REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2012/33590

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

14.9.2012
DATE

SIGNATURE

In the matter between:

D.L VAN RENSBURG CC t/a HARMELIA PHARMACY FIRST APPLICANT

YOLANDI CUNNINGHAM SECOND APPLICANT

and

DISCOVERY HEALTH (PTY) LIMITED FIRST RESPONDENT

DISCOVERY MEDICAL SCHEME &
OTHER RESPONDENTS SECOND RESPONDENT

J U D G M E N T

LAMONT, J:

[1] The applicant by way of urgency brought an application seeking to restore the *status quo ante* of the payment relationship between the applicant and the first respondent. Under the pre-existing arrangement the first respondent paid the applicant the purchase price of medicine supplied to the first respondent's members. The first respondent notified the applicant on 17 August 2012 that it proposed changing that arrangement and that it would only pay its members the purchase price of medicine sold and delivered to them by the applicant.

[2] I refer to the first applicant as the applicant as the second applicant was joined and should not have been. I refer to the respondents as the respondent.

[3] The applicant claimed a variety of relief but I ruled that the only relief which should be dealt with urgently at this stage was the relief claimed concerning payment.

[4] The first respondent is a pharmacy which carries on business as such. It is subject to the provisions of the Pharmacy Act No 53 of 1974. The first respondent is the administrator of the medical scheme of the second respondent. The medical scheme is duly registered under and in terms of the Medical Schemes Act No 131 of 1998 ("*the Act*"). The first respondent is also the administrator of a number of other medical schemes. Those medical schemes were not joined to the proceedings however very short notice was

given to them of the hearing of the matter. It was submitted that I should issue a rule *nisi* in respect of them.

[5] The right of the applicant to obtain relief against the respondents is dependent upon the finding of the existence of a contract between the applicant and the respondent under and in terms of which there is an obligation imposed upon the respondent to make payment to the applicant directly (as opposed to making payment to its members) of monies due to the applicant in respect of medicines sold and delivered by the applicant to the member for which in terms of the contract between the respondent and the members the respondent is obliged to pay (hereafter the "benefit").

[6] It is common cause that there is no written contract.

[7] Each year and for the year in question the applicant completes a form which is transmitted to the respondent. That form is headed "*Discovery Health Community Pharmacy Preferred Provider Network*". It provides for details of the applicant to be completed and underneath that series of data provides:

> "*PROVISIONS FOR PARTICIPATION:*
>
> ...
>
> - *The pharmacy agrees to join the preferred provider networks described below.*
> - *The pharmacy agrees that it will not charge Discovery Health members and their registered dependants fees that are in excess of the rates described below.*

- *The pharmacy further undertakes not to balance bill Discovery Health members for any other services or costs.*

- *All the rates below apply to the dispensing of both chronic and acute medication.*

- *The practice undertakes to give preference to generic items on the Discovery Health Chronic Illness Benefit Formulary upon dispensing chronic medication.*

- *The pharmacy confirms that all the pharmacies described above are not courier pharmacies.*

- *I agree to Discovery Health making the details set out in this form available on www.discovery.co.za and to call centre consultants who will communicate these details to Discovery Health members as and when requested."*

There follows a set of information concerning the network rates for the year in question, place for the person to sign and then:

> "*The pharmacy and/or healthcare providers agreed to take part in the Discovery Health Preferred Provider Pharmacy Network described in this application form.*
>
> *Termination or change*
>
> *Should the pharmacy wish to terminate or change this agreement the practice will be required to give Discovery Health ten working days written notice. Please send termination/change request and BHF number to:-* "

[8] The form sets out the terms of an agreement obliging the pharmacy to charge certain rates in respect of certain plans for the year in question. The relevant portion of the agreement is constituted by an agreement that the pharmacy will undertake certain obligations in relation to the members of the respondent, in return for being a preferred service provider. This form on its

own does not create a relationship between the applicant and the respondent requiring the respondent to make payment to it of the benefit.

[9] The respondent's set of rules registered under the Act refers to a preferred provider (which is the same as a preferred service provider) as being:

> "*4.52 ... A healthcare provider or group of providers, selected by the scheme in terms of an agreement in which the fee/rate is determined in respect of the payment of relevant health services ...*"

[10] This definition deals with the rate which the preferred service provider is to be paid not with the right to receive payment of the benefit directly from the respondent.

[11] Rule 15 confers benefits upon members in the following (relevant) terms:

> "*15.1 Members are entitled to benefits during a financial year.*
>
> ...
>
> *15.3 The scheme shall, when an account has been rendered, pay any benefit due to a member, either to that member or to the supplier of the relevant health service who rendered the account, within 30 days of receipt of the claim pertaining to such benefit.*"

[12] This clause vests rights to benefits in members and provides that once an account has been rendered benefits due to a member can be paid either to the member or the supplier within a said time. There is no right created on

the part of the supplier to demand that payment be made to it in respect of any particular account which has been rendered.

[13] The question of payment of accounts is dealt with in Rule 16 of the rules in the following terms:

> "*16.1 Payment of accounts is restricted to the maximum amount of the benefit entitlement ...*
>
> *16.2 The scheme may, whether by agreement or not within any supplier or group of suppliers of a service, pay the benefit to which the member is entitled directly to the supplier who rendered the service.*
>
> *16.3 Billing rules are the prerogative of the scheme and this includes but is not limited to Discovery Health Guide.*
>
> ...
>
> *16.5 Notwithstanding the provisions of this rule the scheme has the right to pay any benefit directly to the member concerned.*
>
> ..."

Under and in terms of this rule no right is conferred upon the applicant to demand payment of the benefit directly to it. What the rule provides is that at the election of the respondent payment of the benefit may be made to the member or the supplier who rendered the service.

[14] The rules deal with the payment of each particular account and do not set up a system whereby the right to demand payment is conferred on a supplier in advance of rendering the account.

[15] There is no rule within the set of rules which confers upon the applicant the right in advance of rendering services to require that the benefit once rendered be paid by way of the respondent making payment directly to it.

[16] I was referred to section 59 of the Act which provides:

> "*59(1) The supplier of a service who has rendered any service to a beneficiary in terms of which an account has been rendered shall notwithstanding the provisions of any other law, furnish to the member concerned an account or statement reflecting such particulars as may be prescribed.*
>
> *(2) A medical scheme shall in the case where an account has been rendered subject to the provisions of this Act and the rules of the medical scheme concerned, pay to a member or a supplier of service any benefit owing to that member or supplier of service within 30 days after the day on which the claim in respect of such benefit was received by the medical scheme.*
>
> *(3) Notwithstanding anything to the contrary contained in any other law a medical scheme may, in the case of –*
>
> *(a) any amount which has been paid bona fide ...*
>
> *(b) any loss which has been sustained by the medical scheme*
>
> *... deduct such amount from any benefit payable to such a member or supplier of health service.*"

[17] This section deals with the obligations of a respondent on receipt of an account, to pay the account within a particular time and confers upon it the right to pay the amount due to either the member of its scheme or the supplier of a service. The section does not create an obligation on the part of the respondent to make payment to the applicant.

[18] In my view neither the terms of the preferred service provider form, the rules nor the Act confer an obligation upon the respondent to pay the benefit to the applicant directly.

[19] As I am unable to find the contract exists I am unable to find that a right exists for the applicant to exercise against the respondent.

[20] The applicant submitted that the respondent historically had made payments directly to it and that it was not entitled to take a decision, as it had, to in the future pay all benefits to the members.

[21] No legitimate expectation can be created in these circumstances. The contract provides for the benefit to be paid to the member or the service provider, legitimate expectation is a concept belonging to the field of administrative law.

[22] By reason of my finding that there is no right which the applicant has to enforce, it is not necessary for me to deal with other matters which are raised.

[23] The primary reason the current application was brought was to resolve the issue of the applicant's entitlement to be paid the benefit directly. The remaining claims can as well be dealt with in an action as in the present application. It appears to me that there are very little costs saving to the applicant if I preserve the rights of the applicant to continue with the claims which are made in respect of other matters in this application.

[24] Accordingly in my view the application falls to be dismissed with costs including the costs consequent upon the employ of senior counsel.

[25] I make the following order:

The application is dismissed with costs including the costs consequent upon the employ of senior counsel.

C G LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	*12 SEPTEMBER 2012*
DATE OF JUDGMENT	*14 SEPTEMBER 2012*