Mediplus Services Limited v Sanlam Kenya PLC (Previously Pan Africa Insurance Company Limited) & another; APA Insurance Limited (Third party) (Civil Suit 121 of 2003) [2023] KEHC 3081 (KLR) (Commercial and Tax) (14 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3081 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 121 OF 2003

A MABEYA, J

APRIL 14, 2023

BETWEEN

MEDIPLUS SERVICES LIMITED ..... PLAINTIFF

AND

SANLAM KENYA PLC (PREVIOUSLY PAN AFRICA INSURANCE COMPANY LIMITED) ..... 1ST DEFENDANT

HANNOVER LIFE REASSURANCE AFRICA LIMITED ..... 2ND DEFENDANT

AND

APA INSURANCE LIMITED ..... THIRD PARTY

RULING

1. The plaintiff is a limited liability company incorporated in Kenya and carries on the business of procurement and management of medical policies.

2. The 1st defendant is a limited liability company incorporated in Kenya and carries on the business of insurance and reinsurance services. And, the 2nd defendant is a limited liability company incorporated in the Republic of South Africa and carries on the business of reinsurance services, including in Kenya.

3. The 3rd party is a limited liability insurance company incorporated in Kenya.

4. *Vide* a further further amended plaint dated 2/12/2020, the plaintiff instituted a claim against the defendants. It's case was that it entered into an agreement titled 'Medical Reinsurance Cover Note 1999' with the defendants dated 14/12/1999 for the purpose of providing medical insurance in Kenya.

5. That the terms of the agreement included that the plaintiff would administer and manage policies on behalf of the defendants, deal with the paperwork, processing and making payment of claims. The plaintiff would remit to the defendants the insurance premiums collected from customers after deducting monies paid out in settlement of claims together with administration fee and broker's commission.

6. The plaintiff claimed that in performance of its obligations under the said agreement, it paid to the 1st defendant on behalf of both defendants an amount of Kshs.137,420,627.51 as premiums. That upon receipt thereof, the defendants were obligated to insure and reinsure the customers procured by the plaintiff. That the 1st defendant undertook to reimburse the plaintiff all the claims processed and lodged by the plaintiff within one year ending on or about 30/6/2003 being the period of cover.

7. It was the plaintiff's case that sometime in the month of January and February 2002 and during the currency of the agreement, the 1st defendant unlawfully absconded its obligations under the contract by unilaterally terminating the contract on the basis of a purported "clean cut" basis and further declined to manage the run-off as is the practice in the insurance industry.

8. It contended that the 1st defendant neglected and/or refused to make reimbursements for claims that had crystallised and/or which had crystallised during the run off period to the detriment of the plaintiff. That as a consequence of the breach, the unpaid claims accrued to the tune of Kshs.317,229,566.09 and the plaintiff continued to suffer losses.

9. In the premises, the plaintiff prayed for judgment against the defendants jointly and/or severally for the sum of Kshs.317,229,566.09, general damages for breach of contract, interest and costs of the suit.

10. The 1st defendant opposed the suit vide an amended statement of defence dated 29/5/2019. It contended that it had entered into an insurance contract with the plaintiff by it agreed to indemnify the plaintiff against certain liabilities that the plaintiff might incur on account of medical claims, subject to the terms and conditions of the insurance contract.

11. That at all material times, there was a contract of reinsurance in force between it and the 2nd defendant by which the 2nd defendant agreed to indemnify it against all or part of any liability it might incur to the plaintiff pursuant to the Insurance Contract.

12. That the insurance contract between it and the plaintiff was lawfully determined at the instance of the plaintiff with effect from 31/12/2001 and all its liabilities thereunder were duly settled and discharged. It denied being in breach of that contract and contended that it had refunded all premiums to the plaintiff.

13. The 1st defendant further contended that if there were any outstanding claims which it denied, then the 3rd Party would be liable for payment of the same as the 1st defendant had fully transferred its general insurance business to it since January 2003.

14. The 2nd defendant defended the suit vide a further amended defence dated 8/2/2021. It stated that it entered into a reinsurance contract dated 14/12/1999 with the 1st defendant by which it agreed to indemnify the 1st defendant against certain liabilities that the first defendant may incur to the plaintiff. That the plaintiff was not a party to the reinsurance contract and therefore it did not incur any obligation to the plaintiff.

15. It denied receiving any premiums from the plaintiff as all premiums were paid to and managed by the 1st defendant. That the reinsurance contract was not material to the matters in the subject proceedings. That the 1st defendant had become a loss making business in its capacity as the plaintiff's insurer

thereby prompting the 2nd defendant to declare that it would cease to provide any reinsurance support with respect to the plaintiff's business from or after 1/1/2002 unless the increase in premiums was effected.

16. That this led the 1st defendant to terminate the plaintiff's business through the "clean cut" method and refunded all unearned premiums to the plaintiff with the cut-off date being 31/12/2001.

17. In response to the third party notice, the 3rd party filed a statement of defence dated 22/7/2019. It denied the 1st defendant's claim against it and contended that the latter was guilty of laches as the 3rd party was being enjoined 16 years after institution of the suit which was grossly prejudicial. That only certain assets and disclosed liabilities as at 1/1/2003 were taken over by it and the alleged claim was neither disclosed nor was it one of the transferred liabilities.

18. That the claim by the 1st defendant against it was statutorily barred by limitation in terms of the *Transfer of Business Act*, the *Limitation of Actions Act*, the *Insurance Act* and the periods prescribed in the relevant statutory notices.

19. Without prejudice, the third party stated that in terms of the Transfer of Business Act, the 1st defendant continued to bear liability for the subject matter of this suit. That in terms of the *Insurance Act*, the transfer of the general insurance business took effect from 15/9/2005, well after the 1st defendant had compromised its dispute with the plaintiff.

20. In the premises, the third party reiterated that it owed no obligation whatsoever to either the plaintiff or the 1st defendant.

21. At the trial, the plaintiff called 2 witnesses. PW1 was Lewis Nguyai, a director of the plaintiff. He relied on his witness statement dated 26/9/2020 which reiterated the contents of the further further amended plaint.

22. He further testified that there was no insurance policy issued by the 1st defendant to the plaintiff as alleged by the 2nd defendant and that the only agreement subsisting between the parties was the Medical Reinsurance Cover Note 1999 and its Addendum No. 1. That the plaintiff was not privy to the 1st and 2nd defendant's Medical Reinsurance Cover Note 2000 and 2001. That the two substantially varied the terms of the Medical Reinsurance Cover Note 1999 and its Addendum No.1 without the knowledge and consent of the plaintiff and were therefore not binding on the plaintiff.

23. That the purported "clean cut" termination of the Medical Reinsurance Cover Note 1999 by the 1st defendant was illegal and in breach of insurance industry practice and the Medical Reinsurance Cover Note 1999. That the defendants were in breach of the Medical Reinsurance Cover Note 1999 for unjustifiably refusing to reimburse the plaintiff for claims arising out of the "run-off period" from 1/1/2002 to 31/3/2003 which was the lawful termination date for the Medical Reinsurance Cover Note 1999 (hereinafter "the 1999 Cover Note").

24. That as a result of the breach, the defendants jointly and severally owe the plaintiff Kshs.130,124,458.02 in the ratio of 20%:80%, respectively from claims arising out of the "run off period" following the unlawful termination of the Medical Reinsurance Cover Note 1999.

25. On cross examination, he admitted that the plaintiff was not a signatory to the 1999 reinsurance contract. That the plaintiff did not have a direct contractual relationship with the 2nd defendant and therefore the plaintiff never demanded any refund premiums from the 2nd defendant. That the proceedings before the Commissioner of Insurance were strictly between the plaintiff and the 1st defendant and at no point did the Commissioner rope in the 2nd defendant to those proceedings.

26. That the plaintiff was not aware of the restructure by Pan Africa Insurance Holdings Limited and the transfer of its life insurance business to Pan Africa Life Assurance Limited and the general insurance business to Pan Africa General Insurance Limited. That the suit was not an afterthought after the settlement reached at the Commissioner of Insurance since the proceedings before the Commissioner was concerned with the outstanding claims as of 1/10/2001 but not to claims that came subsequent to that meeting.

27. In re-examination, he stated that the proper interpretation of the Cover Note provided that it was a continuous contract from 1/1/1999 subject to 90 days' notice of cancellation at 31/12 of the year therefore placing the termination on 31/3/2002.

28. That the contract with the 1st defendant did not provide for a "clean cut" date hence the same was unilateral and illegal. That the complaint before the Commissioner of Insurance led to the plaintiff receiving some payments which was received on a without prejudice basis. That the present suit was not an afterthought considering the amount of documentation provided in court and that the plaintiff was not an insurance company but only provided health management services ad ceded 100% insurable risk to the defendants.

29. PW2 was Isaac Pitt Ng'aru, a principal consultant of Ng'aru & Associates, Risk management and Insurance Consultants with over 30 years' experience. He testified that his expert opinion was partly informed by two articles filed in court. These were, Alternative Mechanisms For Troubled Companies - A National Association of Insurance Commissioners White Paper, printed in the USA in February 2010 and Achieving Finality - The Commutation Process, 2020 by the Institute of Actuaries Australia.

30. On cross examination, he admitted that the Commissioner of Insurance could adjudicate disputes and that the office holder would be an expert and that ordinarily the decisions of the Commissioner of Insurance would be binding upon the parties. That "clean cuts" were allowed in the insurance industry and that the 90 days' notice of termination in the Cover Note tallied with 90 days' policy.

31. That a loss making insurance business can engage in "clean cut" within certain well known industry parameters on settlement of claims. That from his study of the documents in court there was no mention or discussion of "clean cut" at the Commissioner of Insurance's proceedings.

32. On re-examination, he stated that commutation was done properly and the 1st defendant's letter dated 22/2/2002 cannot constitute "clean cut" as there was commutation plan to it and none was brought to Court.

33. D1W1 Gladys Muema, the Legal Officer for Sanlam (K) testified for the 1st defendant. She adopted her witness statement and produced the 1st defendant's documents as D1Exh1. Her witness statement mirrored the contents of the 1st defendants further amended defence dated 29/5/2019.

34. She testified that the plaintiff and the 1st defendant entered into an insurance contract which was terminated by the 1st defendant. A sum of Kshs.19,291,858.21, being pro rata premium refund from the date of cancellation of the policy, was agreed to be due and owing to the plaintiff from the 1st defendant and was fully paid.

35. That having been paid the premium refund by the 1st defendant, the plaintiff was not entitled to the benefit of the policy which had already been cancelled as per the policy. That if the Court is to find that the plaintiff is owed any monies, then the third party is the one to pay any such amounts.

36. On cross examination, she testified that she had no knowledge of any contractual relationship between the plaintiff and the 1st defendant prior to 24/11/2000. That there was a Medical Insurance Cover

Note 1999 which provided medical insurance and a reinsurance contract between the 1st and 2nd defendant. That the parties to the Cover Note were the 1st and 2nd defendant as the reinsurers. That the plaintiff earned a 17.5% commission as a broker that was to be deducted from premiums.

37. D2W1 was Bill Skirving who testified for the 2nd defendant. He had been an in-house lawyer at the 2nd defendant for 21 years. He adopted his witness statement dated 26/6/2019 and produced the 2nd defendant's bundle of documents as D2Exh1.

38. He testified that, on 14/12/1999, the 2nd defendant entered into a reinsurance contract with the 1st defendant, which was revised, to cover certain liabilities that the 1st defendant may incur to the plaintiff who was not a signatory to that. contract.

39. That the reinsurance contract was not material to the matters in issue in this suit within the context of any liability on the part of the 2nd defendant to the plaintiff. That after a "clean cut", all liabilities were extinguished.

40. TPW1 was Judith Onyango, the Legal Manager of the third party who adopted her witness statement and produced the third-party bundle of documents as TPExh2.

41. She testified that the third party was enjoined in the suit 16 years after its institution which was prejudicial to it. That the third party being enjoined to this suit is malicious and an afterthought and with no legal basis upon which the 1st defendant's claim could stand.

42. That the plaintiff and 1st defendant compromised their respective positions by entering into a form of mediation process which led to a binding agreement before the Commissioner of Insurance in June/ July 2002. This was in relation to pro rata refund of premiums and settlement of pending and accrued claims by the 1st defendant arising out of the contract entered into between the plaintiff and the 1st defendant in January 1999.

43. That the third party vehemently denied the 1st defendant's claim against it and that no medical claims were taken over by the third party. That in terms of the *Insurance Act*, the transfer of general insurance business took effect from 15/9/2005 well after the 1st defendant had compromised its dispute with the plaintiff.

44. On cross examination, she stated that the third party only took over the assets and disclosed liabilities from a merger of Pan Africa General Insurance Company and Apollo Insurance Company Limited. That only certain disclosed liabilities were taken up and that liability in the form of claims by the plaintiff were not disclosed liability.

45. I have considered the pleadings, the testimony of witnesses and the entire record. The issues for determination are: -

    a. What was the contractual relationship between the plaintiff and the defendants?

    b. Whether the insurance contract was validly terminated.

    c. Whether the 1st defendant paid its dues to the plaintiff under the terminated insurance contract.

    d. Whether the plaintiff is entitled to the reliefs prayed for.

    e. Whether the third party is liable to indemnify the 1st defendant.

46. The first issue is the relationship between the plaintiff and the defendants. The plaintiff submitted that it procured an insurance cover from the 1st and 2nd defendants which is documented in the

1999 Cover Note. That under that Cover Note, the plaintiff would administer and manage policies on behalf of the defendants, remit to them insurance premiums collected from customers after deducting an amount covering the settlement of claims together with the plaintiff's Cedant Administration Fee and Brokers Commission. That the defendants' liability to the plaintiff for claims settled was to be settled by both defendants.

47. On the other hand, the defendant submitted that there was an insurance contract entered on 24/11/2000 between the plaintiff and the 1st defendant. That the cover note was a reinsurance contract between the 1st defendant and the 2nd defendant whereby the 2nd defendant reinsured the 1st defendant's business and that the plaintiff was not privy to the same.

48. The 1999 Cover Note and its addendum were produced at pages 1-6 of PExh1. Important features of that Cover Note and its addendum include: the reinsured is named as the plaintiff while the reinsurers are the 1st and 2nd defendants, it was a continuous contract from 1/1/1999 subject to a 90 day notice of cancellation at 31st December of any year, the cedants administration fee was 35% while the broker's commission was 17.5%, and the Cover Note and its addendum were signed by the 1st and 2nd defendant only. In the addendum, the 1st defendant is listed as the reinsured while in the Cover Note, the reinsured is the plaintiff.

49. The Insurance Contract (hereinafter "the contract") dated 24/11/2020 is annexed at pages 1-10 of D1Exh1. Paragraph 4 thereof states in part: -

> " Provided always that the Company reserves the right to cancel the policy or to amend the premiums or benefits or vary the terms and conditions at any stage during the policy period, on giving notice in writing not later than 90 days prior to the day of cancellation."

50. Paragraph 12 thereof provides: -

> " The Company or the Insured may cancel this Policy by giving ninety days' notice in writing to the other party at its last known address. If the Company gives such notice, the Insured shall thereupon become entitled to a proportionate return of premium otherwise the Insured shall only be entitled to a return of premium in accordance with the Company's usual short period scale provided that no claim has been made in the then current period of Insurance."

51. The contract gave the 1st defendant was entitled to cancel the policy or to amend the premiums or benefits or terms thereof upon giving a 90 days notice.

52. The question for determination is which of the two documents that governed the relationship between the plaintiff and the defendants.

53. The 1999 Cover Note is a reinsurance contract. The purpose of reinsurance is to indemnify the reinsured against liability which may arise on the primary insurance. A reinsurance policy is usually contracted between an insurance company and a reinsurance company. In this regard, notwithstanding that the plaintiff was named as the insured in the Cover Note, the same was as between the 1st and 2nd defendant. This is why the same was only signed by the defendants. The plaintiff was not a party to the same.

54. Although the plaintiff could be indemnified as stipulated in the Cover Note, the plaintiff was not a party thereto and cannot enforce the same as it only related to the defendants who were the signatories.

55. The insurance contract dated 24/11/2000 was as between the plaintiff and the 1st defendant. Although PW1 attempted to dispute the same, it was acted on by the parties. It cannot be said that it was not applicable as the relationship between the plaintiff and 1st defendant would then have been in vacuum. It was binding on the two. It created a medical insurance cover provided by the 1st defendant to the plaintiff.

56. I therefore find that the 1999 Cover Note was a reinsurance contract between the 1st and 2nd defendant while the Insurance Contract was between the plaintiff and 1st defendant. The plaintiff had nothing to do with the 1999 Cover Note. It could not make a claim directly on it as it was not a party to the same.

57. On the second issue, I have already established that a valid insurance contract existed between the plaintiff and 1st defendant. That the plaintiff was not privy to the reinsurance contract.

58. Under Clause 12 of the insurance contract, the 1st defendant could cancel the policy by giving a 90day notice in writing to the plaintiff. I have already set out that clause above.

59. Clause 8 of the contract provided that the 1st defendant had the right to cancel the policy or to amend the premiums or benefits at any stage during the policy period on giving a 90day written notice.

60. *Vide* a letter dated 24/8/2001, the 1st defendant informed the plaintiff that it would increase the net premiums by 111%. In response to the letter, PW1 informed the 2nd defendant that the plaintiff would be unable to place any business with it from 1/10/2001 effectively cancelling the insurance contract.

61. The correspondence above and others in the 1st defendant's bundle indicate that the 1st defendant adequately informed the plaintiff of the variation of premium and the plaintiff opted to discontinue any further business with the 1st defendant from 1/10/2001.

62. I find that the 1st defendant was within its rights to vary the premium and that it notified the plaintiff of the variation in accordance with the insurance contract between the parties.

63. On the 3rd issue, the question is whether the 1st defendant fully paid its liabilities to the plaintiff. The plaintiff submitted that under a run-off, the contract between an insured and reinsured is terminated but the underlying obligation to policy holders continues until the expiry of the policy held. For instance, if an insured took out the policy in December 2001, then the insured was entitled to lodge the claim up to December 2002.

64. That despite the fact that the relationship between the plaintiff and the 1st defendant in terms of accepting new business terminated in December 2001, the obligations to the third parties who were holding insurance policies continued until the natural expiry of the policies that they held.

65. The plaintiff submitted that the defendants were obligated to manage runoff, and that they could only have terminated their obligation to manage runoff by entering into a commutation agreement with the plaintiff which was not the case.

66. On the other hand, the 1st defendant argued that the plaintiff and its advocates did not have an objection to the clean-cut arrangement. The cut-off and/or clean-cut termination is a provision that prevents the reinsurer from being liable for claims after the contract termination date.

67. At page 25 of D1Exh1 was a letter 24/3/2002 from the plaintiff's advocates to the 1st defendant. In that letter, the sad advocates acknowledged that it had been agreed between the plaintiff and the defendant that the accounts between them would be clear cut as at 31/12/2001.

68. A dispute arose between the parties on the outstanding balance due to the plaintiff from the 1st defendant which dispute was referred to the Commissioner of Insurance. A meeting was held between

the Commissioner of Insurance and the representatives of the plaintiff and the 1st defendant to solve the dispute. By a letter dated 12/9/2002, the Commissioner stated that it had been agreed by the parties that the total amount payable to the plaintiff by the 1st defendant after final reconciliation on outstanding claims was Kshs.4,684,778.51 which the 1st defendant promised to pay by 18/9/2002.

69. It is noted that prior to the Commissioner's conclusions, the representatives of the plaintiff and the 1st defendant participated in the reconciliation on the final claims owed to the plaintiff. The last paragraph of the reconciliation indicated thus, 'The resolving of the above closes the mediplus claims account.'

70. The 1st defendant submitted that it had paid the amounts agreed and the taxes due as stipulated by the Commissioner of Insurance. The evidence on record supports this assertion and the plaintiff has not adduced evidence to demonstrate that the claims as agreed upon by the parties remained unsettled.

71. The plaintiff and 1st defendant were unable to resolve the dispute as to the outstanding claims after the termination of the insurance contract between them. The plaintiff claimed that a run off style of payment should be adhered to by the 1st defendant while the latter contended that a clean-cut arrangement was in place.

72. It is indicated in the letter dated 24/3/2002, that the plaintiff had consented to the clean-cut arrangement but sought to have the 1st defendant pay through the run off method. The 1st defendant did not agree to that arrangement. The parties thereafter submitted their dispute to the Commissioner of Insurance and had the dispute settled.

73. As at the time the dispute was being submitted to the Commissioner, the plaintiff well knew that there were still claims by policy holders which were still being submitted. It readily accepted to deal with the refund of premiums and chose to ignore the issue of the running claims. Can it be allowed thereafter to turn around and assert that the run-off arrangement applied? I do not think so. It cannot be allowed to deal with the issue, which to the Court seems to have been intertwined, in piecemeal. The claim was in my view, an afterthought.

74. In this regard, the plaintiff's claims as against the defendants fail and the 1st defendant's claim against the third party does not therefore arise.

75. In the further amended plaint, the plaintiff prayed for (a) payment of the entire outstanding amount of Ksh.317,229,566.09, (b) general damages for breach of contract and interest on (a) and (b) at prevailing bank rates.

76. Having found that the plaintiff had compromised its claim with the 1st defendant through the proceedings before the Commissioner, it follows that its claim against the defendants fails in total.

77. As regards costs, the plaintiff shall bear the costs of the defendants. The 1st defendant dragged the third party into these proceedings 16 years after its institution. That was clearly an afterthought. The 1st defendant shall bear the costs of the third party.

It is so decreed.

DATED and **DELIVERED** at Nairobi this 14th day of April, 2023.

A. MABEYA, FCIArb

JUDGE

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