IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 97973/2015

In the matter between: 15/3/2016

LION OF AFRICA LIFE ASSURANCE COMPANY LTD Applicant

and

SOUTH AFRICAN SOCIAL SECURITY AGENCY First Respondent

MINISTER OF SOCIAL DEVELOPMENT Second Respondent

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

15/3/16
DATE

SIGNATURE

REASONS

D S FOURIE, J:

[1] On 17 December 2015 I granted an interim order in the urgent court against the first respondent, a copy of which is attached hereto as **annexure "X"**. A written request for reasons by the respondents was sent to the Registrar of this court on 18 December 2015 and later also to my secretary, but these requests only came to my notice after my return to office

at the beginning of the new term on 25 January 2016. I have now been able to attend to this matter and these are my reasons for the order granted.

BACKGROUND

[2] The applicant is registered to conduct long term insurance business in terms of the Long Term Insurance Act, 1998 and is also licensed as a financial services provider in terms of the provisions of the Financial Advisory and Intermediary Services Act No 37 of 2002. The first respondent is the South African Social Security Agency, a juristic person established under the South African Social Security Agency Act No 9 of 2004. It is, in terms of section 2(1) of the Social Assistance Act, No 13 of 2004 responsible for the administration of social assistance in terms of Chapter 3 of this Act.

[3] It is common cause that the applicant underwrites funeral insurance policies administered by Emerald Life CC. This includes approximately 20 000 policies which form the subject-matter of the application. It is also not in dispute that in practice, and in terms of the Social Assistance Act and the Regulations promulgated in terms thereof, social grants are paid to beneficiaries on a monthly basis within the Republic of South Africa by paymasters, who are contracted by the first respondent in order to assist it in fulfilling its statutory obligations in terms of the Act.

[4] Acting in terms of section 32 of the Social Assistance Act, the second respondent has made regulations in respect of deductions from social

grants as provided for in section 20(4). Regulation 26A allows for deductions to be made from social grants in certain circumstances. It provides as follows:

> *"(1) The Agency [the first respondent] may allow deductions for funeral insurance or scheme to be made directly from a social grant where the beneficiary of the social grant requests such deduction in writing from the Agency.*
>
> *(2) Subject to the provisions of sub-regulation (1), the Agency may only allow deductions to be made directly from a social grant where the insurance company requiring such deduction or to whom the money resulting from the deduction is paid, is a financial services provider as defined in section 1 of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002) and authorised to act as a financial services provider in terms of section 7 of that Act.*
>
> *(3) Notwithstanding the provisions of sub-regulation (1), the Agency may only authorise one deduction for a funeral insurance or for a funeral scheme not exceeding 10% of the value of the beneficiary's social grant."*

[5] It is also common cause that the applicant has since, during or about August 2015, requested the first respondent in terms of Regulation 26A to allow deductions from social grants to which its policyholders are entitled and that the first respondent has allowed such deductions in all instances where the requirements of Regulation 26A have been met. It is also alleged in the founding affidavit that the applicant had concluded approximately

47 000 policies with beneficiaries of children's grants together with an application form containing the request in writing by the beneficiary as required by Regulation 26A(1). According to an e-mail from the paymaster to the applicant, the submission date for the January 2016 deduction cycle was 18 December 2015.

[6] On 4 December 2015 the applicant received a letter from the first respondent indicating that, *"in order to ensure that protection against the rights of the children is adhered to, the Agency has placed a moratorium on the new funeral policy deductions from children's grants with effect from 1 January 2016."* It also indicated that existing funeral policy deductions against children's grants will continue until a further determination has been made. It is not in dispute that when the application was launched (on 8 December 2015), the applicant had already concluded 14 639 new funeral insurance policies, with beneficiaries of children's grants being approximately 75% of all written policies, and that the applicant was about to submit the written requests for deductions of premiums on or before 18 December 2015.

RELIEF SOUGHT AND THE RESPONDENTS' OPPOSITION THERETO

[7] The relief sought was in the form of a final interdict, alternatively and pending the finalisation of an application to review and set aside the moratorium referred to above, that the first respondent be ordered to suspend the operation of the moratorium and to allow the requests by the applicant for the necessary deductions. The application was opposed by the first and

second respondents on the basis that it is not urgent and also because the applicant has not made out a case for interim interdictory relief. A point *in limine* was also raised to the effect that there was a material non-joinder. I shall deal with each issue in turn.

URGENCY

[8] It is not in dispute that notice of the moratorium was only given on 4 December 2015 to take effect on 1 January 2016. The application was issued on 8 December 2015 and came before me on 17 December 2015. Taking also into account that the submission date for the January 2016 deduction cycle was the next day, i.e. 18 December 2015, I had no doubt that the application was indeed urgent.

NON-JOINDER

[9] It was contended that the applicant's failure to also join the first respondent's paymaster should render the application fatally defective, as it also has a constitutional duty, as an organ of state, for the implementation of a workable payment system in a manner that gives effect to the right of access to social security. Notwithstanding the status and obligations of the paymaster, I do not agree with the submission that it was necessary to join the paymaster. It is common cause that the paymasters are contracted by the first respondent in order to assist it in fulfilling its statutory obligations. It has also been explained by the respondents in their answering affidavit (par

26) that officials of the first respondent instructed the paymasters not to effect Regulation 26A deductions against children's grants from January 2016 onwards. Furthermore, according to the respondents these paymasters are acting on behalf of the first respondent, on its instruction and as its agent. It would therefore appear that these paymasters do not have a direct and substantial interest, in their own right, in these proceedings. Furthermore, it is the first respondent who took the decision to implement the moratorium and not the paymaster. Finally, the order was granted against the first respondent only.

INTERIM INTERDICT

[10] An interim interdict was granted pending the finalisation of an application to review and set aside the moratorium contained in the first respondent's letter dated 2 December 2015. It is trite that the requirements which an applicant for such relief has to satisfy are a *prima facie* right; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; a balance of convenience in favour of the granting of the interim relief; and the absence of any other satisfactory remedy.

[11] As far as the requirement of a *prima facie* right is concerned, the applicant was relying on an unreported judgment of Du Plessis J in this Division, case number 36212/2011, Channel Life Limited v Minister of Social Development, South African Social Security Agency, a copy of which is

attached to the founding affidavit. In that judgment Du Plessis J came to the conclusion (p 6 of the judgment) that *"once the requirements of Regulation 26A(1), (2) and (3) have been met, the Agency is obliged to allow deductions as provided for (in) Regulation 26A"*. The learned Judge then also granted a declaratory order to this effect.

[12] In the application before me the respondents have taken the view that children's grants cannot be utilised for funeral cover, but only for basic needs. To do so, the argument goes, would deprive children of their constitutional right of access to social security. It was further contended that to grant an order under these circumstances would "*not be constitutionally appropriate*" and the application should therefore be refused. Although there may be merit in some of these contentions, I was (and still am) of the view that it would be inappropriate for me to decide a constitutional issue in the urgent court (where it is not unusual for a judge, sitting in the urgent court in this division, to be faced with 20 to 30 urgent applications per week, many of which are opposed) when it is not necessary to do so. I don't say it can never happen. There may be cases where it is necessary to decide a constitutional issue in the urgent court. In the application before me, I had to consider whether or not to grant <u>interim</u> relief, pending the finalisation of a review application, almost immediately after hearing argument. I took into account that the parties will have the opportunity, during the main proceedings, to argue these and perhaps also other constitutional issues and to have their rights and obligations then decided finally. Perhaps it would have been

different if the applicant had insisted (which it did not) on the granting of final relief only. I have therefore decided not to make any finding in this regard and to leave the constitutional issue for consideration in due course and after proper notice has been given in terms of the rules. This will also have the benefit to allow other interested parties, as envisaged by rule 16A, to put forward their submissions.

[13] Having regard to the judgment of Du Plessis J and the fact that a system allowing for funeral policy deductions against children's grants was already in place, I concluded that a *prima facie* right had been demonstrated. I also took into account that, since the relief is only temporary and not decisive of either party's rights, the applicant need only have to demonstrate a *prima facie* right, even if open to some doubt. Furthermore, the relief sought (and the relief granted) was not unconditional. The order was granted subject to fulfilment of the requirements set out in Regulation 26A and would lapse if the applicant failed to launch the review application by 1 February 2016.

[14] As far as the second requirement of irreparable harm is concerned, it has been explained in the founding affidavit that if the moratorium were to take its effect, approximately 20 000 policies with total monthly premiums of approximately R1.7 million will be affected. It has also been pointed out that the applicant and the policyholders entered into the relevant policy agreements on the assumption that the premiums would be deducted from the children's grants. According to the applicant the beneficiaries also

accepted that they would have cover for accidental death and that the relevant premiums will for that purpose also be deducted. If these premiums are not paid and the *"default"* is not remedied, the policyholders will lose their cover which will be devastating to such policyholders in the event of accidental death. Furthermore, according to the applicant it would be obliged, if the moratorium were to be enforced, to also make contact with the relevant policyholders and convince them to agree to change their chosen method of payment. This exercise will be expensive, time-consuming and may even result in some of the policyholders not being notified in time about this change. Although these allegations have been denied by the respondents, I had no reason not to accept them for purposes of the interim relief claimed. I was therefore satisfied that this requirement had also been complied with.

[15] I also considered the requirements of a balance of convenience and the absence of any other satisfactory remedy carefully. I took into account that, when the application was heard, a system was already in place in terms whereof the first respondent has allowed funeral policy deductions from children's grants in all instances where the requirements of Regulation 26A have been met. Furthermore, in terms of the first respondent's notification, this system will be allowed to continue as far as existing (as opposed to new) funeral policy deductions are concerned. Put differently, if an interim order were to be granted it would only preserve the status quo as it was before the moratorium had been introduced. On the other hand, if the

relief were to be refused it would probably have all the negative consequences referred to above.

[16] It was contended by the respondents that if the interdict were to be granted the order will effectively *"scupper the process being put in place by the respondents to protect the constitutional rights of children to access social grants"*. I appreciate the respondents' concern with regard to the rights of children. These rights are important. However, I have already indicated above that this is not an issue to be finally dealt with in the urgent court when it is not necessary. The relief sought in the alternative (and granted) is only of a temporary nature. The allegation with regard to the respondents' duty to protect the constitutional rights of children and the relevancy thereof with regard to Regulation 26A has not been ignored, but will ultimately be dealt with and decided, if necessary, in the main proceedings. On the other hand, if interim relief were to be refused, the policyholders stand to lose their cover which may have serious consequences in the event of accidental death. Furthermore, the applicant has pointed out that if the moratorium were to be enforced, it would not only have expensive and time-consuming consequences for the applicant, but will in all probability also have the effect that the applicant will not be able to contact the majority of policyholders in time to put alternative arrangements in place. Having regard to all these considerations, I was satisfied that the balance of convenience was in favour of the granting of interim relief.

[17] The fourth requisite for the granting of an interim interdict is the absence of another adequate ordinary remedy. This requisite is closely linked with that of *"irreparable harm"*. No doubt, having taken into account all the facts and circumstances referred to above, more particularly those with regard to the requirement of *"irreparable harm"* and the fact that this application was urgent, I was unable to conclude that another adequate remedy was under these circumstances available to the applicant. For all these reasons I have exercised my discretion in favour of the applicant when the order, annexure "X" hereto, was granted.

D S FOURIE: JUDGE OF THE HIGH COURT, PRETORIA.

Date: ~~14~~ 15 March 2016

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

17/12/12

PRETORIA, 17 DECEMBER 2015

BEFORE THE HONOURABLE MR JUSTICE FOURIE

Case number 97973/15

LION OF AFRICA LIFE ASSURANCE COMPANY LTD Applicant

and

SOUTH AFRICAN SOCIAL SECURITY AGENCY First Respondent

MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA Second Respondent

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ORDER OF COURT

Having heard counsel for the parties and having read the documents filed of record, the following order is granted:

1 The forms and service provided for in the Uniform Rules of Court is dispensed with in terms of Rule 6(12)(a), and this application is dealt with as an urgent application.

2 Pending the finalisation of an application to review and set aside the moratorium contained in the first respondent's letter dated 2 December 2015 (Annexure "**EDT9**" to the founding affidavit):

2.1 The first respondent is ordered to suspend the operation of the

moratorium of deductions from child support, foster care and care dependency grants (as defined in the *Social Assistance Act*, 2004 (Act 13 of 2004)).

2.2 The first respondent is ordered to allow requests by the applicant for deductions for funeral insurance premiums from child support, care dependency and foster child grants, if such requests meet the requirements set out in regulation 26A of the regulations promulgated under the act and published under Government Notice R591 in Gazette 32254 dated 22 May 2009, namely where:

2.2.1 the applicant provides the first respondent with the written request by the beneficiary of the social grant to the first respondent; as contained in the policy concluded between the applicant and the beneficiary (Annexure "EDT7" to the founding affidavit)

2.2.2 the beneficiary of the social grant has only one deduction for a funeral insurance premium;

2.2.3 the value of the funeral insurance premium does not exceed ten per cent of the value of the beneficiary's social grant.

2.3 The first respondent is ordered to take all steps necessary in order to ensure the implementation of requests for deductions as set out in paragraph 2.2 above.

3 In the event that the applicant fails to launch the application referred to in paragraph 2 above by 1 February 2016, the interim interdict, as set out in paragraphs 2.1 to 2.3 above, will lapse.

4 The first respondent is ordered to pay the applicant's costs, including the costs of senior counsel.

By order of the Court

REGISTRAR

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION PRETORIA PRIVATE BAG/PRIVAATSAK X67 PRETORIA 0001
2015 -12- 17
J. MAKUNGO
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA