, the claim should be paid.

**General:**

20. Our rules provide that where a claim cannot be upheld in law, given certain circumstances, we may exercise our equity jurisdiction.

21. Our Rules state:

*"1.2 The Ombudsman shall seek to ensure that:*

*...*

*1.2.4 he or she accords due weight to considerations of equity...*

*...*

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

22. In the work of PM Nienaber & MFB Reinecke, *LIFE INSURANCE IN SOUTH AFRICA*, Page 60, it is stated:

*"The office may also rely on equity to mould a remedy for which the law makes no provision...Equity thus fosters flexibility. By its very nature the concept of equity is*

*elusive and not capable of precise definition. At best the question can be posed whether any reasonable person, including a reasonable insurer, would agree, on being given all the facts and judged by the convictions of the community, that the proposed intervention is necessary to ensure that justice is done. Even on that postulate opinions may differ and it is for that reason that it is the practice in the office that rulings on equity are only made conjointly at adjudicators' meetings..."*

23. Our 2012 Annual Report stated:

*"...Lord Steyn, a Judge in Britain's House of Lords, ... expounded on the need to introduce an equitable approach to contracts...and said that this should be done by giving effect to what he called the reasonable expectations of honest men...it certainly is a more useful yardstick for the application of equity. Equity is after all nothing other than what the reasonable man in the street – in other words public opinion- would consider to be fair.*

24. Our 2011 Annual Report stated:

*"Treating Customers Fairly*

*...*

*Commentators in newspapers and financial magazines have for obvious reasons backed the TCF drive, and by way of example reference might be made to only two. In one, which appeared in the May 2011 edition of Cover, the editor said –  
'While equity is a requirement in terms of the Ombud's determinations, increasing focus on consumer protection means insurers would do well to apply the principles of equity and fairness in their own claim settlement decisions. This should not be done to limit the number of consumer complaints submitted to the office of the Ombud, but also to help build and endorse a positive image of the insurance industry.'*

*And in an article named "Fear Factor" in the 2 February 2012 edition of Finweek, Bruce Whitfield referred to –*

*'...the issue around the legalese that accompanies insurance contracts and ...the importance of fully understanding precisely what it is your are buying. The small print can devastate policyholder's expectations.'*

*What is of concern is the fact that policyholders are so often unaware of what exactly they are or are not covered for. Despite insurers entreating policyholders to read their policies upon receipt, it is well known that many do not do so. The fact that policyholders are therefore sometimes to blame for not knowing what exactly they are or are not covered for is a matter that insurers should nevertheless not ignore."*

25. Our equity jurisdiction is not restricted by the terms of the policy.

26. Our decisions do not set a precedent as fairness can only be established on the particular circumstances of the case concerned.

27. Prejudice to the insurer or other policyholders does not preclude our office from exercising our equity jurisdiction. Such prejudice is taken into account and weighed against the prejudice suffered by the complainant to decide if an equity decision is justified.

28. A common misconception is that treating every policyholder exactly the same means that the insurer is acting fairly. Equity has to take account of the individual circumstances of a particular policyholder / complainant.

**Final Determination: Order**

29. Taking the above into account, Sanlam was instructed to pay the claim of R17 250.00.

**Outcome:**

30. Sanlam paid the claim, less the premiums already refunded, as instructed.