Case 34 – 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 policies, both Sanlam My Priority Funeral Plans, commenced with effect from 1.11.2015 and 1.7.2016.

2. The complainant submitted funeral claims for a wider family member who passed away on 8.8.2017.

3. The cover amounts were R31 500.00 and R20 800.00 respectively.

4. The deceased was the insured as the complainant's cousin.

5. "Cousin" is defined in the Policies 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.

7. Sanlam Developing Markets (SDM) 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 disclose the correct relationship at application stage.

8. SDM conducted research and enhanced their training towards the end of 2015 and subsequently changed the wording for the policies issued early 2016 and after.

9. SDM refunded the premiums contributed in respect of the deceased.

10. The complainant contributed towards the funeral.

Provisional Determination:

11. The matter was discussed at a meeting of the adjudicative staff on 18.5.2018 under the chairmanship of the Ombudsman, Judge McLaren. The meeting held that:

- Contractually, SDM may decline the claims.

- The complainant had assisted financially with the funeral.

- The term "cousin" includes second cousins in certain black languages / cultures.

- From similar matters, it was acknowledged that SDM had towards the end of 2015, early 2016, following research and trends, identified the need to expand the definitions of wider family.

- Having regard to the above, and taking into account the commencement dates of the policies, that the claim in terms of the policy issued 1.11.2015, prior to such research, was payable.

- The claim in terms of the policy issued 1.7.2016, after such research, was not payable.

- 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. SDM disputed the provisional determination. It argued that:

- The criteria for the claim assessment were the terms and conditions;

- The relationship between the deceased and the complainant was not in line with the terms and conditions;

- It accepted that in some cultures a second cousin is considered as a cousin, but for this reason, SDM explained fully in the terms and conditions, what it considered a cousin to be;

- The evidence from the complainant had no bearing on the contract.

Final Determination Discussion:

13. The matter was again discussed at an adjudicator meeting on 22 June 2018.

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

- Contractually, SDM may decline the claim;

- The complainant had assisted financially with the funeral;

- The term “cousin” includes second cousins in certain black languages / cultures. This is the market in which the product is marketed and sold.

- Policyholders would not necessarily check a definition of a common usage term such as “cousin” before insuring a life.

- SDM’s research and trends at the end of 2015, early 2016, had identified the need to expand the definitions of wider family, together with enhanced training and training aids;

- The timing of the enhancements necessitated, based on their commencement dates, a distinction between the policies;

- SDM had not provided evidence that the enhanced training had been implemented and/or taken place in November 2015, when the first policy had been issued;

- The complainant’s evidence, in supporting her claim, was relevant and could not be ignored.

- That in terms of fairness / equity, as referred to below, the claim in terms of policy in 2015 should be paid.

General:

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

16. 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…"

17. 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…"*

18. 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.*

19. 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 you 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."

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

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

22. 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.

23. 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

24. Taking the above into account, SDM was directed to pay the claim amount of R31 500.00 less the premiums paid.

Outcome:

25. SDM paid the claim, less the premiums already refunded, as instructed.