



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

NOT REPORTABLE

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

Govindjee J

Background

[1] The applicant ('Multisure') conducts business as an independent intermediary, as defined in s 1 of the Long-term Insurance Act, 1998¹ ('the LIA').² It markets and

¹ Act 52 of 1998.

² This is defined in the applicable regulations as a person, other than a representative, rendering services as intermediary: Regulation 3.1 of the Regulations under the Long-term Insurance Act, 1998 (Act 52 of 1998) *GNR 1492* of 27 November 1998, as amended. 'Rendering services as intermediary' is also defined in the regulations to refer to performance by a person other than a long-term insurer or a policyholder, on behalf of a long-term insurer or a policyholder, of any act directed towards entering

sells funeral cover plans to individuals and families. The first respondent ('KGA') is a 'licenced insurer' and a 'long-term insurer' as defined in the LIA, also underwriting funeral policies.

[2] Multisure entered into a written intermediary agreement ('the intermediary agreement') for KGA to underwrite the funeral policies of its clients. The intermediary agreement commenced on 1 January 2015. That intermediary agreement incorporates a 'Master Policy'. Premiums due are paid directly to KGA through deduction from the social grants received by the clients, who are referred to as 'policyholders' in the intermediary agreement.³ Some 8000 'group scheme policies' are in focus, with approximately 18000 lives insured. Multisure cancelled the intermediary agreement on 5 July 2021 and entered into a new agreement for the third respondent ('AUL') to provide underwriting services to its clients, in place of KGA. KGA refused to give effect to the transfer (referred to as 'releasing the book')⁴ without individual notification, from each client, of cancellation. This resulted in proceedings before Schoeman J in this court, and an outcome in favour of Multisure ('the order').

[3] The executory part of the learned judge's order is 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

into, maintaining or servicing a policy or collecting, accounting for or paying premiums or providing administrative services in relation to a policy, and includes the performance of such an act in relation to a fund, a member of a fund and the agreement between the member and the fund: part 3A of the Regulations. Also see the definition of 'independent intermediary' in chapter 1 of the Policyholder Protection Rules (Long-term Insurance), 2017 (GN 1407 of 15 December 2017) (GG No. 41321).

³ Approximately four years prior to the litigation, the South African Social Security Agency ('SASSA') procured the services of Q Link to administer deductions from social benefits administered by SASSA. SASSA then arranged that it would make payment directly to the insurer in respect of group schemes, and not to the intermediary, and proceeded accordingly.

⁴ The 'book' in this context refers to the persons (or members), represented by a particular intermediary, who obtained funeral insurance from the insurer.

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. That 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 to the Agreement with effect from 1 September 2021.'

[4] Multisure launched an urgent application in terms of s 18 of the Superior Courts Act, 2013.⁵ It seeks to bring the order into operation pending the SCA's determination of an appeal by KGA. According to KGA, there are two insurmountable obstacles to the application. Firstly, the implementation of the order pending the appeal would be unlawful since it would effectively resurrect a 'group' that ceased to exist upon commencement of the Insurance Act, 2017,⁶ ('the Act') and unlawfully create a new 'group', supposedly underwritten by AUL. Secondly, the individual policyholders, despite being prejudiced by the implementation of the order, have not been joined. In addition, KGA disputes that Multisure has succeeded in meeting the requirements for the relief it seeks. It is convenient to describe the arrangement between Multisure and KGA and the changes brought about by the Act before turning to these arguments.

The intermediary arrangement

⁵ Act 10 of 2013.

⁶ Act 18 of 2007.

[5] The intermediary agreement explains the contract between Multisure and KGA in the following terms:

‘4. The contract

- 4.1 The Intermediary [Multisure] has approached KGA to underwrite a funeral group scheme in terms whereof funeral and associated benefits are offered to assured lives.
- 4.2 KGA is willing to underwrite the group scheme subject to the terms and conditions of the Master Policy and as set forth in this agreement.
- 4.3 The monthly premium payable shall be calculated in terms of the quotation, annexure B hereto.
- 4.4 The Intermediary undertakes to collect and receive risk premiums from the members of the group scheme [the policyholders] on behalf of KGA, subject to the terms and conditions set forth in this agreement and the Master Policy ...’

[6] ‘Group scheme’ is defined in the intermediary agreement to mean ‘an assistance business group scheme in terms whereof policy benefits under an assistance policy are provided to the member, his dependants and/or extended family. ‘Policyholder’ is defined as the ‘approved and active individual member of the group scheme’.

[7] Multisure’s obligations in terms of the intermediary agreement include maintaining proper records of policyholders and the assured lives and their dependents in respect of the group scheme, collecting premiums on behalf of the policyholders and paying the whole amount of such premiums over to KGA on a monthly basis.⁷ Multisure could not amend the Master Policy or the membership details after giving notice of cancellation.⁸ Once a group scheme commenced, KGA required notification of any changes by the 10th day of the month. In the absence of any notification, the contract provides that KGA will accept the previous month’s membership as the lives to be insured for the month without any changes to the relevant premium, which becomes due, owing and payable by Multisure.⁹ Multisure

⁷ Clause 8.1 of the agreement.

⁸ Clause 7.6 of the agreement.

⁹ Clause 7.8 of the agreement.

was entitled to various fees, as arranged 'between the intermediary and its clients' and commission as agreed with KGA.¹⁰

[8] The termination clause provides:

'9. 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 ... 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.

9.1 In the event of termination:

9.1.1 ...

9.1.2 All monies due by the intermediary to KGA shall be payable to KGA on demand.

9.1.3 The Intermediary shall no longer be allowed to collect premiums on behalf of KGA for the notice month and all intermediary functions performed by the intermediary shall immediately vest in KGA on the date of the letter of cancellation ...'

[9] A clause dealing with 'compliance' adds the following:

'8.2.7 As and when this 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;

8.2.8 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

8.2.9 The compliance responsibility of Rule 15(b) of the Policyholder Protection Rules rests with the Intermediary;¹¹

8.2.10 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 ...'

¹⁰ Clause 15 of the agreement.

¹¹ Rule 15(b) of the Policyholder Protection Rules (Long-term Insurance), 2004 (GNR 1129 of 30 September 2004) read 'A cancellation of an agreement referred to in Rule 11 will only be effective if ... all individual policyholders have to the satisfaction of the registrar been notified of such cancellation'. These rules have been repealed by GN 1407 published in GG 41321 of 15 December 2017.

[10] As indicated, KGA was willing to underwrite the group scheme subject to the terms and conditions of the Master Policy and the intermediary agreement. The Master Policy regulates funeral policies issued to a qualifying applicant for membership, once accepted by KGA for membership, by Multisure. Those policies are then underwritten by KGA¹² and Multisure must provide each member with a participation certificate.¹³

[11] The Master Policy deals with 'cessation of cover' in the following terms:¹⁴

'The cessation of cover shall occur in any of the following circumstances:

- ...When the Policyholder cancels the Master Policy with the Assurer ...'

Somewhat confusingly, 'policyholder' in the context of the Master Policy is Multisure. Clause 14 of the Master Policy confirms that either Multisure or KGA may cancel the Master Policy at any time by giving the other party one calendar month's written notice. As was the case in the intermediary agreement, this is coupled with a clause providing that Multisure may not amend the Funeral Policy or the membership detail after giving notice of cancellation.¹⁵

The legislative amendment

[12] Insurers must generally be licensed to conduct life or non-life insurance business. In addition to being licensed in this way, the insurer must be specifically licensed to conduct one or more of the classes or sub-classes of insurance business set out in Schedule 2 of the Act. Insurers are restricted to conducting insurance business for which they have been licensed, subject to any conditions imposed by the Prudential Authority.¹⁶ Failure to comply may result in suspension or withdrawal of the licence.¹⁷ Section 70 of the Act provides that the Minister of Finance may make regulations identifying a kind, type or category of contract as an insurance policy that may be entered into under the risk class of life insurance

¹² Clause 1.2 of the Master Policy. Multisure is, for purposes of the Master Policy, referred to as the 'policyholder', insured persons are referred to as 'members' and KGA is referred to as the 'assurer'.

¹³ Clause 6.4 of the Master Policy.

¹⁴ Clause 4.5 of the Master Policy.

¹⁵ Clause 15.5 of the Master Policy.

¹⁶ S 25 of the Act.

¹⁷ Ss 27, 29 of the Act.

business in Table 1 of Schedule 2 of the Act.¹⁸ That table lists 'funeral' as a class and 'individual' and 'group' as sub-classes, providing a description of each.

- [13] 'Group' is defined in Schedule 2 to refer 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.' Similarly, 'underwritten on a group basis' means where the risks covered under an insurance policy are rated based on the characteristics of a group of people together, as opposed to that of the individual or individuals to whom the policy relates.¹⁹

[14] This is a change from the definition of 'group scheme' that operated in terms of the LIA prior to the promulgation of the Act.²⁰ It is common cause that the scheme in question no longer qualifies as a 'group' within the ambit of the Act. KGA argues that the contracts between Multisure and its clients endured only as individual policies. Multisure rejects this interpretation, arguing that until the group was 'converted' into individual policies, it remains 'a group'.

Section 18 of the Superior Courts Act, 2013

[15] The operation and execution of decisions subject to an appeal are suspended pending the determination of the appeal unless a court, under exceptional circumstances, orders otherwise. To do so, a court must be satisfied that the applicant has proved, on a balance of probabilities, that it 'will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders'.²¹ If so satisfied, a court must immediately

¹⁸ The Minister has not exercised this power to date.

¹⁹ Schedule 2 of the Act.

²⁰ A group scheme was defined more broadly 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'.

²¹ Ss 18(1) and 18(3) of the Superior Courts Act, 2013.

record its reasons for doing so and the automatic right of appeal enjoyed by an aggrieved party will be dealt with on an extremely urgent basis. Pending that outcome, the order is automatically suspended.²²

[16] These provisos exist because of the potential prejudice that may be caused to a party that is ultimately successful on appeal. It is evident that the applicant must meet three requirements: exceptional circumstances, including consideration of the prospects of success on appeal; that it will suffer irreparable harm if the order is not made; and that the party against whom the order is sought will not suffer irreparable harm if the order is made.²³

Exceptional circumstances

[17] To meet this requirement, something out of the ordinary and of an unusual nature, different from the general rule and uncommon, should be discernible. The circumstances concerned must arise out of, or be incidental to, the particular case. Importantly, this is a question of fact to be decided on a case-by-case basis.²⁴ The actual predicaments in which the litigants find themselves in has been held to be central to the enquiry.²⁵ It has been held that a strict meaning should be given to the phrase, and any circumstances alleged to be 'exceptional' must be carefully examined.²⁶ The SCA has confirmed that the exceptionality of an order in terms of ss 18(1) and 18(3) is underscored by the wording of s 18(4) of the Superior Courts Act, 2013, and that a 'heavy onus' is placed on the applicant.²⁷ In short, the circumstances must be 'truly exceptional'.²⁸ It is also now clear that the prospects of success are relevant to the enquiry.²⁹

²² S 18(4) of the Superior Courts Act, 2013.

²³ *Knoop NO v Gupta (Execution)* 2021 (3) SA 135 (SCA) para 45. Also see *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) ('*Incubeta Holdings*') para 24.

²⁴ See *Premier for the Province of Gauteng v Democratic Alliance* [2021] 1 All SA 60 (SCA) para 14.

²⁵ See *Incubeta Holdings* supra fn 23 para 22.

²⁶ *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas* 2002 (6) 150 (C) at 156I-157C. Also see *Incubeta Holdings* supra fn 23 at 194J-195I.

²⁷ *University of the Free State v Afriforum* 2018 (3) SA 428 (SCA) ('*University of the Free State*') para 11.

²⁸ See *Avnit v First Rand Bank Limited* [2014] ZASCA 132. Also see *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA) at 413D.

²⁹ See *University of the Free State* supra fn 27 para 15, citing, with approval, *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa & Another* [2016] ZAWCHC 34 para 27.

[18] Various facts were placed before court to support the application, including the following. Multisure has not received any commission for intermediary services since August 2021 and estimated, during June 2022, that it would have received an amount in excess of R5,5 million were it not for the pending appeal.³⁰ Multisure receives an income from 'debit order' funeral policies and 'new SASSA' policies and 'legal assist' clients, but cannot sustain its operations on this basis, operating as a loss since 1 September 2021. Multisure's accounting officer confirms that its revenue has plummeted during the period 1 September 2021 to 28 February 2022. The total negative change in its financial affairs during that period is more than R1,75 million and it made a loss in excess of R700 000 during that period.³¹

[19] As Multisure conveyed in correspondence to KGA's legal representatives on 18 May 2022, it has since been forced to sell shares and draw from savings in order to keep its business afloat. Multisure's sole owner has also placed an immovable property on the market as part of the efforts to keep it in business. Two branch offices have closed between October and December 2021 and all business is now conducted virtually. As a result, three full-time staff members and four part-time staff members have been retrenched. Multisure was unable to pay bonuses during December 2021, or to offer increased monthly remuneration or salaries to match offers being received by staff members, and blames this for the loss of two senior and experienced staff members employed at its head office in Gqeberha. Despite the various mitigatory steps, it may be accepted that it will have to continue downsizing in the event that it is unable to enforce the order in its favour. It is clear that Multisure's adverse financial predicament is ongoing. In short, Multisure has been placed in an extraordinary position as a result of the events in question. This is very different, for example, to an ordinary claim for damages where the very existence of a company is not in issue. Whether this constitutes 'exceptional circumstances' for purposes of the s 18 must be determined with due cognisance of the prospects of the judgment of Schoeman J being upheld on appeal.

³⁰ Multisure estimates the commission withheld to be over R560 000 per month.

³¹ Multisure adds, in reply, that a loss in excess of R400 000 was experienced between 1 March and 31 May 2002.

[20] For reasons that follow, my assessment of KGA's prospects of success on appeal supports the conclusion that Multisure has demonstrated exceptional circumstances. The contract between Multisure and its clients is detailed on the 'membership application funeral insurance' form ('the contract'). The client declares that they 'apply for membership of Multisure's funeral cover in accordance with the terms and conditions which I have read and understood as set out herein'. A specimen blank copy formed part of the papers. It contains the 'terms and conditions for funeral policy holders'. The contract itself is couched in the form of a mandate, linked to the application for funeral cover and the terms of the Master Policy.³² The contract provides that the Master Policy is available for inspection and contains the 'full rules and conditions of this contract'. Clause 20 of the contract adds that 'Should there be a discrepancy the conditions as set out in the Master Policy will prevail.'

[21] The applicant for membership expressly authorises Multisure to issue and deliver payment instructions to the applicant's bank in order to meet the premium obligations of the contract. The client acknowledges in the contract, for example, that all payment instructions issued by Multisure shall be treated by their bank as if the instruction had been personally issued by the client. The contract refers specifically to 'authority' and 'mandate' in its terms, adding the following, under the heading 'cancellation':

'I / We agree that although this Authority and Mandate may be cancelled by me / us, such cancellation will not cancel the Agreement. I / We shall not be entitled to any refund of amounts which you have withdrawn while this authority was in force, if such amounts were legally owing to you.'

There is a solitary reference to KGA, as underwriter, in the contract, it being authorised to obtain any necessary medical information pertaining to the signatory.

[22] The Master Policy defines a 'funeral policy' as 'the policy issued to the 'Member' by Multisure and underwritten by KGA in terms of the Master Policy'. The 'Master Policy' is defined as 'the policy issued by KGA to Multisure'. A policy number would have been allocated to Multisure on the inception date. An applicant

³² See, in general, DH van Zyl 'Mandate and negotiorum gestio' in JA Faris (ed) *LAWSA* (3rd Ed) (vol 28(1)) paras 55-69. Also see P Havenga *The Law of Insurance Intermediaries* (2001) (Juta) at pp2-6.

whose application for membership has been accepted by KGA becomes a 'member'.³³ KGA is then obliged to 'issue a participation certificate in respect of each new Member on registration and on notification of any change in the Member's or Dependant's details'. It is one of Multisure's obligations, as policyholder, to provide each member with this participation certificate.

[23] Read in the context of the contract, it is apparent that there is cessation of coverage for members in certain circumstances. Cancellation of the intermediary agreement, which is not in dispute, resulted in Multisure being required to 'notify, in writing, each and every policyholder on the book of the intermediary that the underwriting agreement with KGA is cancelled'. On my reading, intermediary functions vested in KGA for the notice month, but not beyond. It must be accepted that the linked Master Policy similarly fell away and was treated by both parties as cancelled upon expiration of the notice period. There is nothing in the Master Policy or intermediary agreement to suggest that Multisure could not occasion this in one sweep and on behalf of all its clients, who are the members referred to in the Master Policy. In fact, it was not open to the member to do so directly. While cessation of cover would occur at the death of the member, subject to clause 4.2 of the Master Policy, or when a monthly premium was not received by KGA timeously, the member could not cancel their own membership with KGA or themselves cancel the Master Policy. It was incumbent upon Multisure to perform either of those acts, bearing in mind its contract with its clients linked to funeral insurance. As indicated, that contract effectively incorporates the Master Policy, affording it pre-eminence where necessary and referring to it as containing the 'full rules and conditions of this contract'.

[24] Such action on the part of Multisure on behalf of its clients is consistent with the provisions in the Master Policy that apply in the event of death of a member.³⁴ A qualifying spouse automatically becomes the new member, and the funeral policy is converted to either a single policy or individual policy. No amendment form is required by KGA. The Master Policy states that 'The onus shall rest with the

³³ The Master Policy provides that the assurance of persons insured commences on the first day of the month following the month in which the acceptance by KGA of the member's application has been granted and the first monthly premium received by KGA.

³⁴ Clause 4.2 of the Master Policy.

Policyholder to instruct the Assurer to cancel the Funeral Policy if the spouse does not wish to continue with the Funeral Policy'. As indicated, 'policyholder' in this context refers to Multisure. In other words, it is not the member who performs the act of cancellation themselves. Multisure, having been responsible for payment of the monthly premium to KGA in respect of every member in terms of the Master Policy, does so on behalf of the member and by way of an instruction to KGA. That there are multiple members that have given Multisure this power does not change the position. Its cancellation of the intermediary agreement marked the end of KGA's role as underwriter to its clients and it was contractually obliged to inform each of its clients of this reality. It follows that the Master Policy could not survive this cancellation.

[25] KGA's reliance on the legislative change to justify its position appears to me to be tenuous. On its interpretation, each individual member must cancel the Master Policy directly with it simply because the erstwhile definition of a 'group scheme' has given way (at least for newer policies) to a new definition of a 'group'. That interpretation conflicts with the wording of the intermediary agreement, the Master Policy and the contract. It appears to impose an obligation on members where none previously existed, and without proper appreciation of the contractual arrangements at play. Despite the wording of the various agreements, it eliminates Multisure from the picture as if it were not the focal point of the entire scheme. Each of Multisure's clients had granted it a mandate for purposes of obtaining funeral insurance. Once KGA's role as underwriter fell away, preventing these persons from maintaining their relationship with Multisure and from being covered by AUL would be to their detriment. It may also amount to contravention of the Policyholder Protection Rules (Long-term Insurance), 2017 ('PPR') requirements for the fair treatment of policyholders. Multisure's mandate included providing payment instructions to their clients' banks in order to obtain the necessary premiums on a monthly basis. Transferring from one underwriter to another would appear to fall within the terms of the contracts of mandate, based on the ordinary rules of interpretation. Alternatively, in the event that this may have exceeded the expressed bounds, it was open for clients to elect to reject Multisure's performance

of its mandate when they were advised of the change.³⁵ SMS messages were sent to each client as early as 30 June 2021, coupled with website and postal notification during July 2021.

[26] *Mr Nepgen*, for Multisure, pointed out that accepting KGA's proposition would mean that it was entitled to cancel the intermediary agreement itself at any time after the legislative developments, retain all Multisure's clients until individual communication was received from each of those clients and retain the entire insurance premium on an ongoing basis without any deduction of commission. It is difficult to accept that this could have been the legislature's intention in crafting Schedule 2 of the Act. This would amount to a legislative amendment creating some new contractual relationships and terminating others. Such an outcome, in this instance, would be manifestly unjust. That aside, there appears to be no basis to interpret any of the agreements or the legislation and regulations in such a manner. It certainly does not appear to have been the intention of any of the parties to the various agreements that KGA, as underwriter, would somehow overtake Multisure and become party to an arrangement with Multisure's clients in its absence as intermediary.³⁶

[27] Finally, it is important to add reference to the PPR provisos as to 'validity of contracts' in support of this understanding:

'7.3.1 A policy is not void merely because a provision of a 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 ... that person ... may cancel the policy, whereupon that person shall be deemed to be in the same legal position in respect of such insurer ... as if the policy had been cancelled by that person on account of a breach of contract by such insurer ...'

³⁵ See Van Zyl op cit fn 32 para 61. Also see *Dreyer v Sonop* [1951] ZAFSHC 1; *Kunene-Msimanga and Others v Regional Tourism Organisation of Southern Africa and Others* [2022] ZAGPJHC 366 paras 140-141.

³⁶ On the possibility of a life-insurance policy constituting a *stipulatio alteri*, see *Crossman v Capital Alliance Group Risk* (unreported, Gauteng Local Division, Johannesburg) (case no. 34636/2020) (21 April 2022) para 28-30.

[28] This confirms the extent to which policyholder protection is extended. Even a violation of insurance law does not necessarily invalidate a policy. Failure to convert a group policy to individual policies following the statutory change to the notion of a 'group' may fall within this form of protection, to the benefit of the individuals concerned. Following this logic, the purported transfer of the 'group' from KGA to AUL at Multisure's instance, even if in contravention of insurance law because of the new definition of a 'group', would not automatically invalidate those policies. Policyholders who had individually mandated Multisure to obtain funeral cover for them may be transferred to AUL because of these mandates, and will remain protected once transferred to AUL. It might be added that this appears to be consistent with trade usage and the notion of a 'transfer of book'. Given that the elements of such a trade usage have not been fully canvassed, I make no finding in this regard.³⁷

[29] It would then be for AUL to comply with the applicable insurance law and regulations, in respect of its licencing requirements and the like. KGA had no difficulty in persisting as underwriter to the 'group' scheme subsequent to the amendments in 2018. This despite the notion of 'underwritten on a group basis' no longer being apposite given the change in definition to 'group'. Since that change, the risks covered by such underwriting should not have been 'rated based on the characteristics of a group of people together, as opposed to that of the ... individuals to whom the policy relates'. The position seems to be that AUL will be obliged to rate the risk as underwriter on an individual basis. Again, it is not necessary to make a definitive finding in this regard for present purposes. To the extent that the order of Schoeman J may be found to erroneously refer to a 'group scheme' with AUL, instead of making reference to 'individual' cover for Multisure's clients because of the legislative change, this may be cured by amendment or variation of the order. In all these circumstances, the prospects of success on appeal appear to be limited and exceptional circumstances have been demonstrated for purposes of this application.

Irreparable harm

³⁷ See in general Havenga op cit fn 32 at 3, 10-11.

[30] The requirement for Multisure to demonstrate that it will suffer 'irreparable harm' if the relief it seeks is not granted is, in this instance, closely linked to the consideration of exceptional circumstance. In *Premier for the Province of Gauteng and Others v DA and Others*³⁸ the SCA confirmed that there is no prohibition on the same set of facts giving rise to irreparable harm and exceptional circumstances. The ordinary meaning of harm is 'injury, damage or ill effect'. For harm to be irreparable, the effects or consequences must be irreversible or permanent.³⁹ The financial harm occasioned to Multisure is continuous and serious, as described. The business is losing money with each passing month. Multisure has downsized and been forced to rely on savings and the sale of shares. Its owner has placed an immovable property on the market in order to raise further capital. It has established, on a balance of probabilities, that it will suffer irreparable harm if the relief sought is not granted.

[31] As to the potential harm to KGA, Multisure took the point that KGA will no longer be on risk pending determination of the appeal by the SCA. Any financial losses could be rectified by a return of premiums to KGA if it succeeds with its appeal. The probabilities favour this conclusion, so that Multisure succeeds in proving that KGA will not suffer irreparable harm if the order is implemented immediately. In any event, as *Mr Nepgen* pointed out, Uniform Rule 49(12) has been interpreted to refer to the situation where execution follows an order in terms of s18 of the Superior Courts Act, 2013. The subrule provides for security for the restitution of any sum obtained upon execution. This supports the conclusion that Multisure has succeeded in proving that KGA will not suffer irreparable harm if the order is implemented immediately.

Non-joinder

[32] The test for a plea of non-joinder or misjoinder is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal

³⁸ *Premier for the Province of Gauteng v Democratic Alliance* supra fn 24 para 25.

³⁹ *Knoop NO and Another v Gupta (Tayob as Intervening Party)* supra fn 23.

interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.⁴⁰ The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea.⁴¹ The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party.⁴²

[33] The 'subject matter' of these proceedings relates only to whether the order should be brought into operation pending the appeal to the SCA. That order was taken without any such joinder. Nevertheless, I accept that these proceedings may well be of some interest to the individuals concerned. But given the 'transfer(s)' to AUL occasioned by the order, I am of the view that the persons insured have no direct and substantial interest that may be affected prejudicially by the judgment of this court. The order sought by Multisure in these proceedings, giving effect to the order of Schoeman J, is capable of being effected without substantially affecting their interests. The plea must, therefore, be dismissed.

Urgency

[34] The approach to adopt when dealing with an urgent application is governed by Uniform Rule 6(12). In terms of that rule, the court has discretionary power to dispense with the forms and service provided for in the rules and to dispose of the matter at such time and place and in such manner and in accordance with such procedure as it deems fit.⁴³ The first question is whether there must be a departure at all from the usual process.⁴⁴

[35] The applicant is expected, in the founding affidavit, to 'set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that substantial redress could not be afforded at a hearing in due

⁴⁰ *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O) at 168-170.

⁴¹ *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) at 176I-177A.

⁴² *One South Africa Movement v President of the RSA* 2020 (5) SA 576 (GP) at para 22. Also see *Gordon v Department of Health, KwaZulu-Natal* [2008] ZASCA 99 para 9.

⁴³ Uniform Rule 6(12)(a).

⁴⁴ *Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA 135 (W) at 136H-137F.

course'.⁴⁵ Put differently, if the matter were to follow its normal course as laid down by the rules, would the applicant be afforded substantial redress. If not, the matter qualifies to be enrolled and heard as an urgent application. If so, the application does not pass the test for urgency. The question as to the absence of 'substantial redress' in an application brought on usual timeframes lies at the heart of the question of urgency.⁴⁶

[36] In my view, the matter was properly launched on an urgent basis, although with some delay. Much of the perceived lateness is explained by the attempts to avoid litigation and other circumstances that arose in typical fashion for matters of this nature. Any prejudice to KGA is outweighed by the exigency of the matter and the impact of the current position on Multisure, as already indicated. The Uniform Rules must be interpreted to advance the right of access to courts and the present circumstances warrant a departure from the normal procedures and timeframes in the interests of justice.

Conclusion

[37] The specified s 18 requirements for the relief sought have been satisfied. This court nevertheless retains a wide general discretion to determine the conditions upon which the right to execute should be exercised and considerations of what is just and equitable in the particular circumstances remain relevant.⁴⁷ For reasons already canvassed as part of the consideration of the prospects of success on appeal, I am of the view that the intermediary agreement and Master Policy have been cancelled and are of no further force and effect from 1 September 2021. The Group Scheme underwritten by the First Respondent was terminated with effect from this date. It is just and equitable for Q Link to alter the deduction codes on its system immediately so that SASSA may transfer its payment of the relevant premiums previously paid to KGA to AUL. It is also just and equitable for the full aggregate amount of the premiums paid to KGA from 1 September 2021 to be paid

⁴⁵ Uniform Rule 6(12)(b). Also see *Kati v MEC, Department of Finance, Eastern Cape Province* (unreported case no. 929/2006) (High Court of South Africa, Bhisho) at 9.

⁴⁶ See *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196.

⁴⁷ *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another* [2016] ZAWCHC 34 para 26.

to AUL, which will enable Multisure to obtain its commission and fees for this period from AUL. In coming to this decision, I note that the order specifically defines 'Group Scheme'. I read the single reference to 'group scheme' in paragraph (c) of the order to refer to policies underwritten by AUL at the instance of Multisure on behalf of its clients, to be risk assessed on an individual basis given the legislative position.

[38] KGA has unsuccessfully opposed this application and, applying the usual principles, must be saddled with the costs of these proceedings.

[39] This court has deviated from s 18(1) of the Superior Courts Act, 2013, and is obliged, in terms of s 18(4), to immediately record its reasons for doing so. The reasons appear from this judgment. This judgment is subject to the automatic right of appeal enjoyed by KGA in the event that it is aggrieved by this outcome, such appeal to be dealt with on an extremely urgent basis.

Order

[40] The following order will issue:

1. The application is heard on an urgent basis pursuant to the provisions of Rule 6(12) of the Uniform Rules of Court.
2. The operation of the order granted by the Honourable Madam Justice Schoeman, delivered on 15 March 2022, is not suspended pending the outcome of the First Respondent's appeal to the Supreme Court of Appeal, or any subsequent appeal.
3. The First Respondent is ordered to pay the costs of this application.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard:28 July 2022

Delivered:30 August 2022

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