

WHAT ABOUT INSURANCE LAW PRINCIPLES? A COMMENT ON THE SOUTH AFRICAN CASE OF *AFRICAN UNITY LIFE LIMITED v PROSPER FUNERAL SOLUTIONS* CASE No 2021/55922

NEELS KILIAN

Faculty of Law, North-West University,
Potchefstroom, South Africa

Abstract

This article discusses the legal implications of an insurance net premium. A net premium refers not only to a single premium but also to premiums in the aggregate, commonly referred to as a loss ratio calculation. This calculation is relevant to a specific agent of an insurance company, namely a binder holder, the equivalent of which as regards Lloyd's of London is a cover holder. A binder holder is a South African approach to a cover holder and acts as an insurance company without an insurance company licence in order to, for example, draft policy wordings, and accept or reject claims. The article discusses an instance where the court did not consider the importance of a binder holder and a net premium, nor the importance of a bordereau and how it related to the business activities of Prosper Funeral Solutions.

Keywords: cover holder; binder holder; net premium; loss ratio; acknowledgment of debt; bordereau; premium collection company.

[A] INTRODUCTION

In *African Unity Life Limited v Prosper Funeral Solutions* (2021: paragraphs 11-12) the South African High Court (Gauteng Division) had to decide on the legal enforcement of an acknowledgment of debt entered into by African Unity Life (AUL) and Prosper Funeral Solutions (PFS). This was the result of an unauthorized transfer of ZAR10 million by PFS to an undisclosed bank account, which took place after hours to prevent the insurer, AUL, from monitoring the bank account (*African v Prosper* 2021: paragraph 46). The respondent, PFS, relied on previous verbal agreements to place the acknowledgment of debt in perspective. Despite this, the High

Court focused only on the acknowledgment of debt, making the judgment a simple one (*African v Prosper* 2021: paragraph 49).

However, neither the High Court nor the advocates (barristers) for the applicant applied the principles of insurance law, making it extremely difficult to understand the acknowledgment of debt and the legal position of PFS, for example, establishing what type of binder holder PFS was—was it an underwriting manager or a non-mandated intermediary (an underwriting manager receives a fixed binder fee and also shares in the profits of the insurer—profits being calculated with reference to a loss ratio: Kilian 2020)?¹ A binder holder is a South African legislative development, similar to a cover holder, as a company which exists separately from the insurer—Lloyd’s of London; however, the legal implications of being a cover holder fall outside the scope of our discussion.² In the case in question, the High Court did not focus on whether PFS was a binder holder, able to perform binder functions (eg to reject claims submitted by policyholders on behalf of the insurer as if it were the insurer and to draft own policy wordings on behalf of the insurer as if it were the insurer—very similar to a cover holder etc). As stated on its website at the time,³ PFS had a million policyholders and the High Court thus held that the reconciliation of the monthly premium payments by policyholders should be an easy exercise (*African v Prosper* 2021: paragraph 32). However, this opinion regarding the reconciliation may be criticized because the court proposed this without focusing on insurance law principles, ignoring the fact that a bordereau would be required to reconcile such transactions with a million policyholders (Reinecke & Ors 2013).⁴ In this case note, we will discuss the insurance law principles for a binder holder and how they relate to PFS by making research assumptions, which is an accepted practice, to illustrate an alternative legal relationship between AUL and PFS with reference to the ZAR10 million.

¹ See the amendment of the Short-Term Insurance Act 1998 in the Government Gazette No 34877 of 23 December 2011 (1076 and 1077) for the definition of an underwriting manager as a binder holder and section 6.4 with reference to a binder fee and sharing of profits. The same applies to the Long-Term Insurance Act 1998. Short-term refers to non-life insurance products, for example, vehicle insurance, and long-term refers to life insurance products, for example, death cover.

² National Treasury, Republic of South Africa, [Responses to Comments Received on Short-Term Insurance Regulations](#) (submitted to South African Parliament 17 November 2017), at page 105 with reference to AON South Africa—cover holder.

³ The website is no longer available due to the fact that the company has since closed down.

⁴ No definition for a bordereau is provided. Although this textbook is 10 years old, it remains an authoritative source in South Africa.

[B] FACTS AND THE DECISION PERTAINING TO THE CASE OF *AFRICAN UNITY LIFE v* *PROSPER FUNERAL SOLUTIONS*

Facts

In *African Unity Life v Prosper Funeral Solutions*, the High Court focused on the application for provisional liquidation of the respondent (PFS) (Bechard 2022; Bechard 2023). The application seems very simple: PFS previously signed an AUL acknowledgment of debt agreement on 14 May 2021, valid retrospectively from 1 May 2021 (*African v Prosper* 2021: paragraph 12). The debt acknowledgment amounted to ZAR10 million, because PFS had transferred this amount, without the knowledge of AUL, to an undisclosed bank account (*African v Prosper* 2021: paragraph 20). The transfer of the ZAR10 million occurred after hours when AUL could not monitor the bank account for the inflow and outflow of cash by PFS. Previously, on 25 March 2020, PFS had obtained “authority” to collect premiums (technically authority could refer to a binder holder relationship with AUL) from policyholders on behalf of AUL—as if PFS were an “insurer”. The High Court did not refer to the number of policyholders affected by the ZAR10 million transfer, but it is clear that PFS transferred the premiums it had collected without AUL’s permission. In terms of the intermediary agreement—between AUL and PFS—collected or earned premiums had to be paid to AUL without delay (*African v Prosper* 2021: paragraph 49). This is a common clause in a binder holder contract and states that a binder holder should pay over collected premiums to the insurer immediately. Therefore, the legal relationship between an insurer and a binder holder is regulated by an intermediary agreement or, more specifically, a binder holder agreement or contract. On the other hand, the acknowledgment of the debt agreement or contract concluded on 14 May 2021 stipulated the following in clauses a and c:

- a. Make a payment of R4 000 000 to African Unity Life Limited toward the outstanding amount (this amount is based ... on an agreed profit ratio [*also commonly known as a loss ratio calculation*] to African Unity Life for the period) ... The full outstanding amount R10 000 000, effectively R6 000 000 after payment of the R4 000 000, will be paid back on a monthly basis (*African v Prosper* 2021: paragraph 13). (Inclusion and italics added.)

...

- c. Sell the new African Unity Life individual product (new AUL product) where Prosper Funeral Solutions will receive five times the net premium as upfront commission on payment of the first

premium by the policyholder. Until settlement of the full debt ... only one time the net premium will be paid over to Prosper Funeral Solutions while the rest of the remaining upfront commission [four times the *net* premium] will be allocated towards the outstanding debt (*African v Prosper* 2021: paragraph 13). (Inclusion and italics added.)

We inserted “net” because otherwise the above clause is very vague and confusing with reference to the first part of the clause which specifically requires net premium (generally known as profits). The terms of the above-mentioned acknowledgment of debt agreement cannot be varied by any party, unless the amendments are reduced to writing and signed by both parties—AUL and PFS (*African v Prosper* 2021: paragraphs 14 and 27). The first repayment was scheduled for 9 June 2021 and consequently PFS failed to effect payment (*African v Prosper* 2021: paragraphs 14-15). The notice of breach of contract explained that the amount of the first premium from the policyholders of the new AUL product was never paid to AUL and, in addition, that PFS also acted “illegally” as an insurer for different funeral schemes. In this respect, PFS had no “authority” to act as a binder holder to sell funeral insurance cover on behalf of different insurers, for example, 1Life Insurance Company (*African v Prosper* 2021: paragraph 8).

Two different claim forms were found on the PFS website—one for 1Life Insurance Company and the other in the name of PFS—but no insurance company name was disclosed on the latter claim form.⁵ It is also difficult to understand how many of the million policyholders were actually part of 1Life Insurance Company and how many were part of AUL, or both, since the High Court did not make any reference to the number of policyholders, or to the administrative procedures that were put in place to distinguish between AUL and 1Life policyholders, or for which policyholders PFS acted as a binder holder, or more specifically as an “insurer”, as is evidenced by the presence of the PFS claim form.

Further, the PFS board of directors failed to submit an affidavit as to why the application for liquidation should not be granted by the High Court as a direct result of the failure to pay over the first premiums collected for AUL as part of the repayment of the acknowledgment of debt. Instead, a PFS consultant known as Fischer submitted an affidavit, stating why the application for provisional liquidation should not be granted (*African v Prosper* 2021: paragraph 7). The consultant argued that he was familiar with all PFS business activities and, in addition,

⁵ Unfortunately, these forms are no longer available due to the closure of the company and the shutting down of its website.

knew all the relevant contracts entered into by PFS, for example, the intermediary agreement discussed earlier. The consultant also stated that the intermediary agreement, pertaining to the acknowledgment of debt, should be interpreted in terms of previously agreed oral or verbal contracts—concluded on 1 June 2020 (*African v Prosper* 2021: paragraph 20). These oral agreements stated a 5 per cent lead commission (calculated on gross premium earned or collected per policy) only if the funeral products were profitable at 15 per cent (commonly known as a loss ratio; a specific formula is used to calculate a loss ratio, which will be discussed later) (*African v Prosper* 2021: paragraph 30). It would appear that, because of the written acknowledgment of debt agreement, this oral arrangement (15 per cent profitable) was not relevant to the new AUL product to be sold. In other words, we can assume that the acknowledgment of debt was repayable even if PFS, or more specifically AUL, was unprofitable.

The decision

The High Court firstly focused on the issue of whether a consultant could submit an affidavit on behalf of the board of directors as to why an order for provisional liquidation should not be granted (*African v Prosper* 2021: paragraph 9). The Court held that this civil procedure step was a very strange one; nevertheless, it could be accepted by the Court if certain legal requirements were met (*African v Prosper* 2021: paragraph 6). The legal requirements for the civil procedure fall outside the scope of this article, but these steps remain interesting since it is generally assumed that the board of directors is aware of all business activities and could therefore give a better explanation in an affidavit than a consultant, especially about the existence of a binder holder agreement (*African v Prosper* 2021: paragraph 7). Whatever the case, the court focused on the acknowledgment of debt contract signed by PFS and ignored the previous oral agreements since they were concluded in 2020 and there was no evidence to confirm their existence (*African v Prosper* 2021: paragraphs 13-15). The acknowledgment of debt agreement was signed in 2021 and carried the most weight in establishing the true intention of the parties—ZAR10 million was owed and should be repaid to AUL monthly (*African v Prosper* 2021: paragraph 49). No amendments were signed in this respect, for example, the 5 per cent lead commission or 15 per cent loss ratio to supplement PFS cash flow to repay the ZAR10 million, and as a result the Court granted a provisional liquidation order (*African v Prosper* 2021: paragraphs 25, 31 and 50).

[C] ANALYSING THE DECISION

The possibility exists that the PFS board of directors simply did not know how to argue its case or how to present an affidavit confirming the principles of insurance law, for example, the technical relevance of a binder holder. As a result, the High Court failed to focus on the million policyholders and their relationship to the binder holder. Had the Court focused on these policyholders it would have understood that it is extremely difficult administratively to collect premiums and report on the successful collection of premiums to either AUL and 1Life (Millard 2016: 1)⁶—a bordereau would have explained this in great detail, keeping in mind that there were one million policyholders (Marano & Noussia 2019).⁷ A bordereau is issued on a monthly basis to inform, in this case 1Life and AUL, about how many policyholders have paid their premiums on time, how many premiums were collected successfully, how many policyholders did not pay and how many policyholders were subjected to an additional premium collection procedure owing to their non-payment, as well as the aggregate amount of premiums that should have been received by AUL and 1Life for that particular month, among other things (*Liberty v Illman* 2020: paragraph 4; Huneberg 2020).⁸ Without a sophisticated software bordereau, the manual reconciliation of these issues is extremely difficult, if not impossible. To consider how difficult it was to reconcile payments, we will use the following simple funeral insurance example from a South African perspective. In South Africa, funeral policies are very inexpensive with a general lump sum payment of approximately ZAR20,000 per policy (it could be less or more, but is very seldom less than ZAR20,000 per policy). If the average funeral

⁶ Financial Sector Conduct Authority (FSCA) Notice 20/2020, section 2(4)(a), states the following: “The long-term insurer must before entering into an agreement for direct collection of premiums and all the times thereafter – Have the necessary resources and ability to exercise effective oversight over the independent intermediary performing the direct collection of premium services on an ongoing basis.” FSCA Notice 20/2020, section 2, also requires that the FSCA should be informed who has the authority to collect premiums on behalf of the insurer. The advocate for respondent in the AUL case should have asked FSCA who had the necessary authority to collect premiums on behalf of AUL.

⁷ A quick search of 713 pages did not reveal any paragraphs explaining a bordereau in insurance law—this is a very specialized term in insurance law.

⁸ In the *Liberty Group* case, Liberty advanced commission payments to brokers. Subsequently, Liberty Group claimed back the advanced commission owing to policyholders failing to pay their premiums. It is unclear whether Liberty Group had its own sophisticated software to collect premiums, or otherwise who had the authority to collect the premiums. This was not disclosed to the court. To understand this case more clearly, a bordereau should be updated every month for accuracy with regard to data. A broker does not have access to such a bordereau unless Liberty Group was transparent pertaining to which policyholders were paid or not. Generally, an underwriting manager as a binder holder will be able to receive such a bordereau from the company that collects the premium on behalf of the underwriting manager.

premium is ZAR20 per policy (it could be less or more but is very seldom less than ZAR20 per policy), the monthly premium collected could be ZAR20 million (1 million policyholders x ZAR20 equals ZAR20 million). We do not know how many of the million policyholders were allocated to AUL only, so it is extremely difficult to understand the ZAR10 million debt owed to AUL; however, on face value, it would appear that AUL had 50 per cent of the total number of policyholders (ZAR20 million x 50 per cent = ZAR10 million).⁹ As stated earlier, the importance of the bordereau was to distinguish the number of policyholders that formed part of AUL and 1Life (Geldenhuis 2019). Currently, AUL and 1Life make use of 360Administration and Systems, and we assume this system is able to issue a bordereau to both 1Life and AUL—this was never explained to the Court.¹⁰ We also do not know whether PFS had the authority to collect premiums on behalf of 1Life as well, but we may assume that such authority could have existed, although 1Life was not party to the application to dispute the latter assumption.¹¹ In addition, and taking one step back, the company (we assume it was 360Administration and Systems) that runs these debit orders also charges a fee to collect the premiums and to pay them to PFS. Keeping this in mind, we doubt whether the acknowledgment of debt agreement was a suitable contract between PFS and AUL.¹² In other words, although PFS “collected” the premiums, the actual collection company would be 360Administration and Systems which ran the debit orders and paid the collected premiums to PFS. This is made evident by a bordereau explaining the collection in great detail, as discussed earlier.¹³ The fees for collecting an actual premium could be very high per policy, for example ZAR10 per policy (keeping in mind the relevant bank charges to be paid by 360Administration and

⁹ In the FSCA Notice 20/2020, section 1, the definition of accounting for premiums indicates the requirements for a bordereau, for example premium collection processing services. This requirement indicates the ability to reconcile payments effectively on a monthly basis, among other things. As examples see [QSURE](#) for debit order collections. See also “[Brolink Has Entered The Premium Collections Market](#)” (2 June 2021).

¹⁰ Only premium collection companies or companies with similar software can issue a bordereau. See, in this regard, Fulcrum Collections, “[About Us](#)”.

¹¹ FSCA Notice 20/2020, section 2(2)(b), requires permission 30 days prior to the first collection.

¹² The 360Administration and Systems website states AUL and 1Life as its clients.

¹³ The 360Administration and Systems, “[Systems and Services](#)”.

Systems, although this falls outside our discussion) (Kruger 2014).¹⁴ The difference between ZAR20 and ZAR10 is the actual premium or payable premium received for funeral cover. To illustrate this more clearly, we will make use of the following calculation: ZAR20 times one million policyholders equals ZAR20 million less actual costs for debit orders charged by 360Administration and Systems at ZAR10 per debit order, equals ZAR10 million premium collected per month. In this regard, it is important that AUL should have explained to the Court how many policyholders were being managed by PFS in order to have the Court understand the policyholder ratio of ZAR10 million per month in context; for example, 60 per cent of the ZAR10 million premiums belonged to 1Life only or 50 per cent belonged to either AUL or 1Life. By providing such an explanation, the court would have realized the importance of a binder holder relationship with the insurer (AUL or 1Life) and of identifying PFS as a binder holder for the specific policyholders of the insurers. However, the court did not do this and therefore it would be very difficult to argue that PFS could easily reconcile monthly premium payments.

Is it possible to sign an acknowledgment of debt in South Africa when you do not owe a person any money?

In *Dube v Mbokazi*, the applicant in this matter claimed ZAR550,000 from the respondent or defendant (*Dube v Mbokazi* 2018; *Allwright v Gluck* 1962). The plaintiff paid ZAR430,000 to the respondent, and it was verbally agreed that the plaintiff's brother would repay the ZAR430,000 with interest on behalf of the respondent (*Dube v Mbokazi*: paragraph 10). The respondent and the plaintiff's brother also agreed to the terms of repayment verbally. In other words, an acknowledgment of debt or settlement was signed between the plaintiff and the respondent, but effectively the plaintiff's brother was liable for the repayment owing to the existence of a verbal agreement—the latter was not disputed. The plaintiff's brother did not comply with the terms of the verbal agreement and, consequently, claimed ZAR550,000 from the respondent. As a result of the oral agreement, the respondent did not owe the plaintiff any money. The Court held that such

¹⁴ FSCA Notice 20/2020, section 2(2)(c), states the requirements for reasonable remuneration for collecting a premium successfully, depending on the nature of the sophisticated software used by the collection company, for example the remuneration may not be based on a percentage of the aggregate premium collected: see *Profida*. Profida provides the software to manage a business as a binder holder, for example underwriting manager; FSCA Notice 20/2020, section 2(2)(c), states the requirements for reasonable remuneration for collecting a premium successfully, depending on the nature of the sophisticated software used by the intermediary, for example the remuneration may not be based on a percentage of the aggregate premium collected.

an argument for why the respondent was not liable to pay the plaintiff was, in fact, a *bona fide* defence in the law (*Dube v Mbokazi*: paragraphs 16 and 19). In the respondent's affidavit, it is clear that the plaintiff's brother verbally agreed to repay the money. The respondent was also informed by the plaintiff's brother that the necessary payments had been made when, in fact, no payments were made (*Dube v Mbokazi*: paragraph 21). In this case, the High Court took a very interesting perspective on a signed acknowledgment of debt, stating that such a contract could be set aside if evidence (verbal or oral agreements) could be given to the Court that indicated why it should be rejected (*Dube v Mbokazi*: paragraph 27; *Visser v 1Life 2014*: paragraph 28). Although the Court had to decide on the merits of a summary judgment, this case is nevertheless relevant to our discussion; that is, that a written acknowledgment of debt signed with AUL could be set aside in the event of a *bona fide* defence. In this regard, we suggest that PFS should have focused on the ratio of policyholders of 1Life and AUL and the ratio of monthly premiums collected (indicated by a bordereau) to show whether PFS had a *bona fide* defence or not with reference to 1Life's number of policyholders that were part of the ZAR10 million acknowledgment of debt.

Intermediary agreement

A binder holder is a registered financial services provider and must comply with relevant legislation, for example, the Financial Advisory and Intermediary Services Act 37/2002 of South Africa. It is not always easy to identify who an actual binder holder or intermediary is because insurance products may be sold by an insurance broker who is also a type of intermediary but not a binder holder, while an underwriting manager as a binder holder uses only brokers to sell products in South Africa (*Liberty v Illman 2020*: paragraph 4). In addition, insurance companies like Hollard and others in South Africa made use of a company called Insure Group (Van Wyk 2021). The sole purpose of Insure Group was to collect monthly premiums on behalf of Hollard and other insurers, a relationship between insurers and Insure Group that was not previously regulated by the Financial Sector Conduct Authority (FSCA) (Bechard 2022). In other words, at the time it was not required to register as a financial services provider in order to provide such services.¹⁵ One advantage of a premium collection company such as Insure Group is the fact that, if a policyholder were to dispute their premium debit orders, they would not discuss this with Insure Group, as the public would be unaware of the legal relationship between Hollard and Insure Group.

¹⁵ FSCA Communication 1/2022 and exemptions for direct collections of premiums.

For all practical purposes, the public sees Hollard as the company that collects the insurance premiums from its policyholders. The same, we assume, would apply to 360Administration and Systems—only PFS would settle premium collection disputes with individual policyholders.¹⁶ Currently, Insure Group no longer exists because of disputes relating to the amount of actual premiums collected and premiums that should have been paid over to Hollard and other insurers.¹⁷ Be that as it may, the High Court did not focus on the premiums collected by 360Administration and Systems or whether the premiums received were recorded successfully by a bordereau, nor did the High Court focus on whether the FSCA had received an application by 360Administration and Systems or PFS for permission to collect premiums on behalf of AUL or 1Life. The FSCA was also never requested to disclose the name of the actual premium collection company to the High Court.¹⁸

The High Court held the view (without reference to a bordereau) that monthly reconciliations could have easily been done for AUL by PFS, although PFS denied this for the reasons—we assume—stated above with reference to the one million policyholders (*African v Prosper* 2021: paragraph 29). This implies that PFS made use of an incomplete or ineffective bordereau for reconciling the actual premiums collected.¹⁹ An incomplete bordereau would have caused a dispute between the actual premiums collected and (total) premiums collected that should have been collected on behalf of 1Life and AUL based on the total number of policyholders for each insurer.²⁰ Although the High Court held that reconciliation was indeed possible and very easy in principle, it did so without requesting a bordereau or focusing on the importance of a bordereau (Bechard 2022). Therefore, the process of reconciliation is neither as simple as stated by the High Court, nor, in view of the one

¹⁶ Currently, it is impossible to receive interest on the premiums collected. FSCA Notice 20/2020, section 1, regarding the direct collection of premiums that the intermediary who collects the premiums cannot keep the premiums in their bank account; they should be paid over into the bank account of the insurer. See also FSCA Communication 1/2022, exemptions for direct collections of premiums.

¹⁷ [QSURE](#) is a premium collection company similar to Insure Group.

¹⁸ FSCA Notice 20/2020, section 2(2)(b), requires permission 30 days prior to the first collection.

¹⁹ FSCA Notice 20/2020, section 1, the definition of accounting for premiums, indicates the requirements for a bordereau, for example premium collection processing services. This requirement indicates the ability to reconcile payments effectively. The court in AUL did not refer to the latter requirement or whether the bordereau was sufficiently sophisticated to indicate successful premium collections for reconciliation purposes.

²⁰ FSCA Notice 20/2020, section 2(d), states the accuracy of a bordereau that is required and that it should regularly be tested for accuracy.

million policyholders, as it was made out to be by AUL in its affidavit (*African v Prosper* 2021: paragraph 32).

On the other hand, using the net premiums explained to repay the acknowledgment of debt is also problematic from a binder holder point of view. To understand this more clearly, we will quote the contract again:

- c. Sell the new African Unity Life individual product where Prosper Funeral Solutions will receive five times the net premium as upfront commission on payment of the first premium by the policyholder. Until settlement of the full debt ... only one time the *net premium* will be paid over to Prosper Funeral Solutions while the rest of the remaining upfront commission [four times the *net premium*] will be allocated towards the outstanding debt (*African v Prosper* 2021: paragraph 13; Reinecke & Ors 2013).²¹

Calculating the net premium could be confusing. For example, an intermediary agreement could specify the following calculation for a net premium (Kilian 2020; Kruger 2018):²²

Earned premium received from individual policyholder
 Less broker commission (12.5 per cent)
 Less binder fee/commission (5 per cent)
 Less insurer fee (3 per cent)
 Equals net premium of the policyholder

It should be noted that actual fees or commission for funeral policies may differ since burial societies are not regulated in the same way as life insurance companies, for example. The latter fees fall outside our current discussion. However, an intermediary agreement could also specify the following with regard to calculating a net premium or loss ratio in relation to all the insurer's expenses (Kilian 2020):²³

Total earned premiums received by policyholders
 Plus reinsurance commission per total number of policies
 Less broker commission on all policies(12.5 per cent)

²¹ My inclusion and italics: the authors do not explain a net premium.

²² Long-Term Insurance Act 1998. The amendment of regulations made under section 72 of the Government Gazette No 34877 of 23 December 2011 requires a binder contract between the binder holder and the insurer. It is also possible to duplicate the same for burial societies without complying with section 72.

²³ Long-Term Insurance Act 1998. Generally, these deductions are used to calculate the loss ratio. In this regard, see section 6(4) of the Government Gazette No 34877 of 23 December 2011 which states an underwriting manager is allowed an opportunity to share in the profits of the insurer and to receive a binder fee.

Less binder fee/commission on all policies (5 per cent)

Less insurer fee on all policies (3 per cent)

Less premium collection fee on all policies (ZAR10 per policy or expressed in percentage)

Less UPR (unearned premium reserve)

Less IBNR (claim(s) incurred but not reported to insurer)

Less claims received and settled

Equals the aggregate net premium (or commonly known as the loss ratio expressed in a percentage of the total earned premium)

The actual calculation of a net premium, as referred to in clause c above in relation to PFS, remains unclear, especially as to how net premium relates to a percentage of a policyholder's total earned premiums or individually earned premiums. What is clear is the fact that the consultant did not explain the above two scenarios to the High Court. For an earned premium calculation (loss ratio calculation), we assume 5 per cent equals the binder holder's commission, 12.5 per cent equals broker commission, and premium collection costs or fees are ZAR10 per policy; finally, claims paid during the financial year should be included in order to illustrate the net premium calculation or loss ratio calculation. This could also take the form of a simple calculation (earned premium of a policy), simply deducting the broker commission, binder's fee and insurer's fee from a single premium received (or paid) by a policyholder. Subsequently, a sophisticated bordereau should be able to disclose the calculation and to calculate a correct net premium. In addition, the bordereau would also calculate the total amount resulting from the five net premiums as upfront commission, and until the debt (ZAR6 million) with only one net premium as commission would be payable to PFS. Furthermore, if we use a simple calculation (with reference to the ZAR20 premium), the following is evident and assists in understanding whether net premium is the most appropriate method for repaying the debt. The actual net premium on ZAR20 is therefore ZAR5.90 (ZAR20 – ZAR10 (collection fee) – R2.5 (broker commission at 12.5 per cent) – ZAR1 (binder holder fee 5 per cent)—60c (insurer fee 3 per cent) = ZAR5.90). Hence, ZAR5.90 times four (per new AUL policy sold) will be used to settle the ZAR6 million debt. As only new policies may be used to settle the ZAR6 million debt, the clause (as quoted earlier) that refers to the first net premium payable to PFS requires that an additional 254,237 policyholders are required in order to settle the debt (ZAR5.90 x 4 equals ZAR23.60 and ZAR6 million divided by ZAR23,60 equals 254,237 policyholders). How many new policyholders could PFS possibly acquire in a month, or in a year—100 or 1000? And

based on 1000 new policies per month, how long would it take PFS to settle the ZAR6 million debt (if we assume 1000 policyholders per month, this would be $1000 \times \text{ZAR}23.60 = \text{ZAR}23,600$ per month, and $\text{ZAR}23,600 \times 12 = \text{ZAR}283,200$ per annum and $\text{ZAR}6 \text{ million} / \text{ZAR}283,200 = 21$ years)? The following question could also be posed here: is net premium an appropriate mechanism for settling the ZAR6 million debt? While the High Court did not consider this question, we should note that loss ratio can only be calculated at the end of the financial year when all claims submitted by policyholders can be used to calculate the correct loss ratio. This may have a direct impact on the correct calculation of a net premium. Based on the foregoing argument, it is clear that it would have been very difficult to calculate an effective net premium, and the High Court was ignorant of the consequences of this.

For the reasons stated above, we believe that the Court did not focus on the complete picture of how the insurance industry works—the relationship between a binder holder and an insurer with reference to a bordereau or the importance of expressing a net premium in a bordereau, and whether the FSCA’s permission to collect premiums was in fact obtained and by whom, whether by PFS or 360Administration and Systems?²⁴ It is clear that the interpretation of net premium could have been misused to prejudice PFS;²⁵ preventing it from receiving income (or commission) if the loss ratio were extremely high (eg a 100 per cent loss ratio or higher would have indicated that the insurer was unprofitable, and, strictly speaking, there was no available net premium or perhaps a payable binder fee/commission).²⁶ We will never know the true factual circumstances of this case, but there is a possibility that the High Court and the consultant underestimated the technicalities of the insurance business.

[D] CONCLUSION

One reason why the board of directors did not file an answering affidavit—instead this was done by a consultant on behalf of PFS—could be (we assume) that the board was not educated on the technical aspects of insurance law—insurance law aspects regarding the authority to collect premiums, to accept claims and to share in the net premium of AUL.

²⁴ FSCA Notice 20/2020, section 2(d), states the accuracy of a bordereau that is required.

²⁵ We are unable to see the authority of PFS on the FSCA website—information is no longer available owing to the liquidation order granted.

²⁶ FSCA Notice 20/2020 with reference to the definition of a binder holder and the agreements a binder holder may enter into pertaining to the collection of premiums *et cetera*.

In addition, the advocate who represented PFS only focused on the intermediary agreement with reference to a net premium, ignoring whether this was in fact a binder holder agreement and how exactly net premiums should be calculated. An insurer would, at the very least, have known the correct terminologies in insurance law in order to have informed the court of their appropriate meanings, for example, that net premium relates only to a loss ratio calculation and only an underwriting manager as a binder holder can share in the net premium (or profits). Failing this, this could be interpreted as misleading the court. On the other hand, carrying out simple monthly reconciliations (eg relating to policyholders who paid their premiums or not, commission/fees paid) could be an extremely difficult exercise and thus an effective bordereau is required for exact results or calculations.²⁷ The monthly reconciliations of commission payments to PFS could only have been done if the bordereau had accurately calculated the monthly premiums received from individual policyholders and thus an appropriate net premium—four times the upfront commission payable to the insurer or AUL (*African v Prosper* 2021: paragraph 29). While the relationship between AUL and PFS could have been a highly technical one, we will never know the true facts of this case (*ibid*).²⁸ We have merely observed a few principles of insurance law here, based on the High Court judgment, to illustrate how difficult the business of insurance may be when placing an emphasis on net premiums in relation to an acknowledgment of debt.

About the author

Neels Kilian is an Associate Professor at the North-West University in South Africa. He has also been a Research Fellow at the Free State University and Deakin University.

Email: neels.kilian@nwu.ac.za.

References

Bechard, M. “[Directors of Insure Group Managers take their Debarments to the FST.](#)” *Moonstone* 17 November 2022.

Bechard, M. “[Funeral Intermediary in Provisional Liquidation over Unpaid Premiums.](#)” *Moonstone* 19 January 2023.

Geldenhuys, J. “[Collection of Insurance Premiums – Update on Regulatory Framework.](#)” *Moonstone* 15 April 2019.

²⁷ Fulcrum Collections considers its [bordereau](#) as being the best in the market.

²⁸ The High Court in *African v Prosper* should have considered the FSCA Notice 20/2020.

- Huneberg, S. “The Future of Rob-advisors in the South African Insurance Industry: Is the South African Regulatory Framework Ready?” *South African Mercantile Law Journal* (2020): 175-204.
- Kilian, C. “An Investigation of an Overlap in Penalty Calculations: Profit Commission in Reinsurance Treaties versus Profit Commission in Binder Agreements for Underwriting Managers.” *South African Actuarial Journal* (2020): 1-16.
- Kruger, P. “[Binder Agreement and Fees under RDR.](#)” *Moonstone* 11 December 2014.
- Kruger, P. “[New Binder Fee Regulations Bring Consistency.](#)” *Moonstone* 28 January 2018.
- Millard, D. “The Impact of the Twin Peaks Model on the Insurance Industry.” *Potchefstroom Electronic Law Journal* 19 (2016): 1-32.
- Marano, P & K Noussia. *Transparency in Insurance Contract Law*. Europe: Springer, 2019.
- Reinecke, M, J Van Niekerk & P Nienaber. *South African Insurance Law*. Cape Town: LexisNexis South Africa, 2013.
- Van Wyk, K. “[Financial Crimes Inc: The Case against Insure Group Managers.](#)” *Daily Maverick* 10 November 2021.

Cases

- African Unity Life Limited v Prosper Funeral Solutions Case No 2021/55922*
- Allwright v Gluck* 1962 1 All SA 522 (W)
- Dube v Mbokazi* (15843/2017) [2018] ZAGPPHC 699 (28 September 2018)
- Liberty Group Limited v Illman* (1334/2018) [2020] ZASCO 38 (16 April 2020)
- Visser v 1Life Insurance Ltd* (1005/13) [2014] ZASCA 193 (28 November 2014)

Legislation, Regulations and Rules

- Financial Advisory and Intermediary Services Act 37/2002
- Financial Sector Conduct Authority (FSCA) Communication 1/2022
- Financial Sector Conduct Authority (FSCA) Notice 20/2020

Long-Term Insurance Act 1998 ([Amendment of Regulations made under Section 72](#) Government Gazette No 34877 23 December 2011 (1077))

National Treasury, Republic of South Africa, [Responses to Comments Received on Short-Term Insurance Regulations](#) (submitted to South African Parliament 17 November 2017)

Short-Term Insurance Act 1998 ([Amendment of Regulations made under Section 70](#) Government Gazette No 34877 23 December 2011 (1076))