**IN THE SOUTH GAUTENG HIGH COURT**

**(JOHANNESBURG)**

**CASE NO: 09/549**

In the matter between:

| | |
|---|---|
| **MULLER N.O., JOHANNES ZACHARIAS HUMAN** | First Applicant |
| **LUTCHMAN N.O., RALPH FARREL** | Second Applicant |

and

| | |
|---|---|
| **COMMUNITY MEDICAL AID SCHEME** | Respondent |

---

**J U D G M E N T**

---

**BLIEDEN, J:**

[1] The Applicants are the joint liquidators of Humanity Medical Scheme (HMS) which was finally wound up on 26 September 2008, with effect from 23 September 2008.

[2] On 26 September 2008 two payments, in the amounts of R1 850 000 and R5 272 566.80 respectively were made to the respondent out of HMS' bank account by its administrators, Allcare Administrators (Pty) Ltd (Allcare). On 29 September 2008 the Respondent received a further payment from Allcare, again out of a HMS' bank account, in the amount of R1 150 000. The Applicants are reclaiming these three payments.

[3] In terms of section 53(1) of the Medical Schemes Act, 131 of 1998 (the Medical Schemes Act), chapter xiv of the Companies Act, 61 of 1973 (the Companies Act) applies to the winding up of a medical scheme such as HMS. In particular sections 337 to 426 of the Companies Act are applicable in the present matter.

[4] On behalf of the applicants the position in regard to estate assets upon insolvency generally was referred to. It is summarised in Bertelsmann et al, Mars, The Law of Insolvency in South Africa 9th edition page 171 as follows:

> "*The sequestration of a debtor's estate establishes a concurses creditorum. Thereafter nothing may be done by any of the creditors to alter the rights of other creditors.*
>
> *The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters via a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the time of the issue of the order*." See also Walker v Syfret N.O. 1911 AD 141 at 160 and 166; Ward v Barrett N.O. and Another N.O. 1963 (2) SA 546 (A) at 552 C - G; Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Limited 1990 (4) SA 798 (A) at 803 G – J.

[5] The legal position as described above is encapsulated statutorily by sections 361 and 391 of the Companies Act. In terms of section 361(1), where there is a winding up by a court "*all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office."* This provision has been interpreted by the courts as indicating that

the property on liquidation is "*deemed to be in the custody or control of the Master or the liquidator"* (**Secretary for Customs and Excise v Millman N.O. 1975 (3) SA 540 A at 552 H**). According to Blackman, Jooste and Everingham; Commentary on the Companies Act (Volume 3 page 14 – 251), "*although subsections 1 and 2 of section 361 do not specially place the property of the company in the custody and under the control of the liquidator, they do so by implication."*

[6] Section 391 of the Companies Act obliges a liquidator "*forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable"* and to *"apply the same so far as they extend in satisfaction of the costs of the winding up and claims of the creditors",* and to *"distribute the balance among those who are entitled thereto".* Reading section 361 and 391 together the court in **Syfrets Bank Limited and Others v Sheriff of the Supreme Court, Durban Central and Another, Schoerie N.O v Syfrets Bank Limited and Others 1997 (1) SA 764 D** held that when liquidation ensued, custody and control of the property in question "*passed to the Master (in terms of the deeming provision of section 361(1) of the Companies Act) and after his appointment to the liquidator, who is required by section 391 of the Companies Act to take possession and control of the property*" (at 782 E – F*).* I have underlined the word "*property*" in these two paragraphs for emphasis.

[7] It is the applicants' case that the payments in question were made out of HMS' estate assets in preference to those of its other creditors. They

should not have been made: the applicant's were obliged, upon their appointment as liquidators, to take control of all HMS' assets and in due course to make payment to creditors in accordance with their ranking and pro-rata to the amounts of their claims. It is in pursuance of that legal obligation that the present application is being brought.

[8] The respondent has raised a number of defences to the applicants' claim. However in my view only one defence is of relevance and that is that the amounts paid to the respondent by Allcare on behalf of HMS, which are the subject matter of the present application, did not at any stage become the property of HMS and are therefore not subject to appropriation by the applicants.

[9] In regard to this defence the applicants' case is that it is common cause that the monies paid to the respondent by Allcare were paid out of HMS' bank account. It is apparent from the bank statements that, after each of the payments had been made, a significant credit balance remained in HMS' bank account. The September contributions by HMS' members were clearly not kept separately in an account earmarked for repayment to members or for payment to the respondent. In the event, the contributions were commixed in the bank account with HMS' other funds. They therefore became part of HMS' funds (in the legal sense that HMS was a creditor of the bank in the total amount of the funds held in its bank account from time to time.) Once money that has been paid becomes unidentifiable as a result of

*commixtio,* any rights to it vest in the possessor. (See Willie's Principles of South African Law 9th edition page 508.)

[10] The following facts are common cause or are not seriously disputed by the parties.

10.1. Prior to September 2008 HMS had realised that it could no longer continue to conduct business as a medical aid scheme because of its deteriorating financial position which would preclude it from performing its statutory functions for the month of September 2008. These functions to its members are defined in the Medical Schemes Act, 31 of 1988 (the Medical Schemes Act) where the business of a medical scheme *vis a vis* its members is defined in section 1 as follows:

"*The business of undertaking liability in return for a premium or contribution –*

*a. to make provision for the obtaining of any relevant health service;*

*b. to grant assistance in defraying the expenditure incurred in connection with the rendering of any relevant health service;*

*c. where applicable to render the relevant health service, either by the medical scheme itself, or by any supplier or group of suppliers of a relevant health scheme or by any person in association with or in terms of an agreement with a medical aid scheme."*

10.2 At all relevant times HMS had some 21 000 people who were affected by it, either by being principal members or the dependants of such members.

10.3 In order to safeguard the interests of its members and their dependants for the month of September 2008 it had been in communication with the respondent in order to arrange for the latter to take transfer of them in terms of the Medical Schemes Act. A provisional agreement to this effect had been arrived at. However before such an agreement could be given effect to, it needed the approval of the Council for Medical Schemes (the CMS).

**10.4** After having discussed the matter with various officials of the CMS, on 21 August 2008 HMS addressed a letter to it confirming the discussions which had taken place.

10.5 On 22 August 2008 CMS replied to HMS' letter of the previous day in which the following was stated:

> " *We confirm our approval of the scheme's proposal as contained in your letter under reply to transfer members of the scheme to COMMED [the respondent]. In order to effect the transfer of the members as proposed, you are required to urgently make an application not later than Tuesday 26 August 2008, to the Council in terms of section 8(h) of the Medical Schemes Act 131 of 1998 ("the Act"), for an exemption from the provisions of section 63 of the Act, setting out inter alia in detail the following:*
>
> *1. The circumstances resulting in the transfer i.e. the financial status of the scheme;*
> *2. The urgency in needing to speedily effect the transfer of members and the consequences for the members if this is not done;*

3. *The reasons why the time periods as well as the requirements prescribed in section 63 of the Act would result in prejudice to the scheme and its members; and finally*
4. *Why the circumstances described are exceptional."*

This letter was reproduced in the papers as VM4.

**10.6** On 25 August 2008 HMS responded to VM4 in a letter which provided the information required in VM4 by the CMS. This letter is VM5 in the papers. It contains the following statement to the CMS justifying the application:

> "*The Board of Trustees are acutely aware of their fiduciary responsibilities towards the members. It is therefore crucial that members are not prejudiced in any way whatsoever, by ensuring continuous medical cover without a possible "break" in cover, as from 1 September 2008.*
>
> *Should members not be migrated on 1 September 2008, the distinct possibility exists that claims with service dates in September and submitted for payment in October (for example hospital accounts) will not be paid.*
>
> *In all likelihood, members would have no cover for September and probably October as well, at which stage application for membership of alternative Schemes will only be effected on 1 November 2008. The members, being adversely affected by the insolvent position of the*

*Scheme, during this period, would have to obtain medical services from State Hospitals.*

*With the very high incidence of chronic conditions, specially in relation to the Comprehensive Option members, the lack of cover could have life threatening implications to Scheme members.*

*Whilst we are awaiting final decisions the negative solvency of the Scheme is increasing month to month.*

*With this as background there is no doubt that the speedy transfer of members to Commed is of the highest priority."*

**10.7** On 3 September 2008 the CMS wrote a letter approving of the transfer of the members as requested. This approval was backdated to 1 September 2008. On the same date, 3 September 2008 the members of HMS were informed in writing of what had occurred. This was contained in a circular dated 3 September 2008 which is VM7 in the papers. It was only on 5 September 2008 that the transfer was in fact completed in the books of the respondent.

**10.8** In terms of the agreement between HMS and its members all payments to it by members were to be made monthly in

advance and such payments were to be made on or before the 3rd of each month. By the time the notice of transfer of the members to the respondent was communicated to HMS' members their September contributions had already become due and payable and had to a large measure been made by the members.

**10.9** It was common cause between HMS, the respondent and CMS that HMS was not in a position to comply with its obligations to its members and their dependants from 1 September 2008. The only way these obligations could be met was by the respondent performing them. This is in fact is what occurred during the month of September 2008.

[11] Although nothing is said about this in the affidavits filed, it must be accepted that the funds received by HMS for the payment of the September contributions were received by it as a custodian on behalf of the respondent, which in effect was entitled to be paid for the services it rendered as a medical aid fund to the former members of HMS for the month concerned.

[12] HMS made no claim to the monies paid to it in this way, and in fact it was Allcare, acting on its behalf, which made the payments which are the subject matter of the present application to the respondent. Accepting the facts as stated above it is plain that the members of HMS made their September payments to HMS in the justifiable belief that they were obliged to

do so in order to retain their rights to medical aid. It is clear that HMS received these payments on the basis set out in [11] above.

[13] Of importance in this case is the classification of the nature of the payments made by its members to HMS and thereafter the payments made by Allcare to the respondent. In **Nissan South Africa (Pty) Ltd v Marnitz N.O. and Others 2005(1) SA 441 at 448G to 449 D**, Streicher JA speaking for the full bench of the SCA said:

> "[24]…*Payment is a bilateral juristic act requiring the meeting of two minds (Burg Trailers SA (Pty) Ltd v Another v Absa Bank Ltd and Others 2004(1) SA 284 (SCA) at 289B). Where A hands over money to B, mistakenly believing that the money is due to B, B, if he is aware of the mistake, is not entitled to appropriate the money. Ownership of the money does not pass from A to B. Should N, in these circumstances, appropriate the money, such appropriation would constitute theft (R v Oelsen 1950 (2) PH H198; and S v Graham 1975 (3) SA 569 (A) at 573 E-H). In S v Graham, it was held that, if A, mistakenly thinking that an amount is due to B, gives B a cheque in payment of that amount and B, knowing that the amount is not due, deposits the cheque, B commits theft of money although he has not appropriated money in the corporeal sense. It is B's claim to be entitled to be credited with the amount of the cheque that constitutes the theft. This Court was aware that its decision may not be strictly according to Roman-Dutch law but stated that the Roman-Dutch law was a living system adaptable to modern conditions. As a result of the fact that ownership in specific coins no longer exists where resort is made to the modern system of banking and paying by cheque or kindred process, this Court came to regard money as being stolen even where it is not corporeal cash but is represented by a credit entry in books of account.*
>
> *[25] The position can be no different where A, instead of paying by cheque, deposits the amount into the bank account of B. Just as B is not entitled to claim entitlement to be credited with the proceeds of a cheque mistakenly handed to him, he is not entitled to claim entitlement to a credit because of an amount mistakenly transferred, ie should he withdraw the amount so credited, not to repay it to the transferor but to use it for his own purposes, well knowing that it is not due to him, he is equally guilty of theft."*

[14] The facts in the Nissan case are accurately summed up in the head note to that case and are to the following effect:

> "*On its customer's (the appellant's) instructions, Firstrand Bank Ltd (FNB) (the third respondent) transferred an amount in excess of R12 million from the appellant's account to an account held by one of the appellant's creditors, TSW, at the Standard Bank of SA Ltd. The appellant had, however, provided FNB with the incorrect details of TSW's account, with the result that the funds were transferred to the incorrect payee. The appellant did not owe the payee any amount and had no intention of paying the payee any amount. Immediately upon receipt of the funds, the payee realised that the transfer had been made in error but it withdrew the funds from the account nonetheless and was thereafter liquidated. The appellant proceeded to bring an application in the High Court for an order declaring that it, alternatively, FNB, was entitled to payment of the funds. The liquidators of the insolvent estate (the first and second respondents) claimed that they were entitled to the funds as falling into the payee's insolvent estate.*"

[15] The Supreme Court of Appeal in the Nissan case held that the payee had not been entitled to the funds erroneously credited to its account as these had not at any stage become part of its property. There had been at no time any agreement between the party making the payment and payee that such funds were for the latter's benefit. In effect the Supreme Court of Appeal held against the liquidators and ordered them to release the funds to Nissan, the appellant.

[16] In the present case the payments concerned were correctly made by the members of HMS in the belief that they were due to that fund, when in fact unknown to them at that time the fund was unable to render the services for which such payments were being made and the respondent had undertaken the obligations of HMS. In my view what was paid to HMS could not be classified as its property. To say that the money became the property of HMS

by *commixtio* as was submitted by counsel for the applicant is in my view an over simplification.

[17] As was made plain in the passage from the Nissan case quoted in par [13] above the principle that Roman-Dutch law is a living system adaptable to modern conditions is part of our law. Although one is not dealing with stolen money in the present case, one is dealing with credits reflected in its bank account which the recipient was aware were not its property and which it had every intention to pay to the party to whom such money was due. Had HMS utilised the funds received from its members for September 2008 for its own purposes, there is little question that this would have constituted theft on its part, if one applies the reasoning in the Nissan case (*supra*).

[18] As was made clear in the Nissan case (*supra*) payment requires an *animus solvendi* on the part of both the debtor or the creditor. Saambou-Nasionale Bouvereniging v Friedman 1979 (3) SA 978 (A) at 993 A- B; Vereins-Und Westbank AG v Veren Investments 2002 (4) SA 421 at 437 I – 438 E (par 38). In the latter case it was held that in order for effective payment to occur, the payee must, in the absence of a contrary agreement, acquire the "*unfettered or unrestricted right to the immediate use of the funds in question*", otherwise the payment is inchoate. (Verreins-Und Westbank AG (*supra*) at 429 B – E (par 11).

[19] The payments were made by the former members of HMS for September and were transferred to it on that basis. HMS had no difficulty in

identifying the payments concerned nor would any third party have any difficulty in this regard.

[20] There was no necessity for a special trust account to be opened. There is also no suggestion that HMS did not know what was being paid to it by its members. To this extent these funds were earmarked payments and for this reason as well the monies so paid cannot be classified as being HMS' property by *commixtio.* HMS was merely acting as a conduit for the monies received as a consequence of circumstances which had nothing to do with the fault of either the respondent or the members of HMS. The payments could not have been made in any other way by HMS' members because of circumstances beyond their control.

[21] Counsel for the applicants sought to distinguish the principles referred to in the passage quoted from the Nissan case (*supra*) on the basis that that case concerns money paid in error, which is not the situation in the present case. In my view there is no merit in this submission. The money that was paid was correctly paid, but was paid at a time when the members concerned were ignorant of the fact that HMS could not honour its obligations to them for the month of September, and that a third party, being the respondent, had undertaken and did in fact honour such obligations.

[22] As has already been said HMS accepted the money in the full knowledge that it was not its money, and as a result of this fact Allcare paid it over to the respondent as it was obliged to do. At no stage did the money

concerned become the property of HMS and in the circumstances the applicants have no right to claim it from the respondent, for the reasons stated above. The principles relating to impeachable transactions on which the applicants rely is irrelevant when one is dealing with property which at no stage belonged to the insolvent company.

[23] Counsel at the hearing agreed that the present case warrants the costs of two counsel, I agree. The following order is made:

"1. The applicants' claim is dismissed;

**2.** The applicants are ordered to pay the respondent's costs, such costs to include the costs of two counsel.

_____

**P BLIEDEN**
**JUDGE OF THE HIGH COURT**

| | |
|---|---|
| COUNSEL FOR THE APPLICANT: | Adv. E. Fagan (SC) |
| INSTRUCTED BY: Eversheds | |
| COUNSEL FOR THE RESPONDENT: | Adv. J.J. Brett (SC) |
| | Adv. E. Mokutu |
| INSTRUCTED BY: | Savage Jooste Inc. |
| DATE OF HEARING: | 14 April 2010 |