

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, GQEBERHA)

Case No: 2780/2021

In the matter between:

MULTISURE CORPORATION (PTY) LTD

APPLICANT

And

KGA LIFE LIMITED

FIRST RESPONDENT

Q LINK HOLDINGS (PTY) LTD

SECOND RESPONDENT

AFRICAN UNITY LIFE LIMITED

THIRD RESPONDENT

JUDGMENT

SCHOEMAN J.

[1] The applicant is a company that does business as an independent intermediary which primarily markets and sells funeral cover plans to individuals and families. The first respondent (KGA) is a licensed long-term insurer. The second respondent (Q Link) is a company that is authorised to alter the deduction codes at the South African Security Agency (SASSA) whereby the funeral policy holders' premiums (the applicant's members) are paid to the first respondent. The third respondent

(AUL) is an underwriting company with whom the applicant has signed a new intermediary agreement.

[2] The applicant has brought an application on an urgent basis for (a) a declaratory order that the intermediary agreement between the applicant and the first respondent has been terminated; (b) directing KGA to deliver to Q Link the necessary authorisation to alter the deduction codes on its electronic administrative system to provide payment to the AUL; (c) directing Q Link to alter the deduction codes should first respondent not comply with the order in (b); (d) directing the first respondent to pay to AUL all premiums that it had collected since 1 September 2021; and (e) costs.

[3] The notice of motion made provision that an interim order be granted, but when the matter was argued it was common cause that the applicant sought a final order.

The facts.

[4] The applicant contracted and entered into an intermediary agreement with KGA in terms of which the latter underwrote and provided the necessary cover to the applicant's clients who formed part of the group scheme as from 1 January 2015. This agreement incorporated a master agreement. Cover was on a month to month basis with the applicant providing KGA each month with the details of the members of the group.

[5] The majority of the members of the applicant are recipients of social grants administered by the South African Social Security Agency (SASSA). The latter appointed Q Link to administer the deductions from the social benefits during the subsistence of the agreement. Q Link uses deduction codes to determine to which entity deductions are to be made and informs SASSA of the amounts to be paid and to whom payment must be made. SASSA then pays the underwriting insurer. At the time of the application applicant monthly informed Q Link of changes to its clients, enabling Q Link to make the necessary changes to its deduction codes.

[6] On 6 July 2021 applicant gave KGA notice of the confirmation of the cancellation of the agreement with effect from 1 August 2021. But later accepted that it had to give a calendar month's notice and it was accepted that the termination date would be 30 August 2021. KGA replied on 6 July 2021 that it would "notify our team of the cancelation so that the necessary processes can commence" and wished the applicant luck for "the next chapter."

[7] During July 2021 the applicant gave notice to its members that the underwriters would change as from 1 September 2021. They gave notice by (a) sending short message system (sms') to all the members; (b) placing a notice on its website; and (c) posting letters to their policy holders advising them how to download new policy documents. Q Link in the mean time required a letter from KGA confirming the cancelation and

approving the transfer to AUL as well as a letter from AUL confirming its appointment.

[8] After numerous attempts to have KGA comply with the applicant's request to write the required letter to Q Link, KGA wrote a letter to the applicant that it would write the confirmation letter to Q Link "once the necessary steps in terms of applicable legislation have been followed", without specifying what those steps are and what legislation is referred to.

[9] KGA admits that the intermediary agreement has been cancelled but maintains that the underlying relationship with the policyholders has remained intact. It is KGA's case that each individual policyholder has to cancel as the Master Policy formed the contract between KGA and the individual members.

[10] KGA contends that it is entitled to the premiums paid to it until such time as the individual members have concluded agreements with AUL. It denies that AUL's scheme is structured according to statutory requirements, despite the applicant's assertion to the contrary.

[11] Furthermore, the applicant could not cancel the Master Policy as the scheme is no longer a "group" under the Insurance Act 2017.

The agreement.

[12] The applicant and KGA entered into an agreement in January 2015. A Master Policy was incorporated into the agreement. The applicant

referred to the Master Policy in the founding affidavit, but despite averring that it had been attached it had not been. Neither did KGA include the said Master Policy in its answering affidavit, although it averred that the Master Policy formed the basis of the agreement between it and the applicant's members. An unsigned copy of this policy formed part of the replying affidavit. As KGA did not object or apply to file further affidavits to such inclusion, it can be accepted that it is identical to the Master Policy that had been signed by the parties and included in the agreement. The salient terms of the agreement are:

- (a) The applicant requested KGA to underwrite a funeral group scheme in terms whereof funeral and associated benefits were offered to the applicant's clients. The applicant rendered intermediary services on behalf of the policyholders (the members of the applicant) as its principal, to KGA.
- (b) Clause 5.14 determines: 'Should an intermediary transfer from one underwriter to KGA KGA reserves the right to adjust premiums after receipt of the transfer certificate should a significant difference in claim history and ratio be evident, subject to the Policyholder Protection Rules.'
- (c) Clause 7.3 determines: '...Where an amendment form is telefaxed to KGA, the responsibility to ensure that the relevant form or instruction has been received and actioned by KGA, shall lie with the intermediary and a telefax confirmation receipt in the hands of the intermediary shall not be

regarded as proof that a specific document was received by KGA. Furthermore, the intermediary indemnifies KGA against all claims, demands, losses, damages, expenses, and charges of whatsoever nature, arising out of or in connection with the non-receipt of/and or failure to act upon any amendment from or instruction by KGA.'

(d) Clause 8.1.6 and 8.1.7 determine that the applicant is obliged to ensure that the members' cover do not exceed the maximum amount permitted under the Long-term Insurance Act 52 of 1998 or that allowed by KGA and collect participation certificates on behalf of members in terms of the section 48 of the Long-term Insurance Act and provide the same to members.

(e) Clause 8.1.14 keep and maintain proper updated records of the members and their families in terms of the group scheme.

(f) Clause 8.2.7 determines that if and when the agreement is cancelled for whatsoever reason, by the intermediary or KGA, the intermediary is obliged in terms of this contract to notify, in writing, each and every policyholder on the book of the intermediary that the underwriting agreement with KGA is cancelled.

(g) Clause 8.2.8 determines: Proof of this notice must be provided to KGA by the intermediary as confirmation that all the policyholders have been notified of the cancellation of the underwriting agreement; and

(h) Clause 8.2.9 determines: 'The compliance responsibility of Rule 15(b) of the Policyholder Protection Rules rests with the intermediary;'

- (i) Clause 8.2.10 provides that Non-compliance of this clause is a serious breach of the agreement and will lead to action in terms of clause 9 below and KGA also reserves their right to claim damages from the intermediary.
- (j) Clause 8.2.11 provides that the intermediary acknowledges that it is subject to the KGA compliance monitoring process policy the terms of which is deemed incorporated herein.
- (k) Clause 9 determines: 'Either party may terminate this agreement by giving not less than one calendar month's written notice on or before the first of the month of his intention to cancel this agreement, provided that the requirements in clause 8.2 has been adhered to. The intermediary shall remain liable for premium payments during the notice month and acknowledges that no changes may be made to membership lists during the notice month.'

[13] The Master Policy which was incorporated into the agreement determines that the assurer is KGA. Although annexure B to the Master Policy (which determines who the policyholder is) has not been completed, it is clear from the context, that the policyholder is the applicant and 'members' are the people whose applications for membership had been accepted. The salient provisions of the Master Policy are as follows.

- (a) Cessation of cover shall occur when the policyholder cancels the member's membership with the assurer (clause 4.5);
- (b) When the policyholder cancels the Master Policy with the assurer (clause 4.5);
- (c) The assurer and policyholder may cancel the Master Policy at any time by giving the other party one calendar month's written notice. (clause 14);
- (d) The policyholder may not amend the funeral policy or the membership detail after the policyholder has given notice of cancellation of the Master Policy in terms of clause 14. (clause 15.5).

Interpretation of the agreement and master policy.

[14] How interpretation of the agreement and Master Policy should be approached has been set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹ in the following terms:

'... The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality*

appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. . . .’

[15] As no provision is made in the agreement regarding what should happen on cancellation, it can be accepted by necessary implication that it was a tacit term of the agreement that the parties are restored to the position they were in prior to the conclusion of the agreement in the event of the cancellation of the agreement.² This is evident from the fact that clause 5.14 of the agreement envisages that if the applicant had transferred from one underwriter to KGA the latter would be entitled to adjust the premiums. It could only have been done had a previous agreement made provision, either tacitly or expressly, that the parties would be restored to the position they had been prior to the conclusion of the agreement. That would have the effect that the applicant could then again transfer to a new underwriter on a valid cancellation of the agreement.

[16] In evaluating the language of the agreement and the Master Policy it is obvious that both the agreement and the Master Policy make provision for the cancellation of the agreement by the giving of one month’s notice by either party. The only further proviso for the cancellation by either the

² Christie’s Law of Contract in South Africa (7th Ed) p 199.

applicant or KGA is that the applicant is to notify every policyholder, in writing that the underwriting agreement with KGA has been cancelled.

[17] In terms of the provisions of s 1 of the Electronic Communications and Transactions Act 25 of 2002 (the Act) data message means data generated, sent and received by electronic means. Furthermore, in terms of s 12 of the Act if there is a requirement that a document or information must be in writing it is met if the document or information is in the form of a data message and is accessible in a manner usable for subsequent reference.

[18] An affidavit was filed by Sarika Vermani, a self-employed person who has been working for the applicant for the past seven years as an administrator and developer. She is versed with the applicant's relationship management system and in charge of the daily functioning thereof. She sent the sms message to all the active funeral policy clients with cellphones on 30 July 2021. The wording of the sms was the following.

'2021/07/30 – Notice: A new underwriter has been appointed for your funeral policy. For details please see www.multisure.co.za or call 0879432502. Multisure Corp.'

[19] The message was sent to the 7991 members whose cellphone numbers the applicant has and it was posted to each client's profile as proof that the message had been sent. The deponent to the founding affidavit of the applicant stated that in addition to the sending of the sms'

the information was posted on its website and letters were posted to each of the policyholders that the underwriter would be African Unity Life.

[20] I am of the view that the applicant has shown that sufficient notice was given in writing.

The first respondent's regulatory role.

[21] The first respondent indicated that it has a responsibility to ensure that the applicant and the third respondent complied with the applicable legislation and regulatory prescripts. However, the first respondent has not established during argument or on the papers a basis for such overseer's role.

[22] Although the first respondent argued that the applicant is no longer included in the definition of 'group' in Schedule 2, it is a fund that holds the insurance policies exclusively for the benefit of beneficiaries.

[23] It is clear from the reading of the present Policyholder Protection Rules (PPR) and clause 20.3 thereof it is the duty of the insurer (the first respondent) to inform the Authority of the termination or intended termination and replacement of the group scheme by the policyholder. The third respondent has certain obligations as the new insurer, eg. to communicate any material differences between the terms and conditions of the new group scheme policy and the group scheme being substituted or replaced and the reasons for such differences.

[24] It is not within the realm of the first respondent's rights or obligations to see to it that either the applicant or the third respondent comply with any regulatory prescripts once the contract has been cancelled. As was said by Mr Justice PM Nienaber, the erstwhile Ombudsman for Long-term Insurance in an article³:

'Much of the funeral insurance business in South Africa, many believe, is blighted: fraud is rife; irregularities abound; some operators function both illegally and unscrupulously; and the public, especially the less affluent segment, is on occasion cynically exploited. But all is not unsavoury. Many registered insurers and licensed intermediaries active in this area are above-board and render an invaluable service to the community as a whole. Funeral insurance fulfils an unmistakable need and there are thousands of policies in South Africa operating regularly and without mishap.'

[25] I am of the view that the applicant has shown that it is entitled to the relief claimed and the following order is made.

(a) It is declared that "*the Intermediary Agreement – Multisure Corporation – Underwritten by KGA life Ltd*" and the Master policy forming part thereof ("the Agreement") between the Applicant and the First Respondent has been cancelled and accordingly is of no further force and effect from 1 September 2021;

(b) It is declared that the Group Scheme established and underwritten by the First Respondent by virtue of the provisions of the Agreement

³ Funeral Insurance: A Perception from the Office of the Ombudsman for Long-term Insurance. <http://www.ombud.co.za>.

(“the Group Scheme”) has been terminated accordingly with effect from 1 September 2021 and is of no further force and effect (save to the extent that the First Respondent retains any risk beyond the termination date by virtue of the provisions of the Group Scheme);

(c) Q LINK is authorised and directed within 24 hours of the service upon it of this Order to alter the deduction codes on its electronic administrative system which currently provide for payment by the South African Social Security Agency (“SASSA”) to the First Respondent of premiums payable by insured persons in terms of policies forming part the Group Scheme, to instead provide for payment of premiums payable by insured persons in terms of policies transferred to and now forming part of the group scheme concluded with the Third Respondent (“AUL”), to AUL;

(d) The First Respondent is directed within 24 hours of the service upon it of this Order to pay directly to AUL, by means of electronic funds transfer to its bank account the full aggregate amount of all premiums received by the First Respondent from SASSA (as directed by Q LINK in terms of its payment and deduction system) from members of the Group Scheme as established pursuant to the Agreement with effect from 1 September 2021.

(e) That the First Respondent pay the costs of this application.

A handwritten signature in black ink, appearing to read 'Irma Schoeman', written over a horizontal line.

Irma Schoeman

(Judge of the High Court)

COUNSEL FOR THE APPLICANT:

Instructed by:

ADV RICHARDS

GOLDBERG & DE VILLIERS INC

Pembridge House

13 Bird Street

Central

GQEBERHA

COUNSEL FOR THE RESPONDENT:

Instructed by:

ADV ELLIS

VAN LIERES COOPER & BARLOW

c/o GREYVENSTEINS

St Georges House

104 Park Drive

Central

GQEBERHA