

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT  
PRETORIA  
(REPUBLIC OF SOUTH AFRICA)

Case no:47350/13

In the matter between:

4/6/2014

MEDSHIELD MEDICAL SCHEME

FIRST PLAINTIFF

THEMBA BENEDICT LANGA

SECOND PLAINTIFF

AND

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

4 June 2014

CLIVE MARSHALL STUART

FIRST DEFENDANT

GAVIN JOHN GRIFFIN

SECOND DEFENDANT

THABO PADLETON MABETA

THIRD DEFENDANT

BISNATH JAY SINGH

FOURTH DEFENDANT

MAMARE PENNY MOILOA

FIFTH DEFENDANT

Coram: Baqwa J

Heard: 4 June 2014

Delivered: 4 June 2014

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JUDGMENT

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BAQWA J

**Summary** Exception to particulars of claim-Medical Schemes former trustees of the board of trustees-payment of consultancy fees during their tenure as trustees-Lawfulness in terms of Medical Schemes Act 131 of 1998 and rules of the Medical Scheme-Held that consultancy fees not authorised by the Act and the Rules and therefore unlawful. Exception upheld –plaintiffs **locus standi**

**Annotations**

Case law

Council for Medical Schemes and Others v Liberty Medical Scheme and Another [2013] (3) All SA 508 (GNP)

Breen v Williams 186 CLR 9HCA) at 108

Council for Medical Schemes and Others v Liberty Medical Scheme and Another

*ABSA Bank Ltd v South African Commercial Catering and Allied Workers Union National Provident Fund*

Vermeulen v Goose Valley Investments (Pty) Ltd 2001(3) SA 986 (SCA) at 997

Trustees of the Bus Industry Restructuring Fund v Breakthrough Investments CC 2008 (1) SA 67 (SCA)

- [1] This is an action in which plaintiffs instituted an action against a number of erstwhile trustees of the Medshield, the first plaintiff, for the repayment to Medshield of amounts paid to those trustees at various times during the period January 2008 to October 2011 in respect of consultancy fees for consultancy services rendered by the former trustees being the first to sixth respondents herein.
- [2] Plaintiffs contend that the consultancy services and/or payments in that regard were authorised by the board of trustees but were **ultra vires** the board and as such were invalid and unlawful. The claim is based on the alleged consequent invalidity of the authorisation by the board.
- [3] It is the contention of the plaintiffs that because the consultancy services were not specifically authorised by the Medical Schemes Act 131 of 1998 (The Act) or by the Rules of Medshield, they were not valid.
- [4] The law

Rule 23(1) of the Uniform Rules of Court provides as follows:

*"Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in*

*terms of paragraph (f) of sub-rule (5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception."*

4.1. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action or defence.

**Vermeulen v Goose Valley Investments (Pty) Ltd 2001(3) SA 986 (SCA) at 997**

4.2. The purpose of an exception alleging that a pleading lacks averments that are necessary to sustain a defence is to dispose of the leading of evidence at the trial. Such an exception must go to the root of the defence.

**Trustees of the Bus Industry Restructuring Fund v Breakthrough Investments CC 2008 (1) SA 67 (SCA)**

[5] Background

5.1. In terms of section 57 of the Act every medical scheme such as the first plaintiff shall have a board of trustees to manage the business of such Medical Scheme in terms of the applicable laws and Rules. The day to day affairs of a medical scheme are managed by a principal officer who is also chief executive officer of the medical scheme.

5.2. Among the duties of the first plaintiffs' board of trustees are the proper and sound management of the scheme; to avoid conflicts of interests and to declare any interest they may have in any particular matter serving before the

board of trustees and to ensure that the operation and administration of the scheme complies with the provisions of the Act and the Rules.

5.3. In their capacities as members of the first plaintiff's board of trustees, the defendants were entitled to be paid for performing their duties as members of the board of trustees as contemplated in the Act and in the Rules.

- [6] The first to the fifth defendants have noted an exception to the plaintiffs particulars of claim on the basis that the particulars of claim lack averments necessary to sustain a cause of action or claim for damages and that the particulars of claim are vague and embarrassing. Defendants further allege in the exception that despite a notice to remove the cause of complaint being served on the plaintiffs on 26 September 2013, the plaintiffs have failed and or refused to address the defendants' complaints. The defendants have based their exception on three grounds which I propose to deal with **seriatim**.

- [7] First exception: ABSENCE OF LOCUS STANDI

7.1. Medshield was placed under provisional curatorship on 2 October 2012. The return day was 13 November 2012 and the summons was issued 9 months later on 10 August 2013 when the provisional order had already expired. The plaintiffs have not alleged that the rule nisi was extended nor have they furnished proof of the final order regarding curatorship which would give second plaintiff legal capacity to act in the current action.

7.2. The action as is currently presented in the particulars of claim presumes that such final order was granted. Plaintiffs' response is that plaintiff is a medical aid scheme registered in terms of the Medical Schemes Act 131 of 1998 and that in terms of section 26 thereof it is a body corporate capable of suing and being sued in its own name, and that it therefore has legal capacity to bring these proceedings.

7.3. Whilst this maybe a correct position legally, the action has not been brought by the first plaintiff acting in terms of section 26 of the Act. The action has been instituted in the context of it being under curatorship. Plaintiff is therefore under a legal obligation to clarify in which capacity it is suing. Defendants must not be left to second guess which capacity the plaintiffs are suing in and in that context the summons are in my view vague and embarrassing.

7.4. There is an ambivalence in plaintiffs submission that its **locus standi** is not derived from the rule nisi and in the same vein submit that the second plaintiff was authorised to institute legal proceedings in his capacity as plaintiffs' curator.

7.5. Plaintiff further submits that the question of **locus standi** should be brought by way of special plea in terms of Rule 7. Rule 7 provides as follows:

*"7(1) Subject to the provisions of sub-rules (2) and (3) a power of attorney to act need to be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at anytime before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."*

The second plaintiff is cited **nomine officii** as a curator. A curator is appointed by the Court and he does not therefore need a power of attorney to act as such. I am accordingly of the view that Rule 7 is not applicable for the establishment of the **locus standi** of second defendant, if the **rule nisi** was confirmed by Court.

[8] The second exception

The second ground of exception is that the plaintiffs have failed to "*set out such allegations as would show that authorising the performance of consultancy services by the defendants and authorising the remuneration hereof is **ultra vires**, invalid and unlawful.*"

8.1. Plaintiffs submit that there is no merit in defendants ground of exception due to the fact that plaintiffs have pleaded, that the defendants were members of the first plaintiffs' board of trustees and specified the duties of the first plaintiff's board of trustees which defendants were entitled to be paid for.

8.2. Plaintiffs further submit and I accept that in the absence of any evidence to the contrary the Act and the Rules do not make provision for defendants to perform other duties than the duties of the board of trustees. It is defendants' submission that the Act and the Rules are silent on the issues on which the claim is based thereby confirming the absence of any provision in the Act and the Rules entitling them to act as consultants.

8.3. Where the Act is silent it cannot be a logical inference that what is not specifically prohibited is of necessity permitted or allowed. This would not be in keeping with the most basic rules of interpretation. In any event where the statute is silent, Courts are guided by the common law.

- [9] Rule 23 is discussed in Erasmus-Superior Court Practice at B1-157 where the following is stated:

*"The Appellate Division has laid down that 'as a matter of pleading, even if a pleader relies on a particular section of statute, it is not necessary for him to state the number of the section provided he formulates his claim clearly. It is however, necessary for plaintiff to allege all the facts necessary to bring his or*

*her claim within the statute otherwise, if these cannot be implied, the summons discloses no cause of action."*

**Kerringham v City of Cape Town 1934 A.D 80 at 90**

**Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004(4) SA 490 (CC) at 507 C-D**

[10] **In casu**, I find that the plaintiff has alleged all the facts necessary to enable it to rely on the Act. I am accordingly satisfied that sufficient allegations have been made by the plaintiffs to sustain a cause of action.

[11] The third exception

The third ground of exception is that the plaintiffs have not made out a case in delict; a case based on enrichment or a case based on breach of fiduciary duties.

For purposes of the relief which the plaintiffs seek I find that they do not have to make out a case based on delict, enrichment or breach of a fiduciary duty. It is sufficient that the payments were made in contravention of the Act and the Rules- and for purposes of this exception, I proceed on the basis that the payments were made in circumstances where the Act and the Rules did not authorise the payments to be made.

**Council for Medical Schemes and Others v Liberty Medical Scheme and Another [2013] (3) All SA 508 GNP**

[12] In the premises, I also find that the exception on this ground is bad in law and should be dismissed.



[13] In the result I make the following order:

13.1. The exception on the first ground is upheld with costs.

13.2. The exception on the second and third grounds is dismissed with costs.

13.3. The plaintiffs are granted leave to amend their summons within thirty (30) days of this order.

A handwritten signature in black ink, appearing to read 'S.A.M. Baqwa', is written over a horizontal line.

**S.A.M. BAQWA**

**(JUDGE OF THE HIGH  
COURT)**

Counsel for the plaintiffs:

Adv W La Grange

Instructed by:

Diale Mogashoa Attorneys

Counsel for the defendants:

Adv K Tsatsawane

Instructed by:

Corien Potgieter Inc