REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case Number: **024527/25**

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: No

[redacted]

20/03/2025
DATE SIGNATURE

In the matter between:

CLIENTELE LIFE ASSURANCE COMPANY LIMITED Applicant

and

B INSURANCE BROKERS (PTY) LTD First Respondent

B3 FUNERALS SOWETO (PTY) LTD Second Respondent

JUDGMENT

MANOIM J

[1] The applicant in this urgent application, Clientele Life Insurance Company Ltd (Clientele) is an insurance underwriter.

[2] In 2021 it was approached by the two respondents, B3 Insurance Brokers (Pty) Ltd (B3) and B3 Funerals Soweto (Pty) Ltd (B3 Soweto) to take over as the underwriter of their funeral underwriting policies as they had become embroiled in a dispute with their then underwriter a firm called African Unity Life (AUL).

[3] Clientele agreed and once the necessary regulatory hoops had been jumped through, it issued new policies to the clients to replace those of AUL. At the same time, it entered into an agreement with the respondents to regulate their relationship. The respondents are what is known as intermediaries in this industry. They act as the interface between the client who buys the funeral policy and the underwriter. This requires them to be subject to certain regulatory requirements in terms of the Financial and Intermediary Services Act, 37 of 2002, known as the FAIS requirements. They become relevant later.

[4] In 2022 the respondents approached Clientele again. They, on Clientele's version not seriously disputed, were facing financial problems because of cash flow. Clientele agreed to help out by paying them R 100 million upfront – an advance on the commission to be received.

[5] But in return for this advance Clientele required the respondents to agree to an amendment of their agreement. The clause which I shall refer to as the anti-churn clause, was to protect Clientele which had paid the respondents their commission upfront, from the risk of the respondents migrating the policies to another underwriter.

[6] The crucial term in the amendment is this clause 4.14.a, which provides as follows:

- *during the subsistence of the respective intermediary agreements, as well as after the termination or cessation of the same, the Respondents would refrain from any acts and/or omissions which, directly or indirectly:*

    - *invite, induce or persuade, or attempt to invite, induce or persuade any "A1 and A2.1 Policyholder" (as per Annexure A) to cancel his/her Policy and/or relationship with Clientele (it being agreed that Clientele shall likewise not invite, induce or persuade any "A1 and A2.1 Policyholder" to cancel his/her relationship with the intermediaries); and/or*

    - *directly or indirectly interfere with the insurer/insured relationship created between Clientele and any "A1 and A2.1 Policyholder" (as per annexure A to the respective addenda).*

[7] In industry jargon this type of clause is known as an anti-churning mechanism. All went well until on 5 December 2024, Hugo Low, Clientele's Managing Director was shown a letter purportedly emanating from B3. Written by its chief executive officer Surprise Nkosi, it is dated 5 November 2024 (the November letter). It is marked Private and Confidential but is not addressed to anyone. It states that a company called Gavanni Pty Ltd (Gavanni) had been mandated by B3 to initiate "re-broking" of B3's clients policies. The letter does not specifically refer to Clientele's policies. But it does refer, amongst the categories of contracts to be renegotiated, its '*funeral policy portfolio'*. Clientele claims it represents 90% of B3's funeral policy business so this reference to the funeral policy portfolio it contends, must be considered a reference to its policies. If that is the case it argues, then B3 is violating clause 4.14a, the anti-churning provision in the contract.

[8] Clientele wrote to B3 in December precisely making this accusation. It demanded an undertaking that B3 would respect the anti-churning provision. B3 through its attorney wrote back an aggressive letter. It accused Clientele of violating the confidentiality agreement between and being in unlawful possession of the letter.

On the letter itself B3 claimed it was an internal document that had never gone out to anyone. But on the material issue of the undertaking, B3 refused.

[9] Correspondence went back and forth between the parties from December to January with a brief month's hiatus in between; presumably everyone was on leave for their annual vacation. Clientele requested the undertakings again in January; they were not forthcoming from the respondents leading eventually to this application being launched.

[10] In the meantime, in December the parties agreed to take the dispute to arbitration. The contract provides for this. The arbitration is well under way; papers have been filed and an arbitrator has been agreed upon. The parties are agreed that the arbitration will only be concluded in three to four months' time. The arbitration will decide the same issues that arise in this interim interdict regarding the legality of the contract.

[11] Clientele's case is a simple one. The contract is clear and prohibits churning. Prima facie, the November letter, suggests by way of a powerful inference that can be drawn from its content, that B3 was about to churn its funeral policy portfolio to Gavanni. But what it relies on for the trigger for this application is the steadfast refusal of B3 to give the undertaking. Thus, argues Clientele it has a contract, and it is entitled to specific performance. Where the other party refuses to do so it argues, it is entitled to an interdict to compel them to do so.

[12] If B3 does engage in churning the damage will have been done and the harm will be irreversible save for a claim for damages as policies are ongoing financial instruments for which regular premiums are paid.

[13] B3 has opposed the interdict both on the grounds of urgency and the merits. It has also filed a counterclaim in which it claims return of the November letter, its deletion from any electronic communications devices under the applicant's control,

and the striking out of it from the applicant's founding affidavit. No affidavit is attached to this counterclaim; instead, the claim is made that the facts are set out in the answering affidavit of the respondents' deponent. Whether this is adequate to enable the applicant to respond I need not decide.

[14] The counter claim is clearly not urgent and was brought simply as an attempt to erect another hurdle in the way of the applicant. If on the same facts the respondents allege the applicant's claim was brought too late the same criticism can be levelled against them with an even stronger basis given that this demand was only made now in the answering affidavit despite the respondents knowing that the applicant had the letter in its possession in early December. Nor is there any concern of irreparable harm. The only time the letter is likely to be used for any purpose is in litigation, and if there is any basis to the objection which I need not decide now, it can be made there and then, in the appropriate forum. In fairness to Mr Zimmerman who appeared for the respondents he appeared to concede this. This application must be struck from the roll.

[15] I return to the main application. The respondents opposition to the main application was based on several issues. First the application had not been brought timeously. Secondly the applicant could get relief in due course because the parties were going to have the matters determined in the arbitration which had already been set up. Then the respondents objected to the joinder of B3 Soweto on the basis that is a separate legal entity and was not mentioned in the November letter – only B3 is.

[16] Further the respondents also contended that the interdict was for final relief not interim relief. But it is quite clear that the relief is interim, and this point was conceded by Mr Zimmerman at the hearing.

[17] The respondent also argued that the relief was unenforceable because it was too vague. It was alleged that it was not clear to which contracts the relief applied

because the individuals were not named; rather the relief was set out in general terms by way of reference to the erstwhile AUL clients.

[18] The respondents also deny the applicant has established a prima facie right. They contend that the anti-churning clause is not enforceable because it is contra bones mores. The reason for this contention is that they allege is that will force them to contravene their professional duties as independent brokers in terms of the FAIS regulations. They gave as an example if an individual sought advice as to whether the Clientele policy was the best in the market or if they could get a policy better suited to their needs from another company. If the respondent company considered there were better options open to the client the relief being sought would preclude them from doing so. They note that the obligation imposed on the intermediaries survives even the termination of their agreement with the applicant.

[19] The applicant contends that the terms of the relief do not prevent the respondents from advising the individual client. It is aimed, it was argued, at the wholesale churn of a book to another client as appeared to be threatened in the November letter. The applicant of course was a beneficiary of such a wholesale churn when it took over the AUL policies and no doubt given this history is extremely sensitive to the same fate befalling it.

[20] But I do not need to decide these points. The application is not urgent. This is not because it was not brought in time. Here I am with the applicant. It attempted to negotiate with the respondents before resorting to litigation and once this avenue was closed by the respondents refusal to give an undertaking not to churn, the applicant brough the application timeously. But the problem for the applicant is showing it will not be able to get relief in due course. This is the other requirement of Rule 6(12(b).

[21] It is common cause that the arbitration process will take place in the next three to four months. The respondents consider themselves bound if not by the anti-

churning provision at least by the obligation for Clientele to be given 90 days' notice of a client's instruction to change or cancel its policy. This understanding even appears in the contentious November letter.

[22] Thus argue the respondents the apprehended harm is not immediate. I agree with this contention. Moreover, the immediate concern of the applicant at the time the application was launched was the looming spectre of the respondents churning their policies to Gavanni. But the Gavanni deal whatever it entailed (and this point is disputed) is now according to the respondents no longer going to happen. The applicant is not able to refute this so I must accept this.

[23] If the applicant is correct in its legal contentions it will succeed in the arbitration in at most four months' time. The question then is whether it should get interim relief to safeguard its interests until then. The respondents have indicated that they at least respect the 90 day notice period. That leaves possibly one month when a churn may take place. But the immediate threat of that when this application was brought as I mentioned, was the threat of Gavanni. But that threat is no more. I consider that the applicant will still be able to get substantial relief in due course. Given the nature of the legal dispute between the parties which is by no means simple, it is better that the points of law at issue are decided in the course of an arbitration than in the urgent court.

Conclusion

[24] The main application is struck off the roll for lack of urgency. The counter application is struck off the roll for lack of urgency. I do not think it fair for the taxing master to have to deal with disputes over which attendances were necessary for which application. One solution is that each side pays its own costs. But the main application raised more issues and effort than did the counter-application. As a solution I will make no order for costs in respect of the counter-application but reduce the costs the respondents can recover by half in the main application. In terms of the agreement between the parties if there were legal disputes between

them, costs would be awarded on an attorney client scale. I must follow their agreement and award attorney client costs.

ORDER

1. The main application is struck off on the grounds of urgency .
2. The counter application is struck off on the grounds of urgency .
3. The applicant is liable for half the respondents costs in respect of the main application on an attorney client scale.
4. There is no award of costs in respect of the counter-application.

_____ [redacted] _____

MANOIM J

JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant:	D. Van Niekerk instructed by Cliffe Dekker Hofmeyr Inc
For the First Respondent:	R. Zimerman instructed by Taitz & Skikne Attorneys
Date of hearing:	12 March 2025
Date of Judgement:	20 March 2025