REPUBLIC OF SOUTH AFRICA

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(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED ✓
24/2/2012
DATE SIGNATURE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO. : 21282/2011

PFM MEDICAL SCHEME MARKETING (PTY) LTD Applicant

and

SPECTRAMED First Respondent

THE COUNCIL FOR MEDICAL SCHEMES Second Respondent

JUDGMENT

ANDRÉ GAUTSCHI AJ

[1]. The applicant is an accredited broker, and the first respondent a medical scheme, both as defined in the Medical Schemes Act, No 131 of 1998 ("the Act"). The second respondent is the Council for Medical Schemes established by section 3 of the Act, but it took no part in these proceedings.

[2]. On 1 March 2001 the applicant and first respondent concluded a written agreement in terms of which the applicant was appointed as a broker to procure applications for medical aid cover with the first respondent and to

render ongoing services in respect of such members. The agreement commenced on 1 March 2001 and was to endure indefinitely, subject to either party being entitled to terminate the agreement by giving to the other not less than 120 days written notice of termination. There was also provision for shorter notice and termination in the event of breach of contract.

[3]. The following clauses of the agreement are of importance, and are therefore quoted in full :

> "4.9 The Broker further acknowledges and warrants that he is acquainted and conversant with the Broker's code of conduct, minimum service levels and code of ethics applicable to brokers as determined by the Council for Medical Schemes and set out in the Council's notice dated 24th November 1999. The Broker shall at all times comply therewith, and all amendments thereto from time to time."
>
> "6. FEES
>
> 6.1 The Scheme shall pay to the Broker in respect of all applications placed by the Broker with the Scheme and accepted by the Scheme, a fee at the rates set out in accordance with the Act. Currently 3% exclusive of VAT.
>
> 6.2 The Broker shall be entitled to such fees or additional fees in accordance with the Regulations subsequent to the expiry of 1 (one) year from the date of acceptance of a member's application, and in subsequent years, subject to the Broker satisfactorily performing the services referred to in the Act, Regulations and any guidelines laid down by the relevant authorities including but not limited to the Registrar, and generally having achieved a level of satisfaction of its service with both the Scheme and the relevant member."
>
> "7. PAYMENT OF FEES
>
> The Scheme shall pay to the Broker such fees as are applicable in terms of this agreement within 15 (fifteen) days of the end of the month during which the contribution in respect thereof has been received by the Scheme, and provided that the member is accepted and registered with the Scheme."
>
> "9. TERMINATION AND BREACH
>
> 9.1 Either party may terminate this agreement by giving 120 (One hundred and twenty) days notice of termination in writing to the other party at the other party's domicilium for the time being.
>
> 9.2 The Scheme or the Broker may terminate this agreement if either party fails to

address and remedy, within 14 (fourteen) days of receiving written notice from the other party, the following :

9.2.1 allows a judgment or arbitral award against him to remain unsatisfied; and

9.2.2 is sequestrated, whether provisionally or finally or placed under an administration order or if either party is voluntarily wound-up or placed in liquidation or under judicial management whether provisionally or finally;

9.2.3 attempts to make or makes a compromise with his creditors;

9.2.4 commits a breach of any of the provisions of this agreement;

9.2.5 should be or come to be owned, controlled or managed by any person or organisations other than those persons and organisations owning, controlling and managing the party undergoing structural or management changes at the time of signature of this agreement, ...

9.2.6 at any time during the negotiation or currency of this agreement makes any misstatement or any misrepresentation in relation to his or any proposer's business or financial position or makes any such misstatement or misrepresentation to any proper in respect of any product, or commits any fraudulent or unethical business practice which is detrimental to the interests or reputation of the Scheme.

9.3 Upon the termination of this agreement, the Broker shall forthwith deliver to the Scheme at its domicilium in terms of this agreement, all monies, unissued receipt forms, application forms and other forms, documents and manuals (and all copies of such forms and other documents), belonging to the Scheme."

"12. DUTIES OF THE SCHEME

12.1 The Scheme undertakes to provide the Broker with all information, assistance and documentation regarding the Scheme and options available under the Scheme to the Broker."

Clause 12.1 was amended on the commencement date of the agreement by an addendum concluded between the parties, to read :

"The Scheme undertakes to provide the Broker with all information, assistance and documentation regarding the Scheme and options available under the Scheme to the Broker. If the structure of the Scheme is materially altered the Broker may review his position."

[4]. For some ten years after the commencement date, the applicant introduced members to the first respondent and rendered ongoing advice and services to

the members in respect of their membership of the first respondent's scheme, and was paid the agreed fees by the first respondent.

[5]. On 21 February 2011 the first respondent gave 120 days written notice of termination, and the agreement accordingly terminated on 24 June 2011.

[6]. The applicant accepts the validity of the termination and that it is no longer entitled to introduce new members to the first respondent's scheme and be paid an introductory commission therefor. It however contends that it is entitled to continue to render ongoing services to such members, against payment by the first respondent, for as long as members introduced by it remained members of the first respondent's scheme. This contention, resisted by the first respondent, is at the heart of the dispute between the parties.

[7]. The applicant accordingly seeks a declarator that the first respondent is obliged to compensate it in respect of every member of the first respondent introduced by the applicant for the duration of their membership of the first respondent, subject to the applicant continuing to comply with Regulation 28(6) and any lawful notice given by a member in terms of Regulation 28(7) of the Regulations to which I refer below, despite termination of the agreement (Prayer 1). In addition, the applicant seeks an order directing the first respondent to furnish the applicant with details of all terminations, cancellations or change of options subsequent to 20 April 2011 as well as all correspondence directed by members, introduced by the applicant to the first respondent, to the first

respondent pursuant to the first respondent's letter of 20 April 2011 (Prayer 2). (I refer to this letter more fully below). A further prayer was introduced by way of amendment, which I granted at the outset of the hearing, seeking to interdict the first respondent from soliciting and/or inducing the applicant's clients as at 1 June 2011 to terminate their contractual relationship with the applicant (Prayer 3).

[8]. Before dealing with the merits, I need to deal with an attack on the applicant's *locus standi*. It emerged from a supplementary founding affidavit that the applicant had concluded a written agreement on 15 July 2011 with Scientia Healthcare Consultants (Pty) Ltd ("Scientia") and Scientia Optimate Financial Services (Pty) Ltd ("Optimate"), in terms of which it had been agreed to amalgamate the applicant's, Scientia's and Optimate's healthcare consultancy businesses under one entity, namely Scientia, with effect from 1 June 2011. Clause 8.4 of that agreement provides that the applicant's accreditation and FAIS licences would be incorporated into that of Scientia as soon as possible after the effective date. There is no allegation that that has been done and, so argued counsel for the applicant, until it was done, there was and could be no transfer of the business of the applicant into Scientia, and it had not lost its *locus standi*. It is also alleged that it was contemplated that the members would remain clients of the applicant until such time as the first respondent consented to the transfer of the members from the applicant to Scientia. An exchange of correspondence thereafter shows that the first respondent was uncooperative, and the applicant alleges that, as a result, the applicant did not

transfer its clients to Scientia. These allegations are not placed in dispute. It therefore seems that notwithstanding the conclusion of this agreement, effect has not yet been given to it, and the applicant has therefore not lost its *locus standi* in this matter.

[9]. The applicant relied for its entitlement to the declarator almost entirely on the Act and its Regulations. It paid scant attention to the terms of the agreement. In order to deal properly with the applicant's approach, I need to set out the relevant provisions of the Act and the Regulations, and consider the interaction and relationship between the agreement and those provisions.

[10]. In section 1 of the Act, "broker" is defined to mean "a person whose business, or part thereof, entails providing broker services ..." and "broker services" is in turn defined to mean :

> "a) the provision of service or advice in respect of the introduction or admission of members to a medical scheme; or
>
> (b) the ongoing provision of service or advice in respect of access to, or benefits or services offered by, a medical scheme;"

[11]. Section 65 provides as follows :

> "65. **Broker services and commission**
>
> (1) No person may act or offer to act as a broker unless the Council has granted accreditation to such a person on payment of such fees as may be prescribed.
>
> (2) The Minister may prescribe the amount of the compensation which, the category of brokers to whom, the conditions upon which, and any other circumstances under which, a medical scheme may compensate any broker.
>
> (3) No broker shall be compensated for providing broker services unless the Council has granted accreditation to such broker in terms of subsection (1).

(4) ...

(5) A medical scheme may not directly or indirectly compensate a broker other than in terms of this section.

(6) A broker may not be directly or indirectly compensated for providing broker services by any person other than—

(a) a medical scheme;

(b) a member or prospective member, or the employer of such member or prospective member, in respect of whom such broker services are provided; or

(c) a broker employing such broker."

In terms of section 66(1)(a), a person who contravenes any provision of the Act or fails to comply therewith is guilty of an offence.

[12]. In terms of section 67 of the Act, the Minister may, after consultation with the Council, make Regulations relating to various matters stipulated in section 67(1)(a) to (q). In terms of section 1, a reference to "this Act" includes the Regulations. Regulations were promulgated in terms of GNR. 1262 of 20 October 1999, and amended from time to time thereafter. Of importance to this case are certain parts of regulation 28, which reads as follows :

"**28. Compensation of brokers**

(1) No person may be compensated by a medical scheme in terms of section 65 for acting as a broker unless such person enters into a prior written agreement with the medical scheme concerned.

(2) Subject to subregulation (3), the maximum amount payable to a broker by a medical scheme in respect of the introduction of a member to a medical scheme by that broker and the provision of ongoing service or advice to that member, shall not exceed—

(a) R50, plus value added tax (VAT), per month, or such other monthly amount as the Minister shall determine annually in the *Government Gazette*, taking into consideration the rate of normal inflation; or

(b) 3% plus value added tax (VAT) of the contributions payable in respect of

that member,

whichever is the lesser.

(3) ...

(4) ...

(5) Payment by a medical scheme to a broker in terms of subregulation (2) shall be made on a monthly basis and upon receipt by the scheme of the relevant monthly contribution in respect of that member.

(6) The ongoing payment by a medical scheme to a broker in terms of this regulation is conditional upon the broker—

(a) continuing to meet service levels agreed to between the broker and the medical scheme in terms of the written agreement between them; and

(b) receiving no other direct or indirect compensation in respect of broker services from any source, other than a possible direct payment to the broker of a negotiated professional fee from the member himself or herself (or the relevant employer, in the case of an employer group).

(7) A medical scheme shall immediately discontinue payment to a broker in respect of services rendered to a particular member if the medical scheme receives notice from that member (or the relevant employer, in the case of an employer group), that the member or employer no longer requires the services of that broker.

(8) ...

(9) ..."

[13]. The applicant has approached the matter thus : Before a broker can be compensated in terms of section 65 of the Act, a prior written agreement with the medical scheme must exist (regulation 28(1)). There is no requirement in the Regulations that, once such prior written agreement is terminated, further entitlement to ongoing commissions would cease. Indeed, regulation 28(5) entitles the applicant to continued ongoing commissions. As far as ongoing commissions are concerned, the only requirements are the following :

(a) receipt by the scheme of the member's monthly contribution (Regulation 28(5));

(b) the broker must continue to meet service levels agreed to between the broker and the medical scheme in terms of the (prior) written agreement between them (Regulation 28(6)(a));

(c) the broker must not receive any other direct or indirect compensation, save for a negotiated professional fee from the member (Regulation 28(6)(b); and

(d) the member must not have given notice that he or she no longer requires the services of the broker (Regulation 28(7)).

Accordingly, submits the applicant, once the agreement is terminated, the Act and the Regulations envisage and provide for ongoing commissions as long as the aforegoing requirements have been met. This is in line with the purpose of the Act, which is to protect the member first and foremost, and would protect the broker from losing its "book" in one fell swoop by termination of the agreement. This is apparently where the applicant's real gripe lies. It contends that it has introduced, over the years, some 7 000 members to the first respondent's medical scheme, and by terminating the agreement, the first respondent has now retained the applicant's "book", reaping where it has not sown.

[14]. The approach adopted by the applicant is in my view ill-conceived. It may be accepted that the purpose of the Act is to protect members. But the Act and the Regulations do not create rights to payment in themselves; such rights

must be found in the written agreement between the parties. The Act and the Regulations regulate the rights created by agreement, and place certain limitations and restrictions on those rights. For instance, a person may not act as a broker or be compensated for providing broking services unless accredited by the Council, may not be compensated by a medical scheme unless it has entered into a prior written agreement with the medical scheme, and the amount of compensation is limited. However, the Act and the Regulations do not allow for compensation without a written agreement, and, subject to the limitations and restrictions imposed by the Act and Regulations, the broker's right to compensation must be found in the written agreement. The applicant points for example to the wording of regulation 28(5), which is quoted in paragraph [12] above, and submits that payment is not made dependent upon any aspect of the written agreement, but is mandatory on receipt by the medical scheme of the member's contribution. I do not agree. The obligation to make payment derives from a contract between the parties. Regulation 28(5) merely prescribes that, where a payment is due contractually, it shall be made on a monthly basis and upon receipt of the contribution. Once the contractual right to payment ceases, regulation 28(5) is of no further application.

[15]. The applicant relies on a rule of interpretation of statutes that a statutory provision is presumed to interfere as little as possible with common law rights. That of course is so. Nevertheless, the common law right to receive remuneration for services rendered derives from contract, and it may therefore be presumed that the Act did not intend to change that save by express

provision or necessary implication, both of which are absent from the wording of the sections and regulations quoted above.

[16]. Nor is there any significance in the words "prior written agreement" as used in regulation 28(1). All that that means is that before a broker may receive compensation from a medical scheme, it had to have concluded a written agreement with the medical scheme. It does not seek to convey that it is sufficient that the written agreement should have been "prior" and that it therefore does not need to be "current" or "in existence". On the contrary, in regard to the payment of ongoing commissions, regulation 28(6)(a) makes the payment thereof conditional upon the broker continuing to meet service levels agreed to in terms of the written agreement, presupposing an extant written agreement.

[17]. I therefore turn to the written agreement. I have set out the relevant terms of the agreement above. There is no doubt that the right to place new applications for membership with the first respondent's scheme came to an end with the termination of the agreement. That much is accepted by the applicant. However, the question remains whether the applicant may continue to perform ongoing services and be compensated therefor in respect of existing members introduced by it. The agreement is silent on this aspect, which must therefore be found either in a proper interpretation of the agreement or in a tacit term. I am of the view that the agreement does not allow for ongoing fees, for the following reasons :

17.1 The usual effect of a termination of an agreement is that the relationship between the parties comes to an end. It is recognised that certain provisions survive a termination, for instance restraints of trade and dispute resolution clauses. But ordinarily one would not expect the parties to continue after termination with the provision of ongoing services against the payment of fees when those rights and obligations were the core provisions of the agreement.

17.2 Whilst termination as of right by giving 120 days' written notice would not necessarily indicate any difficulty or strained relationship between the parties, clause 9.2 provides for earlier termination upon the happening of certain events (for instance sequestration, winding-up or judicial management), or certain undesirable actions on the part of *inter alia* the broker (such as a breach of contract, misrepresentation, misstatement, or fraudulent or unethical business practices). In that event, the intention of termination would be to bring the ongoing relationship to a relatively abrupt end, the purpose of which would be defeated if the broker could insist on continuing to service members against payment of fees.

17.3 Clause 9.3 provides for the broker to surrender all documents and manuals upon termination of the agreement, whether in terms of clause 9.1 or clause 9.2. The ongoing services rendered by the broker to members would involve, for the most part, processing claims and

negotiating and obtaining payment of benefits on behalf of members. It is difficult to envisage how the broker could continue to provide such services if it has surrendered all forms, documents and manuals which would be relevant to making and processing medical aid claims. The fact that such documents and manuals have to be returned would militate to my mind against a construction of ongoing services and fees.

17.4 The applicant's interpretation would entail that the applicant and the first respondent would be tied together indefinitely, for as long as there is a single member introduced by the applicant who remains a member of the scheme. The first respondent would be powerless to extract itself from that situation. A court would not easily give that construction to an agreement. It is presumed that an agreement is terminable on reasonable notice where it is silent as to its duration, especially when it requires parties to work closely together and to have mutual trust and confidence in each other[1]. In the present case, the parties did not leave their relationship open-ended, but provided for termination on 120 days' notice.

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1 Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd & other related cases 1985 (4) SA 809 (A) at 827H-J :

> "...when parties bind themselves to an agreement which requires them to work closely together and to have mutual trust and confidence in each other, ..., it is reasonable to infer that they did not intend to bind themselves indefinitely, but rather contemplated termination by either party on reasonable notice. Where an agreement is silent as to its duration, it is terminable on reasonable notice in the absence of a conclusion that it was intended to continue indefinitely."

[18]. The mischief of which the applicant complains, namely that the first respondent has in effect hijacked its "book", is not a mischief which the Act needs to cater for, but is simply a result of a failure by the applicant to provide for such an eventuality in the agreement. This failure is of its own making, and it now seeks to interpret the Act and the Regulations in such a way as to compensate for that failure.

[19]. I am therefore of the view that the agreement, on a proper construction, does not permit of continuing ongoing services after termination, and that no tacit term to that effect can be imported. I am further of the view that the Act and the Regulations do not come to the applicant's assistance where the agreement itself makes no provision for such ongoing services and fees. The declarator sought in prayer 1 must therefore fail.

[20]. Counsel for the applicant conceded that the interdict sought in prayer 3 is only relevant if prayer 1 were granted. On reflection, I am not sure that that is correct, but the relief sought in prayer 1 can in any event not be granted. It relates to the letter of 20 April 2011, to which I have alluded above. The letter was apparently addressed to the members introduced by the applicant. It advised them of the termination of the agreement with the applicant, and gave them four options, one of which was to elect to stay with the applicant as the member's healthcare intermediary. Whilst the letter might have a slant against the applicant, it does not to my mind induce or procure a breach of the contract between the applicant and the members. Rather, it provides the members with

options. It is also not disputed that it was written after the first respondent had been advised by the Head of Accreditation of the second respondent, acting on behalf of the Registrar of Medical Schemes, that the first respondent was obliged to inform its members of any changes within the first respondent which might affect their position. No case has in my view been made out that the first respondent intentionally and without justification induced or procured a breach of the contracts between the applicant and the members. In my view, prayer 3 must therefor also fail.

[21]. The applicant seeks in prayer 2 an order that the first respondent should furnish it with certain information with regard to members introduced by it to the first respondent, more particularly with regard to cancellations by members of their mandates with the applicant. The applicant was the mandated representative of each member when they made application to join the first respondent's scheme. While the agreement between the applicant and the first respondent was extant, the applicant would have been entitled to information with regard to members introduced by it to the first respondent. The position is however different after termination. The information sought relates primarily to cancellations by members of their mandates with the applicant, for that is what the applicant is mainly interested in. That means that the applicant seeks to demand information regarding its former clients with whom it no longer has a contractual relationship (albeit that the cancellation may have been unlawfully induced), from the first respondent with whom it also no longer has a contractual relationship. There is no legal or contractual basis for such relief.

The applicant contends that a failure to force the first respondent to disclose the information sought would effectively legitimise the unlawful conduct of the 20 April 2011 letter and to allow the first respondent to retain the benefits it has gained from the unlawful interference in the applicant's business. That is with respect not a legal basis for the relief sought. I have in any event already found that the letter of 20 April 2011 did not amount to actionable unlawful conduct on the part of the first respondent. The first respondent contends that, to the extent that the applicant seeks any information outside of the ambit of a contractual or statutory entitlement, it is obliged to follow the requirements of the Promotion of Access to Information Act, 2 of 2000, which it did not do. I agree with that submission. It follows that the applicant is also not entitled to the relief sought in prayer 2.

[22]. In the circumstances, I make the following order :

"The application is dismissed with costs, such costs to include the costs of two counsel."

ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	10 February 2012
Date of judgment	:	24 February 2012
For applicant	:	Adv S van Nieuwenhuizen S.C. Adv J M Heher
	:	(instructed by Fluxmans Inc (Mr J Levitz))
For first respondent	:	Adv B E Leech S.C. Adv M F Welz
		(instructed by Werksmans Attorneys (Mr N Kirby))
No appearance for the second respondent		

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