



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 304/2022

In the matter between:

KGA LIFE LIMITED

APPELLANT

and

MULTISURE CORPORATION (PTY) LTD FIRST RESPONDENT

Q LINK HOLDINGS (PTY) LTD SECOND RESPONDENT

AFRICAN UNITY LIFE LIMITED THIRD RESPONDENT

FUNERAL FEDERATION OF

SOUTH AFRICA

AMICUS CURIAE

Neutral citation: *KGA Life Limited v Multisure Corporation (Pty) Ltd and Others (with Funeral Federation of South Africa intervening as Amicus Curiae (304/2022) [2023] ZASCA 122 (20 September 2023)*

Coram: MOLEMELA, MBATHA, and WEINER JJA and OLSEN and MALI AJJA

Heard: 7 March 2023

Delivered: 20 September 2023

Summary: Funeral Group Scheme – termination of contract between intermediary and insurer – Insurance Act 18 of 2017 (the 2017 Act) – effect on contract, concluded before promulgation of the 2017 Act, between insurer and intermediary – contract not complying with provisions of the 2017 Act – contract unenforceable by reason of supervening illegality.

ORDER

On appeal from: Eastern Cape Local Division of the High Court, Gqeberha (Schoeman J, sitting as court of first instance):

- 1 The application to adduce further evidence on appeal is dismissed with costs.
- 2 The appeal is upheld.
- 3 There is no order as to the costs of the appeal.
- 4 The order of the High Court is set aside, and the following order replaces it:
 - ‘1 The application is dismissed.
 - 2 There is no order as to costs.’
- 5 The Registrar is directed to refer a copy of this judgment to the Prudential Authority under the Insurance Act 18 of 2017.

JUDGMENT

Weiner JA and Olsen and Mali JJA (Molemela and Mbatha JJA concurring)

Introduction

[1] This is an appeal against the judgment and order of the Eastern Cape Local Division of the High Court, Gqeberha (the high court). The high court granted judgment in favour of Multisure Corporation (Pty) Ltd (Multisure) against KGA Life Limited (KGA), in the following terms:

- ‘1. 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.
2. That the Group Scheme established and underwritten by the First Respondent by virtue of the provisions of the Agreement (“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).
3. That Q Link is authorised 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 of 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.
4. The First Respondent 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 the Agreement with effect from 1 September 2021.
5. That the First Respondent pay the costs of this application.’

[2] Aggrieved by the decision of the high court, the appellant, KGA sought leave to appeal. The appeal serves before us with the leave of the high court.

[3] KGA is a ‘licensed insurer’ as defined in s 1 of the Long-Term Insurance Act 52 of 1998 (the 1998 Act)¹ and registered as such under the Financial Sector Regulation Act 9 of 2017 (the FSRA).²

[4] The first respondent is Multisure, an independent intermediary as defined in s 1 of the 1998 Act, and regulation 3.1 of the regulations promulgated under the 1998 Act.³ Multisure’s business is to market and sell funeral cover plans for various companies to individuals and families (funeral policies).

[5] The second respondent, Q Link Holdings (Pty) Ltd (Q Link) is a service provider appointed by the South African Social Security Agency (SASSA), to administer, inter alia, the deductions from moneys due to social grant beneficiaries, which moneys are paid to various creditors of such beneficiaries. It uses deduction codes for each creditor. Its mandate is to inform SASSA of the amounts to be paid and to whom. SASSA then makes direct payments to the creditors, in this case to the insurer to whom premiums for funeral insurance are due.

¹ Section 1 of the Long-Term Insurance Act 52 of 1998 (the 1998 Act) defines the term ‘licensed insurer’ as follows:

‘(a) a previously registered insurer as defined in Item 1 of Schedule 3 to the Insurance Act who has been granted a license under section 23 of the Insurance Act within the period referred to in item 6 (2) of Schedule 3 to the Insurance Act; or

(b) a person who has been licensed under section 23 of the Insurance Act after the date on which that Act commenced.’

² Section 1 of the Financial Sector Regulation Act 9 of 2017, under its definitions, states that an ‘eligible financial institution’ means each of the following:

‘(a) A financial institution licensed or required to be licensed as a bank in terms of the Banks Act;

‘(b) a financial institution licensed or required to be licensed as a long-term insurer in term of the Long-term Insurance Act or a short-term insurer in terms of the Short-term Insurance Act.’

³ Regulation 3.1 of the 1998 Act defines ‘independent intermediary’ as follows:

‘a person, other than a representative, rendering services as intermediary.’

[6] The third respondent, African Unity Life Limited (AUL), is the proposed new underwriter, chosen by Multisure to replace KGA.

[7] The Funeral Federation of South Africa (FFSA) applied to be and was admitted, as *amicus curiae* (*amicus*). The FFSA is an organisation whose aims include the promotion and advancement of the interests of funeral service providers that provide funeral insurance to members of the general public.

Application to adduce further evidence on appeal

[8] In this Court, KGA made an application to adduce further evidence on appeal. The basis for the application was to introduce an email received from the Financial Sector Conduct Authority (the FSCA) as designated in terms of the Financial Intelligence Centre Act 38 of 2001. The FSCA is a market conduct regulator of financial institutions. KGA submitted that the introduction of the email was sought to respond to the submissions of the *amicus*. The essence of the letter by the FSCA was that Multisure was cautioned not to settle claims of its members as it was not an insurer. Paragraph 8 of the letter from the FSCA reads as follows:

‘We are aware that the matter is subject to litigation between the KGA Life and Multisure and an outcome has not yet been provided. In this regard, the Authority does not intend to resolve contractual disputes between the parties.’

[9] Multisure opposed the application, on the basis that the letter was hearsay, and the FSCA was aware that the matter was *sub judice*. Its opinion, in any event, was not binding on the Court. This Court does not admit opinion evidence unless it is tendered as expert evidence in terms of the relevant Rules of Court and procedures. This opinion was clearly not that of

an expert and did not meet any of the requirements for the introduction of new evidence on appeal.⁴ In the result the application to adduce further evidence on appeal is dismissed with costs.

Background and common cause facts

[10] Multisure had a large body of clients with whom it had concluded funeral policy agreements by admitting each client to membership of Multisure's group funeral insurance scheme. On 14 January 2015, KGA and Multisure entered into an Intermediary Agreement (IA) which incorporated a Master Policy (MP) underwritten by KGA. The majority of Multisure's clients or members are social grant beneficiaries, whose payments for funeral cover are made by SASSA.

[11] KGA agreed, in terms of the two agreements, to underwrite and provide the necessary cover to Multisure's clients under a group scheme. During the subsistence of the IA, SASSA decided that it would make payments directly to the insurer (in this case KGA) under the group scheme, and not to the intermediary (in this case Multisure) as such agreements originally contemplated. It appointed Q Link to administer the deductions from the social benefits administered by SASSA. Q link, through the use of specific deduction codes, categorises the deductions and informs SASSA of the amount to be paid to the creditor in question.

[12] There were ultimately three documents produced by Multisure as material to an understanding of the nature of the scheme:

⁴ *O'Shea NO v Van Zyl NO and Others (Shaw NO and Others Intervening)* [2011] ZASCA 156; 2012 (1) SA 90 (SCA); [2012] 1 All SA 303 (SCA) para 9.

- (a) The membership application form to be signed by Multisure's clients (the membership application).
- (b) The 'Intermediary Agreement – Multisure Corporation – Underwritten by KGA Life Limited'.
- (c) The Master Policy issued by KGA.

These documents are, to a greater or lesser extent, internally confusing and, in certain respects, they do not speak to each other with sufficient clarity.

[13] The membership application form has an agreement attached to it which is described as an agreement between Multisure and its client who applies for membership of 'Multisure's Funeral Plan' (the membership agreement). It provided that a member must pay 'membership fees', which can be 'reduced or increased in the sole discretion of Multisure'. The only clue as to what the term 'membership fees' conveys is to be found in clause 15 of the IA which records that, in addition to commission payable by KGA, Multisure will be entitled to 'the fee arranged between the intermediary and its clients'. In completing the membership form, the client authorises Multisure to institute and control debit orders on the client's bank account. Nothing is said about SASSA's role in these matters. The membership agreement imposes no obligations on Multisure, save for the implicit obligation of acting as intermediary between members and KGA.

[14] The membership agreement records that the MP is available for inspection at the head office of KGA, that it contains the 'full terms/rules and conditions' of the contract, and that the provisions of the MP prevail in the event of a 'discrepancy'. The word 'policyholder' is usually used in the MP to denote Multisure. However, that usage is not altogether consistent as there

are some contexts in which the word appears to be a reference to a member of the group scheme. It affords both Multisure and KGA the right to cancel the MP. It requires KGA to issue a ‘participation certificate’ in respect of each new member.⁵ The provisions of the MP bind KGA to pay claims but the MP provides no clarity on the issue as to whether the claims are to be paid directly to the member (or the member’s nominee), or to Multisure.

[15] Each of Multisure and KGA had the right to cancel the IA. There is no provision to the effect that Multisure must have the permission of its membership to do so, or must consult them in any way.⁶ Multisure contends that it is the policyholder and that the MP terminates with the IA, sometimes called the ‘underwriting agreement’ in the papers. This is consistent with the general tenor of the group scheme. The IA provides that claims will be paid to Multisure. Members are not party to the intermediary agreement.

[16] The IA provides that, if the agreement was cancelled, for any reason, by either Multisure or KGA, Multisure is obliged to notify ‘in writing, each and every policyholder on the book of the intermediary that the underwriting agreement with KGA has been cancelled’. The consequences of termination are provided for in both the IA and MP. The termination provisions require one month’s notice from either party. There is no dispute that Multisure complied with this, but the issue is whether there was a contract to cancel, having regard to the provisions of the Insurance Act 18 of 2017 (the 2017 Act), which will be elaborated upon below. The MP provides that, in the event

⁵ That provision has not been dealt with in the papers, and one does not know whether, in its terms, it establishes or assumes a direct contractual relationship between KGA and the member concerned.

⁶ There is no evidence that, in purporting to cancel, or cancelling, the intermediary agreement, Multisure acted otherwise than entirely unilaterally.

of Multisure terminating it, the cessation of cover of Multisure's clients would follow and that during the notice period Multisure would remain liable for payment of the premium to KGA.

[17] There is no dispute between the parties that, until the 2017 Act was promulgated, the group scheme was valid and lawful. This is despite the fact that the provisions governing the scheme, before the 2017 Act, gave Multisure vast powers over the funeral insurance interests of the members of the scheme.

Issues

[18] The parties originally raised several issues upon which this appeal was said to turn. They were whether:

- (a) Multisure had notified each and every policyholder of the cancellation;
- (b) Multisure had lawfully terminated the MP;
- (c) an underlying contractual relationship existed between KGA and the individual clients who formed part of the group scheme and whether this contractual relationship existed independently of the MP, and remained intact despite Multisure's cancellation of the IA;
- (d) given the provisions of the 2017 Act, each member of the Group Scheme had to individually cancel the policy with the insurer, KGA, as the group scheme under Multisure no longer existed;
- (e) the reference in paragraph (c) of the order to 'the group scheme concluded with the AUL' is ineffectual because of the definition of 'group' introduced in schedule 2 to the 2017 Act;
- (f) Multisure had complied with all the legal requirements in terms of the 2017 Act, in that AUL had not, in terms of the Act communicated to the

members the material differences of its proposed scheme compared to KGA's policy;

(g) the cancellation of the MP would bring about the end of the group scheme with the result that there was nothing that KGA could transfer to AUL as provided by the order of the high court; and

(h) the order of the high court directing KGA to make payment of all premiums that it had received from the effective date of cancellation of 1 September 2021 to date of the order, was justified, inter alia as KGA remained on risk after 1 September 2021.

In view of the conclusion to which we have come, other than the legislative issues mentioned in paragraphs (d) and (e), these issues do not need to be decided.

The Insurance Act 18 of 2017

[19] The 2017 Act was promulgated with effect from 1 July 2018. The promulgation of the Act and its regulations brought about substantive changes to the definition of a group scheme and a policyholder. The objectives of the 2017 Act, as contained in s 3, are:

‘...[to] promote the maintenance of a fair, safe and stable insurance market for the benefit of policyholders by establishing a legal framework for the prudential regulation and supervision of insurers and insurance groups that –

- (a) facilitates the monitoring and the preservation of the safety and soundness of insurers;
- (b) enhances protection of policyholders and potential policyholders;
- (c) increases access to insurance for all South Africans;
- (d) promotes broad-based transformation of the insurance sector; and
- (e) contributes to the stability of the financial system in general.’

[20] An issue of legality looms large in this appeal. It arises as a result of the changes brought about by the 2017 Act to the regulation of the funeral insurance industry. Our concern that the issue had perhaps not received the attention it deserved during oral argument led to a note being sent to the parties inviting further submissions on the subject. Those have been delivered and we are grateful for the assistance thus given.

[21] The founding papers make no reference to the 2017 Act at all. It is clear that they were drafted upon the basis that the reader should suppose that there was nothing at all wrong with the group scheme, and that what was proposed was that AUL would simply take over as group underwriter. (In one paragraph of the founding affidavit, it is expressly stated that AUL would be ‘the new underwriter’ which would be ‘taking over’.) It was only in its answering affidavit that KGA raised the issue of the 2017 Act, contending that the Act rendered both the IA and the MP (as a group policy) invalid.

[22] The founding affidavit is clear upon the point that Multisure’s decision to put an end to its relationship with KGA was a consequence of AUL having offered better terms which KGA could not match. Nothing is said in the founding papers to contradict the implication that AUL was in effect tendering for the position of underwriter under the same group scheme as was, according to Multisure, in force until the date upon which it severed its contractual relationship with KGA. The implications of the 2017 Act were simply ignored. The relief of substance sought by Multisure is, inter alia, an order for the redirection of deductions from social welfare grants to AUL which,

according to Q Link's rules, cannot be executed as a mass transfer without the agreement of the current insurer (KGA in this case).⁷

[23] The rules of Q Link relied upon by Multisure deal with the 'transfer of policies between Q Link insurers'. There is no doubt that the transfer rule adopted by Q Link is designed for the transfer of groups of insurance premium deductions from one insurer to another. It can have no application, for instance, when an individual seeks to cancel a deduction in favour of one insurer and establish a new one in favour of another insurer.

[24] KGA, in its answer, denied that it was under any obligation to participate in Q Link's group transfer process by advising Q Link in writing that KGA had no objection to the request for the redirection of deductions. Its first argument in support of that proposition is that Multisure's cancellation of the intermediary agreement brought the group scheme to an end, as a result of which there was nothing to transfer. The second argument advanced by KGA in support of its refusal to co-operate involves the changes brought about by the 2017 Act.

[25] KGA submits that the 2017 Act resulted in significant changes to group insurance policies. It raises the issue of the lawfulness of the group scheme. It puts its case as follows:

'As I have said above, what is apparent – if it was within the applicant's power to terminate the Master Policy – is that the group scheme created in terms of the intermediary agreement and Master Policy, cannot simply be 'taken over' en-masse and underwritten by a new

⁷ There is no reason to suppose, and it appears to be undisputed, that each of Multisure's members could, as an individual, cancel the deduction against her or his grant, but that would entail individual re-registration of commission deductions in favour of AUL, an apparently time-consuming and costly exercise.

insurer. The new insurer will have to enter into individual funeral policies with each and every policyholder and member of the defunct group scheme.’

[26] The 2017 Act replaced the system of registration of insurers with a licencing system. The Act recognised the need for transitional provisions which allowed time for the conversion of registration to licencing. The subject was dealt with in Schedule 3 to the Act. Item 6 allowed registered insurers to continue to conduct the insurance business for which they were registered until their registration was converted to a licence. Item 6 (2) provided that the Prudential Authority should convert the registrations of all previously registered insurers to licences in accordance with the 2017 Act within a period of 2 years after the effective date, which was 1 July 2018. We must assume that KGA’s registration allowed it to conduct funeral insurance business with respect to groups. It is common cause on the papers that when the litigation commenced KGA was a licenced insurer. Nothing is said about when it obtained its licence; but it was presumably before 1 July 2020.

[27] Section 5(1) of the 2017 Act reads as follows:

‘No person may conduct insurance business in the Republic unless that person is licenced under this Act.’

Section 23(4) of the 2017 Act is to the effect that a licence must specify, inter alia, the type of insurance business for which the insurer is licensed and the classes and sub-classes of insurance business that the insurer may conduct. Section 25(2) amplifies this by providing that, in addition to being licensed to conduct life or non-life insurance business, the insurer must be licensed ‘to conduct one or more of the classes or sub-classes of insurance business set out in Schedule 2’.

[28] Table 1 of Schedule 2 sets out the classes and sub-classes of insurance business. The class we are concerned with is funeral insurance which has two sub-classes, one named ‘individual’ and the other ‘group’. Schedule 2 opens with a number of definitions, the material one being the definition of a ‘group’ which reads as follows:

“‘group’ in respect of the classes of insurance business, relates to an insurance policy entered into with –

- (a) an autonomous association of persons united voluntarily to meet their common or shared economic and social needs and aspirations (other than obtaining insurance), which association is democratically-controlled;
- (b) an employer; or
- (c) a fund,

where the association, employer or fund holds the insurance policy exclusively for the benefit of a beneficiary.’

[29] Previously, a ‘group scheme’ was defined in the regulations⁸ under the 1998 Act as ‘a scheme or arrangement which provides for the entering into of one or more policies, other than an individual policy, in terms of which two or more persons without an insurable interest in each other, for the purposes of the scheme, are the lives insured’.

[30] The definition of a ‘group scheme’ in regulation 3(1) in part 3A was replaced with the following definition:

‘Group scheme’ in respect of a —

- (a) registered insurer means a scheme or arrangement which provides for the entering into of one or more policies other than an individual policy, in terms of which two or more

⁸ GNR.1492 of 27 November 1998: Regulations under the Long-Terms Insurance Act, 1998 (Act no. 52 of 1998) (Government Gazette No. 19495).

persons without an insurable interest in each other, for the purposes of the scheme, are the lives insured;

(b) a licenced insurer, means a policy with a group as defined in Schedule 2 of the Insurance Act.’

[31] Section 5(1) of the 2017 Act must be read together with the licencing provisions already referred to in ss 23 and 25 of that Act, and in particular s 25(4)(a), which is to the effect that a licenced insurer ‘may only conduct insurance business in the classes or sub-classes of insurance business set out in Schedule 2 for which it is licensed in accordance with subsection (2)’. Section 5(1) of the 2017 Act must accordingly be interpreted to convey that no person may conduct insurance business unless that person is licenced under the Act to do so in respect of that business. As already mentioned, the effect of the 2017 Act on Multisure’s scheme was ignored in the founding papers. Having been raised in the answering papers, Multisure conceded in reply that ‘the agreement and the group scheme as it *de facto* existed and was implemented by the applicant and the first respondent at the time of its cancellation did not comply with now current legislative provisions’. A consideration of the legislation illustrates that the concession was correct with effect from the date upon which KGA obtained its licence.⁹

[32] In the result, with effect from not later than 1 July 2020, Multisure’s group scheme, manifested in the three agreements already described above, constituted a contract for the unlawful conduct of unlicensed insurance business – a contravention of s 5(1) of the 2017 Act which, in terms of s 69 of

⁹ Multisure sought to withdraw this concession which it submitted was legally untenable.

that Act, constitutes an offence which, on conviction, attracts a fine not exceeding R10 million.¹⁰

[33] In its replying affidavit Multisure made the following statement:

‘However subsequently to 1 July 2018 the first respondent [KGA] took no steps to terminate the agreement and simply continued to underwrite and administer the group scheme as it has done previously and the applicant [Multisure] went along with this.’

[34] However, there is no allegation that either Multisure or KGA were unaware of the fact that steps had to be taken to undo the group scheme and replace it with contractual relationships between the parties which would be lawful under the 2017 Act. It was indeed unlawful for them to proceed as they did once KGA ceased to be a registered insurer and became a licenced insurer. It is apparent from the submissions made on behalf of the *amicus*, the FFSA, that the changes to the future conduct of the funeral insurance industry brought about by the 2017 Act caused consternation in the industry. It, in effect, excludes intermediaries doing business as Multisure, and many others, had done prior to the coming into effect of the new regulatory scheme.

[35] With effect from the date upon which KGA became a licenced insurer, the group scheme, the provisions of which are set out in the three agreements referred to above (the membership agreement, the IA and the MP), became a contractual arrangement for the performance of an unlawful act, namely the

¹⁰ Section 69(1) of the 2017 Act provides as follows:

‘Any person commits an offence and is on conviction liable to a fine not exceeding R10 million if that person—

(a) contravenes or fails to comply with a provision of section 5(1), 10 or 29(2) or 29(3); or

(b) fails to comply with a request under section 43 (2).’

conduct of insurance business by KGA in breach of s 5(1) of the 2017 Act. If, upon a proper construction of the provisions of the Act, the contracts comprising the group scheme became invalid and unenforceable, through the intervening legislation, Multisure's subsequent purported cancellation had no legal consequences, as there were no valid contracts to terminate. Furthermore, Multisure disclosed no source of the powers and rights it purported to exercise in:

- (a) acting on behalf of the members;
- (b) appointing AUL as the insurer of the scheme members; and
- (c) demanding a change in the Q Link deduction codes to establish a regime of payments to AUL,

other than such as can be derived from the contracts comprising and recording the terms of the group scheme

[36] The general principle applicable in these circumstances was put as follows by Innes, CJ in *Schierhout v Minister of Justice (Schierhout)*:¹¹

'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. ...So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the law giver has expressly so decreed or not; the mere prohibition operates as to nullify the act.'

It has subsequently been accepted in our law that the general principle thus stated is subject to a qualification, and the judgment usually cited as the source of the qualification is that of Solomon JA in *Standard Bank v Estate van Rhyn*,¹² where the following was stated:

¹¹ *Schierhout v Minister of Justice* 1926 AD 99 (*Schierhout*) at 109.

¹² *Standard Bank v Estate van Rhyn* 1925 AD 266 at 274.

‘The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the legislature, and, if we are satisfied in any case that the legislature did not intend to render the act invalid, we should not be justified in holding that it was.’

[37] Of course in this case we are dealing with an express prohibition – not an implied one. Citing *Schierhout* as authority, the general principle was again stressed in the majority judgment in *Cool Ideas 1186 v Hubbard and Another (Cool Ideas)*.¹³ The principle was put as follows in the concurring minority judgment:

‘However, the question whether non-compliance with a statutory prohibition would nullify an act is determined with reference to the language of the statute concerned. But it is important to note that where a statutory provision under consideration amounts to a prohibition such as the ones contained in s 10(1) of the Housing Protection Act, an act performed contrary to it would be invalid, unless it is clear from the statute that, in the light of its scope and object, invalidity was not intended. In other words, it is the prohibition which “operates to nullify the act” performed contrary to it.’¹⁴

[38] The invalidity of a contract afflicted by supervening illegality of performance, such as has occurred here, must follow if the prohibited act, in this case the unlawful conduct of unlicensed insurance business, would be a nullity.¹⁵ The central, if not the sole purpose of the agreements in this case is the conduct of an unlawful group funeral insurance scheme which is

¹³ *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*).

¹⁴ *Ibid* para 91.

¹⁵ As to the term ‘supervening illegality of performance’, see *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (A) at 1205G-I.

prohibited under the 2017 Act. We are not dealing with a prohibition of some marginal or collateral feature of the contract which can be severed from it without fatal harm to the principal intent and purpose of the contract.

[39] The enquiry is, accordingly, whether on a proper construction of the 2017 Act, and despite the provisions of that Act, the conduct of group funeral insurance business (for which a licence cannot be obtained) is nevertheless not to be regarded as a nullity. This would fly in the face of the judgment of Jafta J in *Cool Ideas*, in which it is made clear that conduct performed contrary to a prohibition, would be invalid.¹⁶

[40] The material part of the unusually brief preamble to the 2017 Act reads as follows:

‘To provide for a legal framework for the prudential regulation and supervision of insurance business in the Republic that...promotes the maintenance of a fair, safe and stable insurance market...’

[41] Section 3 of the 2017 Act, headed ‘Objective of the Act’, is to the same effect, recording in particular that a fair, safe and stable insurance market is sought ‘for the benefit and protection of policyholders’. Section 2 of the Act, headed ‘General Interpretation of the Act’ provides in s 2(1)(a) that the Act must be interpreted and applied in a manner that gives effect to the objective of the Act set out in s 3.

[42] In our view, Multisure takes far too narrow a view of the concept of the interests of policyholders when it argues, in essence, that the legislature could

¹⁶ *Cool Ideas* para 91.

not have intended that policyholders under a prohibited group insurance contract should be deprived of any claim they have under a group funeral insurance policy for which no licence is held. It is significant that the type of association of persons which qualifies as a group under Schedule 2 to the 2017 Act must not only be one formed for a shared or common purpose other than obtaining insurance, but must also be democratically controlled. The clear legislative intent is to avoid the potentially prejudicial outcomes which are possible when a group scheme is under the control of an intermediary or an insurance company, or both, given that the only interest such parties have in the conduct of funeral insurance business is the extraction of profit from the payments required of the policyholders for the desired funeral cover.

[43] It would be irrational to assume that the 2017 Act intended, despite the provisions referred to above, to simultaneously endorse as enforceable group schemes of the type no longer permitted. The only immediately apparent purpose behind the decision to no longer permit group insurance business of the type formerly conducted by Multisure, is that it serves to promote the maintenance of a fair and safe insurance market for the benefit and protection of policyholders. This is clear from the preamble to the 2017 Act. No other suggestion was made in argument, nor in the papers.

[44] Consistent with its argument that there is no relationship between KGA and the group's members, Multisure contends that it is or was the policyholder, entitled to protection. Upon a proper construction of the 2017 Act, Multisure is not a policyholder in the sense in which that term is used in a context such as is found in s 3 of the 2017 Act. It pays no premiums and it is not the beneficiary of any claims which might arise out of what is, or

purports to be a contract of funeral insurance. There is no evidence of a legislative intent to protect the interests of a deviant insurer or intermediary from the demise of a scheme, the purpose of which is the conduct of unlawful insurance business.

[45] On the other hand, there is clear evidence of legislative concern for the ultimate policyholders in a scheme such as that run by Multisure, that is to say its members. The members' interests in the event of their contracts being nullified for unlawfulness are purely financial, and they are given a remedy under s 67 of the 2017 Act which reads as follows:

‘67 Unlicensed Insurers Business

(1) If a person contravened or is contravening s 5(1) of this Act the prudential authority, in addition to any other action that the prudential authority may take under this Act or the Financial Sector Regulation Act, may –

(a) direct that person to make arrangements satisfactory to the prudential authority to discharge all or any part of the obligations under insurance policies entered into or purported to be entered into by that person; or

(b) apply to court for the sequestration or liquidation of that person, whether he/she or it is solvent or not, in accordance with the Insolvency Act 1936 (Act 24 of 1936), the Companies Act, the Co-Operatives Act or the law under which that person is established or incorporated’.

[46] The legislature saw the need to allow a period for the conversion of registration to licencing. During that period, it was self-evidently the duty of insurers, and in a case like the present, the duty of insurers and associated intermediaries, to alter the terms upon which they conducted business where that was necessary because no licence would be available for the type of

business for which the insurer was previously registered. The proposition that, despite the fact that the legislature fixed a period of two years within which these changes had to be made, it was nevertheless intended that where the deadline was not met, the insurance business could continue as before, subject only to criminal sanction, and that contracts for the performance of the now prohibited insurance would be enforceable, is simply not sensible.

[47] Against a conclusion that its group scheme, and the contracts which recorded its provisions, have become invalid and unenforceable, Multisure argues that rules 7.3.1 and 7.3.2 of the Policyholder Protection Rules published in terms of s 62 of the 1998 Act determine the position. Section 62(1)(a) provides as follows:

‘(1) The Authority, by notice in the *Gazette*, may –

(a) prescribe rules not in consistent with this Act, aimed at ensuring for the purpose of policyholder protection that policies are entered into, executed and enforced in accordance with sound insurance principles and practice in the interests of the parties and in the public interest generally.’

[48] The rule relied upon by Multisure reads as follows:

‘7.3 Validity of Contracts

7.3.1. a policy is not void merely because a provision of the law, including a provision of the Act or the Insurance Act, has been contravened or not complied with in connection with that policy.

7.3.2 If a person has entered into a policy with an insurer who was, in terms of the Act or the Insurance Act, prohibited from entering or not authorised to enter into the policy, or with another person who is not an insurer but who has in terms of the policy undertaken an obligation as insurer, that person, by notice in writing to such insurer or other person, or the Authority by notice to such insurer or other person and on the official website, may cancel the policy, whereupon that person shall be deemed to be in the same legal position

in respect of such insurer or other person as if the policy had been cancelled by that person on account of a breach of contract by such an insurer or other person.’

[49] This argument cannot prevail for the following reasons.

(a) First, we are not dealing with a policy challenged ‘merely’ because it has contravened, or is not compliant with, some or other provision of law in connection with that policy. The issue in this case is far more fundamental. We are concerned with the conduct of insurance business entirely prohibited under the provisions of the 2017 Act.

(b) Secondly, Multisure’s contention that a declaration of what the law is on the question as to whether a policy is void or not, falls within the power given to the Prudential Authority to make rules, is ill-conceived. The rules in question are aimed at seeing to it that ‘policies are entered into, executed and enforced in accordance with sound insurance principles and practice’. It is difficult to see how declaring enforceable what would otherwise be unlawful and void, can be consistent with sound insurance principles and practice.

(c) Thirdly, and most importantly, the issue in this case, insofar as it concerns legislative provisions, is whether an Act of Parliament (the 2017 Act) rendered contracts for the performance of prohibited insurance business void and unenforceable. If the Act has that effect, the Prudential Authority had no power to make a rule countermanding, as it were, the provisions of an Act of Parliament.

[50] Multisure has argued further that upholding this appeal in full will mean that this Court gives its ‘imprimatur to the continued unlawful conduct of KGA of its insurance business in respect of the SASSA grant recipients...’. Putting aside KGA’s contention that it has lawfully insured, and continues

lawfully to insure, Multisure's former members, the argument misses the point entirely. To succeed in this litigation, Multisure had to establish first that it had the power, unilaterally and lawfully:

- (a) to ordain that AUL would replace KGA as the underwriter of Multisure's group scheme (its case on the founding papers); or
- (b) to determine that each of its former members would be bound to enter into an individual funeral insurance policy with AUL (its case in reply, dealt with below); and
- (c) to authorise the institution of new deductions against the social grants payable to its members or former members.

[51] A finding that Multisure has failed at the first hurdle does not constitute an endorsement of KGA's conduct, or a finding that it has a sound claim as of right to continue to be at risk (against receipt of premiums) in respect of the funeral policy interests of the individual former members of Multisure's group. Those questions are not reached in this appeal.

[52] Multisure sought to change its case in reply. It concedes that AUL is not going to take over as underwriter of a group insurance scheme. It is going to issue individual policies to each of the former members of Multisure's now unlawful group scheme. The central argument introduced in reply is that this Court should dismiss the appeal so as to allow the insurance business generated by the members of the former scheme to be conducted with AUL in compliance with the 2017 Act.

[53] This new approach by Multisure offered in reply, which is of course not the case that KGA was called upon to answer, raises a number of questions:

(a) How and when did Multisure acquire authority from each of its 8000 members to conclude individual insurance policies with AUL? Nothing is said on this score in the replying affidavit.

(b) Is paragraph 3 of the order of the high court, catering for the alteration of deduction codes ‘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 [AUL]’, justified? No individual policies are being transferred. There is no longer a ‘group scheme’ as defined in the 2017 Act.

(c) As already discussed, the Q Link transfer rules relied upon by Multisure as generating an obligation on the part of KGA to indicate to Q Link, in writing, that KGA has no objection to what is proposed, contemplates a situation in which the mass transfer of deduction codes is justified because the grant beneficiaries involved form a group. The particular provision in Q Link’s transfer rules relied upon by KGA reads as follows:

‘The current insurer must indicate that he agrees with the movement of the policies on a letterhead.’

The position adopted by Multisure in reply is that there will in fact be no transfer of policies, as new individual policies will be concluded between each of the former members of the Multisure group scheme, and AUL.

(d) The order sought for disgorgement of the premiums which KGA has received from SASSA since the alleged cancellation of the intermediary agreement, rests upon the disputed proposition that since then, KGA has been carrying on with the group insurance business on its own, whereas it was the right of AUL to do so during that period. It now appears that there is little if any relationship between what AUL proposes to do as insurer, and what KGA is alleged to have been doing as a group insurer. There is, in fact, no evidence

of any individual policies having been issued, let alone any attempt to equate the money received by KGA with what would have been received by AUL in terms of the proposed individual policies, the terms and conditions of which have not been disclosed by Multisure.

[54] The general rule that things done contrary to statutory prohibition are invalid, which has as a consequence that contracts for the performance of those things are invalid, applies. In the result, there was no contract to be cancelled at the time Multisure purported to do so, and Multisure had no power or right to appoint AUL as a substitute for KGA as the underwriter of what had become its defunct group funeral insurance scheme. Multisure equally had no right or power to ask Q Link to make deductions from the SASSA entitlements of its former members and to pay those monies over to AUL. The case sought to be made by Multisure in its founding papers must accordingly fail. For similar reasons, and for the further reasons discussed above, if we were inclined to entertain the claim made in reply, the outcome would be the same.

[55] KGA's appeal must accordingly succeed. This does not amount to this Court sanctioning KGA's non-compliance with the 2017 Act, nor its subsequent conduct. However, the relief sought by Multisure cannot succeed for the reasons set out above.

[56] This litigation, and the disputes which gave rise to it, originate in the decision by KGA and Multisure not to reorganise their business to comply with the provisions of the 2017 Act. As far as can be judged from their affidavits, the parties have been acting throughout in pursuit of their personal

financial interests, and with scant regard for the funeral insurance interests of the members. For this reason, our conclusion is that each party should bear its own costs, both here and in the high court.

[57] Having regard to the consequences of the outcome of this judgment for the funeral insurance industry, as contended by the amicus, the Registrar of this Court will be directed to refer a copy of this judgment to the Prudential Authority.

Order

[58] In the result, the following order is made:

- 1 The application to adduce further evidence on appeal is dismissed with costs.
- 2 The appeal is upheld.
- 3 There is no order as to the costs of the appeal.
- 4 The order of the High Court is set aside, and the following order replaces it:
 - ‘1 The application is dismissed.
 - 2 There is no order as to costs.’
- 5 The Registrar is directed to refer a copy of this judgment to the Prudential Authority under the Insurance Act 18 of 2017.

S WEINER
JUDGE OF APPEAL

P OLSEN
ACTING JUDGE OF APPEAL

N MALI
ACTING JUDGE OF APPEAL

Appearances

For appellant: JJ Meiring (with N Dwayi)
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For first respondent: JJ Nepgen
Instructed by: VIC Skeleton Inc., Gqeberha
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For Amicus Curiae: M Klein
Instructed by: Matthew Klein Attorneys, Pretoria
Phatshoane Henney Attorneys, Bloemfontein.