IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

HELD IN PRETORIA

CASE NO: FOC 1343/05 FS

In the matter between:

JOHAN ADRIAAN STEENKAMP Complainant

and

OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED Respondent

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DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS Act')

Introduction

[1] This case brings into sharp focus the potentially tragic consequences that could arise from the rendering of a financial service in a manner that is negligent or not in compliance with the Financial Advisory and Intermediary Services Act 37 of 2002 ('FAIS Act'). It concerns the rejection of a medical aid benefit and simultaneous cancellation of Complainant's membership of the scheme, as a result of the alleged non-disclosure of material information by the Complainant when he applied for membership

to the scheme. The facts and circumstances surrounding the case will emerge in this determination.

The Parties

[2] Complainant is Johan Adriaan Steenkamp, adult male, a construction worker residing at 30 Hobson Crescent, Sasolburg, Mpumalanga Province.

[3] Respondent is Old Mutual Life Assurance Company (South Africa) Limited, an authorised financial services provider and a duly registered company in terms of the company laws of the Republic of South Africa and having its principal place of business at Mutual Park, Jan Smuts Drive, Pinelands, South Africa. Further parties but not Respondents to the proceedings are Oxygen Medical Aid Scheme ('Oxygen') and Old Mutual Personal Financial Advice, both being owned by Respondent.

Background

[4] On the papers before me, the following material information appears:-

[5] On 20 March 2005 Complainant's son, Ruan was born prematurely after a gestation period of only 32 weeks. Complainant's wife, Amanda

Steenkamp, was diagnosed with terminal lymphoma cancer and was in a comatose state when an emergency caesarean section had to be performed on her. She died shortly after this procedure.

[6] Ruan had respiratory complications. After birth, he was placed on a ventilator for 1 week and received assistance with breathing for 3 weeks. He was discharged from hospital after 4 weeks.

[7] Ruan was admitted to the Universitas Provincial Hospital, Pretoria on 15 May 2005 for apnea. This is a medical condition which manifests in the temporary cessation of breathing. He was treated and discharged on 17 May 2005.

[8] Ruan was again admitted to the Sasolburg Provincial Hospital on 25 May 2005. This time he was treated for pneumonia and broncho-pulmonary dysplasia.

[9] On 26 May 2005, whilst Ruan was still in hospital, Respondent, represented by one Faan Stander ('Stander') employed in its Personal Financial Advice division consulted with Complainant. During this consultation Stander recommended that Complainant join Oxygen. Oxygen is a business unit of Respondent responsible for health care. As part of the process of enabling Complainant and his dependents to

become members of Oxygen, Stander completed the necessary application forms which Complainant signed. Complainant's membership of the scheme was to take effect on 1 June 2005.

[10] Ruan was transferred to the Vereeniging Med-Clinic on 31 May 2005 for further treatment. He was placed on an oxygen delivery device through which oxygen was administered to him. Complainant, with the assistance of a family friend, had to pay R1 500.00 for the day to the clinic as the medical aid membership would only come into effect on 1 June 2005.

[11] On 31 May 2005 Complainant phoned Oxygen and informed it of Ruan's hospitalisation and requested an authorisation number, effective from 1 June 2005. Oxygen provided Complainant with an authorisation number 'R462309', apparently valid for five days.

[12] On 5 June 2005 authority was sought from Oxygen to administer a drug, 'Synergis' for the treatment of Ruan's lung infection.

[13] Oxygen raised certain concerns relating to the request mentioned in paragraph [12] above and investigated the reasons for the medication. Oxygen found that Ruan had certain medical conditions which they allege were not disclosed to them. Oxygen immediately suspended Complainant's membership with it. Ruan, at the time, was receiving

treatment in the Neo-Natal Intensive Care Unit at Vereeniging Medi-Clinic. The hospital phoned Complainant to inform him that Oxygen was not going to pay the medical bills. Complainant could not afford Ruan's treatment at this facility. The child was therefore taken home where he was nursed by his grandparents, whilst Complainant was at work.

[14] Oxygen's reason for the cancellation of Complainant's membership, given by way of an undated letter signed by the medical underwriter one Mr Warren Vercueil, was that there was non-disclosure of Ruan's medical condition.

[15] Complainant alleges that Ruan's complications at birth and hospitalisation were disclosed to Stander during the completion of the application form for medical aid. Complainant alleges that he specifically told Stander that Ruan was born prematurely and the mother passed away during the birth.

[16] Complainant advises that when he informed Stander of this, he was told that this was not important. Stander completed the application form and Complainant was requested to simply sign it. Complainant did not read the document neither was he furnished with a copy thereof.

[17] As a result of the cancellation of Complainant's membership of Oxygen, Complainant is now personally liable to pay the outstanding medical

expenses and accounts amounting to R31 204.83. This amount is made up as follows:

[17.1] R1 588.00 – Dr Elna Gibson (Paediatrician);

[17.2] R 27 787.13 – Medi-Clinic Group;

[17.3] R 533.20 – Dr JJ Steyn (Radiologist);

[17.4] R 623.20 – Riana Knouwds (Occupational Therapist);

[17.5] R 409.60 – Drs Soldin and le Roux; and

[17.6] R 263.70 – Drs Soldin and le Roux

This is the direct financial loss that Complainant is claiming from Respondent.

The Response

[18] The response by Respondent to this Office comprises of two letters. The one is from Oxygen and the other from Respondent's Personal Financial Advice division. Both letters are dated 22 September 2005. I shall deal with each letter in turn.

[18.1] The letter from Oxygen

[18.1.1] In its response Oxygen sets out Ruan's medical condition and the events leading to the cancellation of Complainant's membership. It further refers to certain questions in the application form which were answered 'no' when they should have been answered 'yes';

[18.1.2] These questions relate to heart, respiratory, eye and ear disorders. Other questions related to hospitalisation, medical treatment, surgery etc. in the preceding 12 months and other factors that may affect the member's health in future;

[18.1.3] The letter further states that Ruan's health was severely compromised with various conditions and that this could result in prolonged hospitalisation;

[18.1.4] Oxygen maintains that the declaration signed by Complainant confirms that non-disclosure of any material information will affect membership and any

contributions paid will be forfeited. The contributions that were paid by Complainant were refunded during September 2005 in the amount of R1 100.00. This was done, according to Oxygen, as an act of goodwill and not because they were obliged to.

[18.2] The letter from Respondent's Personal Financial Advice unit

[18.2.1] This response was limited to the role Stander played during the rendering of the financial service with particular reference to the allegation by Complainant that Stander was informed of Ruan's medical condition;

[18.2.2] Respondent, according to the letter, states that their representative, Stander, does not deny that Ruan's premature birth was disclosed to him. Notwithstanding this disclosure, Respondent maintains that Complainant failed to disclose the detailed medical complications as highlighted in Oxygen's response. Stander therefore knew that Ruan was born prematurely and that his mother passed away during his delivery. In this response Respondent states the

following: 'Our Representative therefore only knew about the fact Ruan was born prematurely and that his mother had passed away during his delivery.'

[18.2.3] Respondent also mentions that underwriters 'have the right to request detailed client medical records and are able to interrogate and access such information'. It further states that the declaration provides that client's medical information may be obtained for purposes of assessing the risks and considering claims;

[18.2.4] Respondent concludes by stating that there would be no motivation for Stander to omit the information allegedly disclosed by Complainant;

[19] In a letter annexed to the above response dated 28 July 2005, an area manager, one Mr GG van der Westhuizen of the Personal Financial Advice business unit confirms that Ruan's premature birth, his hospitalisation and discharge after four weeks was mentioned. However, he disputes that any further material disclosures were made.

Determination and reasons therefore

[20] The essence of the complaint relates to the rejection of a claim and the subsequent cancellation of Complainant's membership of Oxygen, evidently as a result of the alleged non-disclosure of material information by Complainant. As a result of the cancellation, Complainant is obliged to pay outstanding hospital and medical expenses.

[21] Complainant states that during the two consultations he had with Stander in May 2005, Ruan's premature birth and hospitalisation was mentioned. This was allegedly confirmed in a meeting held between Complainant and Respondent. Respondent does not deny that Ruan's premature birth and hospitalisation was disclosed to their representative. This is also confirmed by Respondent in its letter dated 28 July 2005.

[22] Respondent bases the cancellation of Complainant's membership of Oxygen on the alleged non-disclosure of material information by Complainant. Respondent states in its letter dated 22 September 2005 that the cancellation was a result of Complainant's failure to mention Ruan's heart, respiratory, ear and eye disorders.

[23] In order to determine this complaint a brief examination of the legal position is required. At common law, there is a duty on an insured to

disclose all material information relevant to the risk to be underwritten. If this duty is breached the insurer will be entitled to repudiate a claim and cancel the policy. This duty also requires an insured to answer all questions truthfully. The court in *Warren v Henry Sutton [1976] 2 Lloyd's Rep 276 (CA)* was of the view that even though it is the responsibility of the insured to ensure that all material facts are disclosed to the insurer, it is the broker's duty to assist the insured in disclosing all material information.

[24] Havenga in the *Law of Insurance Intermediaries* states the following:

'An insured may not appreciate which facts are material and it is part of the broker's duty as a professional to recognise which matters are material and to make sure that they are disclosed to the insurer. If the broker is in doubt about whether or not a fact is material, the insured should be advised that it must be disclosed. If it later appears that the fact is not material, then the insured will not have been prejudiced.' [1]

[25] It is clear that Stander, acted as representative of the Respondent and *a fortiori* any disclosures made to him would be disclosures made to the principal, in this case the Respondent and invariably Oxygen. Extrapolating the principles expounded in the *Warren* case and affirmed by the learned author Havenga, it can be said that the same duties as are attendant on a broker are required of a provider when rendering a financial

[1] Havenga, Peter: Law of Insurance Intermediaries JUTA Law First Published 2001at 39 to 40

service. Section 2 of the General Code of Conduct requires a provider to act honestly, fairly, with due skill, care and diligence and in the interests of clients and the integrity of the financial services industry. Stander's actions are a clear indication that he failed to comply with this duty. He was tasked to obtain medical aid cover for Complainant and his dependents. His failure to disclose information to Oxygen resulted in Complainant's membership being cancelled with attendant financial prejudice. Had Stander rendered the financial service with due skill, care and diligence as is required of him as a professional, the financial loss would not have occurred.[2]

[26] Assuming, as Respondent maintains that Complainant did not disclose all Ruan's medical complications, it was nevertheless Stander's duty, as the provider herein, to at the very least disclose what Complainant had told him, namely that Ruan was born prematurely, that his mother died during the procedure and the hospitalisation to Oxygen. This would have prompted Oxygen, as it was entitled to do, to make further enquiries and to properly assess the risk that was being underwritten.

[27] Clarke states the following regarding the disclosure of information by an insured:

'…it is not necessary to disclose minutely every material fact; assuming that there is a material fact which he is bound to disclose, the rule is

[2] See in this regard *Durr v ABSA Bank Ltd and Another 1997 (3) SA 448 (SCA)* at 460 H to 463 I.

satisfied if he discloses sufficient to call the attention of the underwriters, in such a manner that they can see that if they require further information they ought to ask for it. So, if reasonably sufficient information has been placed before them, they cannot take advantage of failure to follow it up. If they shut their eyes to the light, it is their own fault.'[3]

[28] It is evident that sufficient information was disclosed to the Respondent's representative to call its attention to the fact that it ought to ask for more information. By Stander's conduct, Respondent and Oxygen have indeed 'shut their eyes to the light.'

[29] It is clear from Stander's actions that notwithstanding the disclosure of important and vital information, this was never brought to the attention of Oxygen. Had this information been disclosed by its own representative, it is probable that Oxygen would have applied for and obtained further information relating to Ruan's medical condition to properly assess the risk it was covering. The fact that Stander did not consider disclosing the premature birth of the child and the fact that his mother died after giving birth, indicates that he did not apply his mind to the materiality of these disclosures. According to the evidence, he did not think it important enough because the child is only 2 months old. This is not pertinently denied by Respondent. The disclosure relating to Ruan's premature birth

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3 Clarke, MA: The Law of Insurance Contracts 4th edition Witherbys Publishing (2002) at par 23.13

is not recorded anywhere. Oxygen therefore, as a result of Stander's failure, was not aware of any fact that would have warranted it to seek further information on Ruan's medical condition.

[30] This Office conducted some research on premature infants ('preemies') who are born after a 32 weeks gestation period.[4] It is clear that preemies are prone to a number of medical problems, primarily because their vital organs are not completely ready to function on their own. The risk of complications in preemies is thus higher than full-term babies.

[31] It was found that the following common health problems are prevalent amongst preemies:

[31.1] Hyperbilirubinemia – a condition with high levels of bilirubin, a compound that reduces the natural breakdown of blood. This compound causes jaundice, fairly common in full-term babies but much more common in preemies;

[31.2] Apnea – during an apnea episode a baby stops breathing, the heart rate may decrease causing the skin colour to turn blue or purple. This is caused by immaturity in the area that controls the drive to breathe;

[4] Published on http://www.miraclebaby.co.za/UsefullInfo.asp, last visited on 20 February 2006

[31.3] Anaemia – a lack of red blood cells;

[31.4] Low blood pressure

[31.5] Respiratory Distress Syndrome – the infant's immature lungs do not produce enough surfactant, allowing the inner surface of the lungs to adapt to breathe air;

[31.6] Bronchopulmonary Dysplasia – a lung reaction to oxygen. This is treated with medication and oxygen;

[31.7] Infections – preemies are prone to serious illness because they are ill-equipped to fight germs that can cause these illnesses;

[31.8] Patent Ductus Arteriosus – the short blood vessel frequently stays open thus causing excess blood to flow into the lungs which can lead to heart failure; and

[31.9] Retinopathy of Prematurity – abnormality of the blood vessels in the infant's eye which may cause blindness.

[32] It is clear that Stander did not comprehend or, prompted by Complainant's disclosure of Ruan's condition, failed to make adequate enquiry to establish the full extent of Ruan's medical condition.

[33] It becomes clear, bearing in mind what has been said in paragraph 31 above, that Ruan had at least three of the abovementioned complications. Whether Ruan would have been covered under the medical scheme at all or subject to conditions is a different exercise and is not relevant for the purposes of this determination.

[34] Leigh-Jones states the following in *MacGillivray on Insurance Law*:

'…the insured must perform his disclosure properly by making a fair presentation of the risk proposed for insurance. If the insurers thereby receive information from the insured or his agent which, taken on its own will in conjunction with other facts known to them or which they are presumed to know, would naturally prompt the reasonable careful insurer to make further enquiries, then, if they omit to make the appropriate check or enquiry, assuming it can be done simply, they will be held to have waived disclosure of the material fact which that enquiry would necessarily have revealed.'[5]

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[5] Leigh-Jones, Chris: MacGillivray on Insurance Law 10th edition Witherbys Publishing (2002) at 446

[35] The 'appropriate check or enquiry' referred to above would have been a relatively simple exercise and would have revealed sufficient information to enable Oxygen to properly assess the risks they were underwriting.

[36] In the circumstances, Respondent's representative neglected to fulfil his obligations by virtue of the authority granted to him to obtain appropriate medical aid that will meet Complainant's needs and objectives.

[37] In its response, Respondent further maintains that no mention was made of Ruan's hospitalisation. This is in clear conflict with what Van der Westhuizen says in his letter of 28 July 2005. However, even if the issue of Ruan's hospitalisation was in dispute, on probabilities alone it is inconceivable that a prematurely born infant whose mother passes away shortly after birth would not be hospitalised for at least some period of time. It is highly likely, given the circumstances, that Complainant informed Stander of the hospitalisation if he told Stander about the premature birth and the mother's death. This is confirmed in Respondent's letter dated 28 July 2005 wherein it mentions that the premature birth and the hospitalisation were mentioned to Stander. Oxygen's decision based on non-disclosure of material information therefore does not hold and as a provider specialising in health care, it ought to have known that babies born prematurely have medical complications and are kept in hospital for a reasonable period of time.

[38] In the authoritative work, *The General Principles of Insurance Law* the following is stated regarding the broker's duty pertaining to material information.

'The first duty of the broker is therefore to disclose to the insurer material information of which he is aware. Where the broker inserts incorrect information in the application form, he will be liable to the insured.' [6]

As I have stated in paragraphs 25 and 26 above, the same principles can be extrapolated to include the duties of the provider, Stander in this case. Not only did Stander fail to correctly complete the application form but he failed to disclose material information to the insurer or the scheme.

[39] The disclosure of Ruan's premature birth by Complainant should have triggered warning signs and Stander, as a professional and authorised provider, ought to have known or at the very least enquired whether the risk was acceptable to Oxygen. Stander should have elicited more information from Complainant regarding Ruan's condition in order to assess Ruan's acceptability to the medical aid scheme. In the circumstances I am of the view that Respondent's argument that there was material non-disclosure has no merit.

6 Reinecke, van der Merwe, van Niekerk and Havenga LexisNexis Butterworths (2002) at par. 474

[40] Respondent in its letter dated 22 September 2005 refers to question 2.13 of the 'underwriting annexure' in the application form which Stander completed. This question reads as follows: 'Have you in the past 12 months had any procedures, operations or hospitalisations, or received any surgical, medical treatment, advice or tests?' This question was answered 'no'. In its letter dated 28 July 2005 Respondent acknowledge that Ruan's premature birth, hospitalisation and discharge were disclosed to their representative. If this is the case then it begs the question why this question was never answered 'yes'. The conclusion can be drawn that Stander either did not apply his mind when completing the questionnaire or simply disregarded this material information that was provided to him. Stander's negligence resulted in Complainant's medical aid claims not being processed and paid and his medical aid membership being cancelled.

[41] Stander completed the application form and submitted it on Complainant's behalf to Respondent. The General Code in terms of section 7 (1) (d) requires a provider to fully inform the client where it completes or submits any transaction requirement on behalf of the client, that the client should be satisfied as to the accuracy and completeness of the details. Complainant was simply given a declaration attached to the application form to sign and had no opportunity to peruse the contents thereof or to

check the accuracy or completeness thereof. Complainant later received a customer advice record but no copy of the application form.

[42] Complainant is a construction worker with standard 8 as the highest standard passed. Complainant also attended a special school which assists learners who are academically weaker in developing their technical skills. Taking into consideration Complainant's assumed level of knowledge, it is quite clear that in all probability he would not have understood the implications of the health questionnaire unless it was properly explained to him.

[43] The General Code, in terms of section 3 (1) (a) (iii), requires that where representations are made and information provided to a client it must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client. As stated in a previous determination[7] by this Office, Complainant is the type of consumer who can be considered a consumer in need of care. There is nothing on the evidence to indicate that the assumed level of knowledge of the Complainant was established. The Complainant in my view would not have been able to appreciate the level of disclosure that would have been required of him. He is not a medical expert, neither is he a financial advisor authorised, as Stander is, to sell medical aid. Complainant's state

[7] Grobler v Direct Axis (Pty) Ltd Case Number: FOC 1434/05 NP 2 at par 21 to 25

of mind is encapsulated in the following paragraph in his letter of complaint:-

'Verstaan asseblief dat op daardie stadium ek my vrou aan die dood moes afstaan en een van my een kinders (*sic*) by die dood omgedraai het, dus het ek swaar gesteun op Old Mutual se "kundigheid".

Unfortunately in the circumstances of this case, Complainant's faith in 'Old Mutual se "kundigheid" was misplaced. Had Stander taken Complainant's circumstances or level of knowledge into consideration and elicited more information from Complainant, the application form could have been completed correctly.

[44] Section 3 (2) (a) of the General Code provides that a provider must have appropriate procedures and systems in place to record such verbal and written communications relating to a financial service. It is clear that no information, either written or oral were recorded, save for the Client Advice Record ('Klientadviesrekord'), which is not at all helpful. The lack of any recorded verbal or written communication clearly does not assist one to understand what took place during the rendering of the financial service. What is clear though is that important disclosures were indeed made to Stander, acting as Respondent's representative. Those disclosures should have prompted further enquiry.

[45] Stander's failure to record this information is clear non-compliance with this provision. The completed application does not exist as it is Respondent's version that the form was destroyed after the information was electronically captured.

[46] This Office requested Respondent to provide us with the original handwritten application. The purpose of this request was to compare the handwritten form and the electronic copy which was provided to this Office to check the accuracy of the information recorded. Respondent stated that this was not possible as the original application was destroyed. Respondent further uses a 'Finalisor Process' which replaces the paper application forms that are completed. This process involves the capturing of the handwritten application form onto a software system. This electronic format is then kept as part of the application process. Notwithstanding this practice, it is peculiar that a provider of the calibre of Respondent does not at least scan documents material to the financial service.

Conclusion

[47] It is clear and not in dispute that vital information relating to Ruan's premature birth, hospitalisation and his mother's death was made to Stander in his capacity as Respondent's representative. Apart from dismissing Complainant's disclosures as unimportant, Stander made no

further enquiry nor did he pass this information on to Oxygen. It is therefore clear that Stander failed to complete the application form correctly and disregarded material information disclosed to him.

[48] This failure is what caused Complainant's membership of Oxygen to be cancelled and consequently the rejection of his medical aid claims, for which he is now being held liable.

[49] We have in this determination only examined the financial loss sustained by Complainant in this case. It is apparent that Complainant has suffered and probably continues to suffer severe emotional and psychological harm as a result of the untimely death of his wife in the circumstances. The child as a result of the cancellation of medical aid cover could potentially have been exposed to serious health risks. All of this trauma can be attributed to the negligence of Respondent when rendering the financial service.

Order

[50] The complaint is therefore upheld and the following order is made:

[50.1] Respondent is ordered to pay Complainant the outstanding medical accounts in the amount of R 31 204.83; and

[50.2] Respondent it ordered to pay interest on the aforesaid sum of R31 204.83 at the rate of 15.5% per annum from the date of this determination to date of final payment.

[50.3] Respondent is ordered to pay the case fees of the Office of the Ombud for Financial Services Providers in the sum of R1 000,00 plus Value Added Tax thereon.

DATED AT PRETORIA ON THIS THE 13th DAY OF MARCH 2006

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CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS