IN THE FINANCIAL SERVICES TRIBUNAL

Case Number: PA4/2022

ABACUS INSURANCE LIMITED **Applicant**

and

THE PRUDENTIAL AUTHORITY **Respondent**

Tribunal panel:
SK Hassim SC (chair), C Woodrow SC and PR Long.

For the applicant:
M Van der Nest SC and E Van Heerden instructed by Clyde & Co Inc.

For the respondent:
MA Chohan SC and M Lengane instructed by Allen & Overy (RSA) LLP.

Hearing:
29 March 2023.

Summary:
Application in terms of sec 230 of the FSR Act for the reconsideration of a decision of the Prudential Authority declining to vary the licence conditions of a 'traditional' insurer to permit such insurer to underwrite both third party as well as first party risks – Interpretation of the Insurance Act – no implied prohibition in the Insurance Act on 'traditional' insurers underwriting risks for both its own (first party risks) and third parties (third party risks).

DECISION

Introduction

1. The applicant, Abacus Insurance Limited ("**Abacus**"), is a 'traditional' insurer[1] and holds a non-life insurance licence[2] (the "**Abacus Insurance Licence**").[3]

2. The Abacus Insurance Licence permits Abacus to underwrite third party risks. In other words, risks related to policyholders other than Abacus or the group of companies within which Abacus is situated.

3. Abacus is wholly owned by Abacus Holdco (Pty) Ltd ("**Abacus Holdings**"), and Abacus Holdings is wholly owned by Pepkor Holdings Limited ("**Pepkor**").

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1 A term used colloquially to describe an insurer that is not a "*'cell captive insurer'*" or "*'captive insurer'*" as defined in the Insurance Act, Act 18 of 2017 (the "**Insurance Act**").

2 In terms of section 23 of the Insurance Act.

3 The Insurance Act defines:

> ***'non-life insurance business'*** *means any activity conducted with the purpose of entering into or meeting insurance obligations under a non-life insurance policy;*
>
> ***'non-life insurance policy'*** *means any arrangement under which a person, in return for provision being made for the rendering of a premium to that person, undertakes to meet insurance obligations that fully or partially indemnifies loss on the happening of an unplanned or uncertain event, other than-*
>
> *(a) a life event; or*
>
> *(b) a death event or disability event not resulting from an accident,*
>
> *and includes a renewal or variation of that arrangement;*

4. Pepkor is accordingly a ‘parent company’ *vis-a-vis* Abacus.

5. Historically, CFAO Insurance Limited (“**CFAO**”) underwrote Pepkor’s non-life risk portfolio (the “**Pepkor Policy**”). For reasons not germane to this decision, CFAO exited the Pepkor Group and no longer holds an insurance licence. As a result, Pepkor wanted Abacus (its wholly owned subsidiary) to underwrite the Pepkor Policy, and Abacus wanted to take over the underwriting of the Pepkor Policy.

6. In order to take over the Pepkor Policy, Abacus applied to the respondent, the Prudential Authority, (the “**Authority**”) in May 2021 to vary the Abacus Insurance Licence in terms of section 26(1) of the Insurance Act, Act 18 of 2017 (the “**Insurance Act**”) to add further classes and sub-classes to the licence conditions of the Abacus Insurance Licence. (the “**Licence Variation Application**”)

7. Section 26(1)(a) of the Insurance Act (under the heading: “*Variation of licence conditions*”) provides as follows:

> (1) The Prudential Authority may amend, delete, replace or vary any licensing conditions or impose other or additional licensing conditions-
>
> (a) on application by an insurer or controlling company;
>
> …

8. What Abacus was applying for was a license to underwrite the non-life risks of its parent company (in addition to the non-life risks of third parties that it was underwriting under the existing Abacus Insurance Licence).

9. Had the Authority granted the Licence Variation Application, Abacus would have been licenced to underwrite 'third party risks' as well as the risks of its parent company, Pepkor, which are 'first party risks' (or 'own risks').

10. On 23 May 2022, the Authority declined the Licence Variation Application (the "**Authority's Decision**"). It did so on the basis that:

    10.1. the Insurance Act prohibited a 'traditional' insurer from insuring or underwriting its own risks (first party risks) as well as the risks of third parties (third party risks) unless the insurer was a 'cell captive insurer'. However, Abacus was not a cell captive insurer. Consequently, it was not permitted to insure or underwrite the risks of both its parent company and those of third parties; and

    10.2. a 'traditional' insurer (such as Abacus) should not be permitted to conduct both first party and third party business under the same licence because of potential conflicts of interest.

11. In this regard, the Authority stated as follows (*inter alia*) in the letter containing the Authority's Decision:

> …
>
> 3. … If approved, Abacus Insurance will be insuring first party risks, as defined in the Act.
> 4. With reference to the definition of first party risks as provided for in the Act, only a captive insurer or a cell captive insurer may insure first party risks. Abacus Insurance is not licensed as a captive insurer or a cell captive insurer and therefore cannot insure first party risks.

5. Furthermore, the PA is not comfortable with an insurer conducting both first party and third party risks in the same insurance license, due to the potential conflicts of interest it poses for the governance structures of insurers.

…

12. The Authority, in its heads of argument, describes the main issue before us as follows:

> The core issue before the Tribunal is whether the Prudential Authority properly interpreted the Insurance Act … when rejecting the applicant's application to vary its license and thereby to preclude it from underwriting both its own risks and those of third parties.

(**Heads of argument of the Authority, par 1**)

and

> Thus, this dispute ultimately turns on the interpretation of the relevant provisions of the Insurance Act and, in particular, whether the Act, properly construed, contemplates, that traditional insurers (being those insurers that underwrite risks that are external to their own organisational structure or ecosystem) are prohibited from insuring those risks that are internal to their organisational structure or ecosystem (first party risks).

(**Heads of argument of the Authority, par 25**)

13. In turn, Abacus contends that the Authority's interpretation of the Insurance Act does not accord with the well-established principles of statutory interpretation.

14. At the hearing, the parties were agreed that should this Tribunal find:

14.1. the interpretation proffered by the Authority to be correct, the present application should be dismissed,

14.2. on the other hand, the interpretation proffered by Abacus to be correct, the present application should be upheld and the Authority's Decision set aside and the matter should be remitted to the Authority for reconsideration.

Justiciability and test on reconsideration

15. Abacus brings the application in terms of section 230 of the Financial Sector Regulation Act, Act 9 of 2017 (the "**FSR Act**"). It is uncontested that the Authority's Decision is a decision that may be reconsidered by the Tribunal – the Authority's Decision was made by a financial sector regulator, namely the Authority, in terms of a financial sector law, namely the Insurance Act. (**FSR Act**, section 218)

16. In taking the decision in terms of section 26 of the Insurance Act, the Authority exercised a discretion. Accordingly, the Tribunal can interfere with such decision only if it finds that the Authority failed to bring an unbiased judgment to bear on the issue; did not act for substantial reasons; exercised its discretion capriciously; or exercised its discretion upon a wrong principle. (**MET Collective Investments (RF) (Pty) Ltd v Financial Sector Conduct Authority** (Case No A23/2019) par 67)

17. In our view, a misinterpretation of the Insurance Act in reaching the Authority's Decision would constitute, at the least, the exercise of the discretion upon a wrong principle.

18. The jurisdiction of the Tribunal is accordingly properly engaged, and we are entitled to hear and adjudicate the application.

Approach to interpretation:

19. Unsurprisingly, counsel for both Abacus and the Authority cite the now trite principles set out by the Supreme Court of Appeal (SCA) in **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) ("**Endumeni**") at par 18: (footnotes omitted)

> … 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 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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. … The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

20. In **Minister of Police and Others v Fidelity Security Services (Pty) Limited** [2022] ZACC 16 at par [34], the Constitutional Court set out the principles for the interpretation of statutes as follows: (footnotes omitted)

> [34] The interpretation of the Act must be guided by the following principles:
>
> (a) Words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity.
>
> (b) This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.
>
> (c) Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not businesslike or sensible results should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification "reasonably possible" is a reminder that Judges must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.
>
> (d) If reasonably possible, a statute should be interpreted so as to avoid a lacuna (gap) in the legislative scheme.

21. Statutory interpretation is a unitary exercise. (**Chisuse and Others v Director-General, Department of Home Affairs and Another** 2020 (6) SA 14 (CC) at par [52]) The text, context and purpose of the provision must be considered holistically. (**University of Johannesburg v Auckland Park Theological Seminary** 2021 (6) SA 1 (CC) at par [65]). A sensible meaning is to be preferred to one that leads to unbusinesslike results. (**Telkom SA SOC Ltd v Commissioner, South African Revenue Service** 2020 (4) SA 480 (SCA) at par [15])

The argument of the Authority:

22. Simplified, the Authority's argument is as follows: Abacus is a 'traditional' insurer as it is licensed to insure third party risks. Abacus now seeks to insure first party risks as well as third party risks. Whilst the Insurance Act does not expressly state that a 'traditional' insurer may not insure both first party and third party risks, properly construed and in context, the Insurance Act draws a distinction between 'traditional' insurers and cell captive insurers with only the latter permitted to insure both third party risks and first party risks. Furthermore, the Insurance Act limits a cell captive insurer by imposing the prohibition that it may only underwrite both first party and third party risks under different cell structures. Abacus is not a cell captive insurer. Should Abacus be permitted to underwrite both first party and third party risks, the Authority would be permitting Abacus to undertake cell captive insurance without the regulatory framework governing cell captive insurers applying to it.

Interpretation of the Insurance Act:

23. The parties are *ad idem* that there is no provision in the Insurance Act that <u>expressly</u> prohibits a 'traditional' insurer from underwriting first party risks.

24. This must be viewed against the fact that the Legislature, where it deemed necessary, expressly included various express prohibitions in the Insurance Act. In this regard, for example, section 25 of the Insurance Act contains the following

prohibitions (under the heading "*Licence conditions*"): (emphasis inserted to highlight the prohibitions)

24.1. Section 25(1) provides:

> (1) An insurer, other than a microinsurer or a reinsurer, must be licensed to conduct life or non-life insurance business, and **may not be licensed to conduct both**.

24.2. Section 25(5) provides:

> (5) A captive insurer **may not insure third party risks**.

24.3. Section 25(6) provides:

> "(6) (a) Only a cell captive insurer may conduct insurance business through cell structures.
> (b) A cell captive insurer **may not insure**-
> (i) **first party risks and third party risks in the same cell structure**; or
> (ii) the risks associated with the insurance obligations of another insurer without the approval [sic] the Prudential Authority."

25. In our view, it is relevant that the legislature has not expressly prohibited 'traditional' insurers from underwriting first party risks, nor from underwriting first party and third party risks (or conducting first party and third party business) under the same licence.

26. The Authority relies on the definition of "first party risks" in section 1 of the Insurance Act in contending for an implied prohibition. The Insurance Act defines "first party risks" as follows: (our emphasis)

'first party risks' means-

(a) in respect of a **captive insurer**, the operational risks of-

(i) the group of companies of which the insurer is a part;

(ii) any associate of a company that is part of the group of companies referred to in subparagraph (i); or

(iii) any joint arrangement that a company that is part of the group of companies referred to in subparagraph (i) participates in;

(b) in respect of a **cell captive insurer**, the operational risks of the cell owner and the operational risks of-

(i) the group of companies of which the cell owner is a part;

(ii) any associate of a company that is part of the group of companies referred to in subparagraph (i); or

(iii) any joint arrangement that a company that is part of the group of companies referred to in subparagraph (i) participates in;

27. Based on the definition of "first party risks", the Authority holds the view that (**a**) the Insurance Act permits only captive and cell captive insurers to conduct first party business; (**b**) accordingly, as Abacus is licensed as neither a captive insurer nor a cell captive insurer, Abacus is not allowed to underwrite first party risks.

28. Since we agree with various points made by counsel for Abacus regarding the interpretation of the Insurance Act relevant to the question posed *in casu*, we will at times quote liberally from the heads of argument filed on behalf of Abacus.

29. As discussed above, the Authority's case for an implied prohibition lies in the meaning assigned to terms in section 1 of the Insurance Act, namely the definition section. However, the definition section does not deal with which insurers may insure against first party risks and which may not. Nor is that the purpose of the definition section.

30. The inevitable point of departure is the language / text (**Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others** (470/2020) [2021] ZASCA 99 (09 July 2021) par [25]; **Endumeni** par [18]). The words of a statute "*must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.*" (**Cool Ideas 1186 CC v Hubbard** 2014 (4) SA 474 (CC) at par [28]. See also **Chisuse v Director-General, Department of Home Affairs** 2020 (6) SA 14 (CC) at par [47].) The fact that the definition section attributes specific, separate meanings to the words "*first party risks*" in relation to ("*in respect of*") "*captive insurers*" and "*cell captive insurers*" does not limit or confine the insurance of first party risks to only "*captive insurers*" and "*cell captive insurers*". It simply defines / attributes a meaning to the term "*first party risks*" in respect of those insurers.

31. The phrase "*in respect of*" denotes "*with reference to*" or "*in connection with*". It does not, in its ordinary grammatical meaning, express a prohibition in respect of categories / entities not mentioned thereunder.

32. Nor does the context of the definition section and the definition upon which the Authority seeks to rely disturb the plain meaning of the words used:

    32.1. As already stated, the sections upon which the Authority seeks to rely appear in the definition section of the Insurance Act. The Insurance Act opens its definition section in these terms: "*In this Act, unless the context otherwise indicates-…*" Accordingly, any definition applies subject to context (**Independent Institute of Education (Pty) Limited v KwazuluNatal Law Society and Others** [2019] ZACC 47 at par [17]).

The definition section makes plain that the words would only bear the meaning ascribed to it by the Legislature if the context so requires (**Liesching v The State** 2017 (2) SACR 193 (CC) at par [33]). The purpose of a definition in legislation is to ascribe the meaning to be assigned to words in that legislation. The Authority elevates the definition of "first party risks" to a substantive statutory provision. The definition imposes neither obligations nor does it confer rights.

32.2. That the purpose of the definition section in the Insurance Act is to ascribe the meaning to be assigned to words in the Insurance Act as opposed to providing for prohibitions becomes even more self-evident where there are express prohibitions contained in the body of the Act itself (s 25 of the Act), but which does not contain the prohibition contended for by the Authority. In our view, had the legislature intended to prohibit or prevent an insurance company from insuring or underwriting both first party risks and third party risks it would have done so expressly (in s 25 of the Act). It has not.

32.3. The term "*first party risks*" is used in the Insurance Act in the context of cell captive or captive insurers only. (Section 1 in the definitions of

"*captive insurer*", "*operational risk*"[4] and "*third party risks*"[5]; and in section 25(6)(b)(i)[6].) There would accordingly have been no need for the Legislature to give a meaning to 'first party risks' in respect of 'traditional' insurers.

32.4. The Insurance Act similarly defines "*'third party risks'*" only in respect of cell captive insurers: "***'third party risks'*** *means, in respect of a cell captive insurer, risks other than first party risks;*". Applying the reasoning that the Authority seeks to advance regarding 'traditional' insurers *in casu* to the aforesaid definition of "*'third party risks'*", the aforesaid fact (namely the fact that the Act defines "*'third party risks'*" only in respect of cell captive insurers) would create an implied prohibition against captive insurers underwriting third party risks. Had the Legislature been satisfied that such implied prohibition was included, the Legislature would not have needed to have gone any further. But this is not what the Legislature has done. Instead, the Legislature expressly states in s 25(5) of the Insurance Act that: "*(5) A captive insurer may not insure third party risks.*" It appears that the Legislature was not content to rely on some or

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4 ***'operational risk'****, for the purposes of the definition of first party risks, means the risk of incurring losses as a result of inadequate or failed internal processes, people and systems, or from external events and excludes any risks associated with the insurance obligations of an insurer;*

5 ***'third party risks'*** *means, in respect of a cell captive insurer, risks other than first party risks;*

6 *(b) A cell captive insurer may not insure-*

(i) first party risks and third party risks in the same cell structure;

other implied prohibition, and this fact militates against the argument advanced by the Authority.

33. The argument advanced by the Authority further results in unbusinesslike results, and a sensible meaning is to be preferred. For example, applying the interpretation of the Authority to the definition of "*third party risks*" would result in a conclusion that only cell captive insurers may insure third party risks. 'Traditional' insurers would not be allowed to insure either first or third party risks, because they fall under neither definition. The results are entirely unbusinesslike and would give rise to an absurdity that is at odds with the purpose of the statute.

34. Finally, the implied prohibition contended for by the Authority is not sustainable in law. Effect can be given to the Insurance Act as it stands and to the ostensible legislative intent of the Insurance Act – the implied prohibition contended for is not a 'necessary' implication:

> [187] … This Court has held that "words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands and to the ostensible legislative intent". In *Rennie*, which has been cited by this Court with approval in connection with this test, Corbett JA endorsed the further proposition that a strong factor militating against the implication of a term in a statute is the difficulty in formulating it. This is, in my opinion, a sound limitation which guards against the danger of courts straying beyond the judicial domain into matters of legislative policy or pure speculation.
>
> (**Electoral Commission v Minister of Cooperative Governance and Traditional Affairs** [2021] ZACC 29; 2022 (5) BCLR 571 (CC) at par [187] footnotes omitted)

and

> [54] Words cannot be read into a statute by implication unless the implication is necessary in the sense that, without them, effect cannot be given to the statute as it stands and to the ostensible legislative intent. In our opinion, the case for an implied prohibition fails this test and is at odds with the general principles of statutory interpretation summarised earlier. Effect can be given to the Act as it stands, without reading into section 20 an implied prohibition barring an application for a possession licence by a person who previously held a possession licence which terminated without renewal in terms of section 24. The ostensible legislative intent would not be defeated if one were to refrain from implying such a prohibition.
>
> (**Minister of Police and Others v Fidelity Security Services (Pty) Limited** [2022] ZACC 16 par [54] footnotes omitted)

35. Finally, risks that the Authority may perceive in respect of a 'traditional' insurer underwriting first party and third party risks may be mitigated in terms of the powers that the Authority holds in terms of the Insurance Act. For example, section 25(8) of the Insurance Act provides that the Authority may impose licensing conditions:

> (8) The Prudential Authority, in the case of an insurer, may impose licensing conditions in addition to subsections (1) to (7) necessary to achieve the objective of this Act …

36. Should the Authority have concerns in respect of the Licence Variation Application, it may impose suitable conditions.

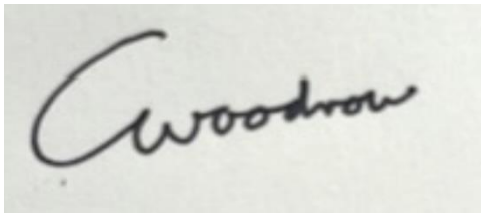
Conclusion

37. We find that the interpretation contended for by the Authority is wrong. There is no implied prohibition in the Insurance Act on ‘traditional’ insurers underwriting risks for both its own (first party risks) and third parties (third party risks).

Order

38. The reconsideration application is upheld, and the decision of the respondent is set aside, and the matter is remitted to the respondent for further consideration.

Signed on behalf of the Tribunal panel.



C Woodrow SC