HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Not reportable

Not of interest to other Judges

CASE NO: **A448/2014**

10/6/2016

In the matter between:

HMI HEALTHCARE CORPORATION	Appellant
and	
MEDSHIELD MEDICAL SCHEME	First Respondent
JOHANNES ZACHARIAS HUMAN MULLER N.O.	Second Respondent
MICHAEL MMATHOMO MASILO N.O.	Third Respondent
MASTER OF THE GAUTENG HIGH COURT, PRETORIA	Fourth Respondent

J U D G M E N T

MAKGOKA, J

[1] This is an appeal against the whole judgment and order of Tlhapi J handed down on 30 January 2014, in terms of which she rescinded an order granted by Van der Merwe DJP *ex parte*, at the instance of the appellant, HMI Healthcare Corporation (HMI) on 18 December 2012. The rescission application was brought by the first respondent, Medshield Medical Scheme (Medshield). Tlhapi J also set aside certain steps taken by HMI pursuant to the rescinded order. HMI was also ordered to pay the costs of the application, including costs of two counsel and costs associated with the steps taken by HMI pursuant to the *ex parte* order. HMI appeals to this Court with leave of the court *a quo*, granted on 30 May 2014.

[2] The rescinded application followed an *ex parte* order obtained by HMI for leave to defend an action instituted by Medshield in this Court against a company in liquidation and to institute an action or a counterclaim against Medshield in the name of that company. The details of that company and its centrality to this case are set out in paragraphs 4 – 7 below. HMI sought the above relief in terms of ss 387(4) and 388 of the Companies Act 61 of 1973 (the old Companies Act) and subject to it furnishing an indemnity as to the costs to the joint liquidators of the company in liquidation.

The facts

[3] To understand the context in which the rescission application was brought, the following brief background is necessary. The main adversaries in the matter are Medshield and HMI. Medshield is a medical scheme registered in terms of the provisions of the Medical Schemes Act 131 of 1998. Its business entails, among others, raising contributions from its members and paying the claims lodged by them or by medical service providers on their behalf, in accordance with Medshield's applicable rules and scales of benefits.

[4] HMI is a subsidiary within the Bathabile Group of companies. HMI is the sole member of Calabash Health Solutions (Pty) Ltd (Calabash) and consequently owns the entire issued capital of Calabash. Calabash specialised in the rendering of managed healthcare services in terms of the capitation agreements entered into with medical schemes such as Medshield. Broadly, the capitation agreements entailed that Calabash would render management/administration services, and assumed the risk in respect of healthcare services provided to beneficiaries of medical schemes. In return, Calabash was entitled to capitation fees paid by the contracted medical schemes.

[5] On 26 October 2006 Medshield and Calabash concluded a capitation agreement in terms of which Calabash assumed all risk of payment of claims lodged by Medshield's members on the conditions set out above for a typical capitation agreement. The capitation agreement had retrospective application from 1 January

2006, and was to endure for three years until end of December 2008. During November 2007 a report was presented at a meeting of HMI that Calabash was experiencing financial difficulties which was putting strain on its cash flow and impacting on its ability to pay claims. The report further confirmed that in terms of a capitation agreement with another medical scheme, Moto Health, Calabash would owe Moto Health R35 million as from April 2008. Calabash made its last payment in terms of the capitation agreement with Medshield in March 2008. In May 2008, after Calabash's financial position was brought to its attention, Medshield suspended its capitation agreement with Calabash and stopped paying capitation fees to Calabash.

[6] Calabash was placed under voluntary creditor's winding up in terms of a special resolution of HMI, which resolution was registered by the Registrar of Companies and Close Corporations on 17 July 2009. The second and third respondents were finally appointed joint liquidators of Calabash on 23 October 2009. At the first meeting of creditors on 22 September 2009, HMI proved a claim in the amount of R3 530 000 against Calabash. At the second meeting of the creditors on 27 October 2009, HMI's related company, Agility Global Health Solutions Africa Ltd (Agility), proved a claim in the amount of R9 959 829.96 against Calabash. During April 2011, during a special meeting of creditors, Medshield proved a claim against Calabash in the amount of R39 226 814.40.

[7] On 17 July 2012 the Master gave written notice of expungement of all of the above claims in terms of the provisions of s 45 of the Insolvency Act 24 of 1936. The Master noted that this would afford the creditors an opportunity to prove their claims by way of court action. This was followed by written reasons on 3 September 2012 for that decision, in which the Master observed that the factual disputes in the claims were of 'technical intensity' such that, as a quasi-judicial officer, he was not equipped to investigate and adjudicate the claims. He concluded that it would be prudent to expunge the claims and afford the creditors the opportunity to prove their claims by way of court action. On 2 October 2102, at a further meeting of creditors, Medshield attempted to prove further claims against Calabash in the sum of R1 395 295, but this was rejected by the Master.

Medshield's action against Calabash

[8] On 29 November 2012 Medshield instituted action in this Court under case number 63139/2012 against the joint liquidators as the representative of Calabash in which it set out nine claims (claims 'A' to 'I') totalling R40 622 109. Claims 'A' to 'G' amounted to R39 226 418.40. This represents the total of the claim proven against Calabash, but subsequently expunged by the Master, as explained in the preceding paragraph. The balance of the amount claimed (R1 395 295) formed the basis of claims 'H' and 'I', which is the further amount Medshield unsuccessfully sought to prove, as explained earlier.

[9] Medshield's claims arose from the capitation agreement it had concluded with Calabash. Medshield alleged, among others, that Calabash had breached the capitation agreement in several respects, including failure to pay service providers for its members' claims; failure to remain accredited as a managed organisation by the Council for Medical Schemes; failure to advise Medshield that it had no entitlement to occupy its previously leased premises by virtue of its lease with HMI having been terminated; failure to maintain accurate books and records; and failure to advise Medshield of its financial losses and massive liabilities.

[10] Medshield's summons was served on the joint liquidators on 30 November 2012. HMI says that Medshield's action came to the attention of its attorneys on 4 December 2012. On 6 December 2012, in response to a telephone enquiry by HMI's attorneys, the joint liquidators indicated that they did not intend to defend Medshield's action. The joint liquidators' stance was also conveyed in writing to Medshield's attorneys on the same day. The stance adopted by the joint liquidators thus paved the way for Medshield to obtain judgment by default in its claims against Calabash. Summons having been served on the joint liquidators on 30 November 2012, the *dies induciae* of 10 days for entering an appearance to defend the action was set to lapse on 14 December 2012.

The *ex parte* application

[11] On 11 December 2012 HMI's attorneys directed an urgent letter to the Deputy Judge President, setting out the above situation, and conveyed their instructions to bring an application for leave to defend Medshield's action against Calabash. The attorneys indicated that such application needed to be moved quite urgently in order to prevent Medshield from applying and obtaining default judgment. An indulgence was therefore sought from the Deputy Judge President to grant HMI access to the unopposed motion court of the week of 17 – 21 December 2012 to move the application. In response to that request, the Deputy Judge President issued a directive for the matter to be heard on 18 December 2012.

[12] On 12 December 2012 HMI launched the *ex parte* application. Needless to say, the application was served neither on Medshield, nor on the joint liquidators. With regard to the joint liquidators, it was simply stated in the affidavit supporting the application that the second respondent, one of the joint liquidators of Calabash, had been informed telephonically of the intention to bring the application. The second respondent, it was said, had indicated to HMI's attorneys that the joint liquidators would not be opposing the application and would abide the Court's decision. Nothing was said with regard to service on Medshield or its attorneys of record.

[13] For the sake of completeness, I set out in full, the relief sought by HMI in the *ex parte* application. The notice of motion read as follows:

'1. That, in terms of section 387(4) and section 388 of the old Companies Act, 61 of 1973:-

1.1 the applicant be and is hereby empowered to defend the action instituted by Medshield Medical Scheme (Medshield) against Calabash Health Solutions (Pty) Ltd (in liquidation) (Calabash) out of the above Honourable Court under case number 2012/69139, in the name of Calabash and subject to the applicant furnishing an indemnity as to costs to the duly appointed joint liquidators of Calabash, Johannes Zacharias Human Muller N.O. and Michael Mmathomo Masilo N.O. ("the joint liquidators")

1.2 the applicant be and is hereby empowered to defend any other legal proceedings brought against Calabash by Medshield, in the name of Calabash and subject to the applicant furnishing an indemnity as to costs to the joint liquidators;

1.3 the applicant be and is hereby empowered to institute action against Medshield, or to launch a counterclaim under case number 2012/69139, for the recovery of the claim articulated in the draft particulars of claim attached to the letter addressed by the applicant's attorneys to the joint liquidators on 6 September 2012, as well as for any other claim which Calabash may have against Medshield, in the name of Calabash and subject to the applicant furnishing an indemnity as to the costs to the joint liquidators;

2. That the costs of this application be costs in the action under case number 2012/69139, alternatively costs in the liquidation of Calabash, unless opposed by any third party, in which event such third party be ordered to pay the costs of this application;

3. Further and/or alternative relief.'

[14] The affidavit supporting the *ex parte* application was deposed to by Mr George Roper, a director of HMI. Seeking to establish HMI's *locus standi*, Mr Roper stated that HMI and Agility are creditors of Calabash and had proved claims against Calabash in the sums of R3 530 000 and R9 959 829.96, respectively, which claims were also expunged by the Master. He further stated that at that stage, there were no proved creditors of Calabash from whom the joint liquidators could take directions, as contemplated in terms of s 386 of the old Companies Act. According to Mr Roper, Calabash had a damages claim against Medshield, but the joint liquidators were not possessed of sufficient funds in order to defend the action instituted by Medshield, or to launch a counterclaim against Medshield for the recovery of the alleged damages.

[15] As a result of the above, so asserted Mr Roper on behalf of HMI, the joint liquidators could not be involved in the litigation, and were accordingly, unable to protect the interests of the creditors and the sole member of Calabash, HMI. Mr Roper submitted on behalf of HMI that were the order sought not be granted, Medshield's claim would proceed undefended, and Calabash's claims against Medshield would not be pursued. Such a situation, it was contended, would be contrary to the provisions relating to the winding up of companies as contained in the old Companies Act and the Insolvency Act, and would not be just and beneficial, with disastrous effect on the estate of Calabash, its creditors and its members.

[16] Attached to *ex parte* application, was the draft particulars of claim prepared on behalf Calabash in terms of which Calabash would, in claim 'A', demand a total sum of R5 631 015, alternatively R16 893 045, from Medshield. In the further alternative, Calabash would seek that Medshield render an account to it for the period April to May 2008, alternatively, April to September 2008, in respect of beneficiaries on the Access Options. In claim 'B' Calabash would seek Medshield to render an account to it in respect of its beneficiaries on the same options for the period January to March 2008.

[17] The basis of the above claims is the alleged failure of Medshield to provide accurate monthly membership data to Calabash, as a result of which Calabash allegedly made payments of claims which ought not to have been paid, as no contributions had been made or received from members and where members were not entitled to submit claims, for various reasons. Calabash alleged that the total value of these claims amounted to R13 601 895, which it paid when in fact, it ought not to have paid. In addition, Calabash claimed to have paid prospective members or service providers before the members' actual joining date or after the termination date of members' membership of Medshield, resulting in claims being paid where members in question were not entitled to submit claims. The total value of those claims was said to be R3 291 150. Calabash therefore alleged that the sum total of the claims due to inaccurate information provided by Medshield was R16 893 045.

[18] According to the draft particulars of claim, Calabash only bore the risk in relation to claims paid by Calabash up to 31 May 2008. It is also said that Medshield's alleged failure to provide accurate monthly membership data to Calabash, amounted to a breach by Medshield of its obligations in terms of the capitation agreement. Calabash further stated that as a result of the alleged breach of the capitation agreement, the sum total of claims paid by it for the period April to May 2008, which ought not to have been paid was R5 631 015, which Calabash would claim as its damages. The alternative claim, also on the same basis, for the period April to September 2008, was R16 893 045.

The *ex parte* order

[19] As stated earlier, as per the Deputy Judge President's directive, the matter was enrolled for 18 December 2012. It was on that occasion that the Deputy Judge President heard and granted the order sought by HMI, on an *ex parte* basis. The order granted mirrored the relief sought by HMI. I have, in para 13 above, set out the relief which HMI sought. To recap, in essence HMI was granted permission to defend Medshield's claims against Calabash, and to institute an action against Medshield, or launch a counterclaim against Medshield on behalf of Calabash. Pursuant to the order, HMI delivered the following documents: (a) notice of intention to defend Medshield's claim on behalf of Calabash; (b) notice of substitution in terms of rule 15(2) of the Uniform Rules of Court; and (c) a special plea, plea over and a counterclaim on behalf of Calabash. In its special plea and plea over, as well as the counterclaim, HMI pleaded, among others, that Medshield's claims had been extinguished by prescription in terms of s 10(1) of the Prescription Act 68 of 1969.

The application for rescission of the *ex parte* order

[20] On 4 April 2013 Medshield brought an application for the rescission of the *ex parte* order granted in favour of HMI on 18 December 2012. Medshield sought the rescission in terms of rule 42(1)(1)(a) of the Uniform Rules of Court (the Uniform Rules) on the ground that the order was erroneously sought and granted in its absence. Medshield asserted that it was an interested party in the application and it was as such, entitled to be served with the application. It also sought to set aside the steps that had been taken by HMI pursuant to the *ex parte* application. In addition, Medshield sought an order declaring that HMI was not entitled to defend Medshield's action against Calabash in the name of Calabash; or to defend any other legal proceedings brought by Medshield against Calabash, or to institute any action or counterclaim against Medshield.

[21] Medshield's application was supported by an affidavit deposed to by Mr Themba Langa, the court-appointed curator of Medshield. Mr Langa stated that to its knowledge, Medshield had a direct and substantial interest in the relief sought in the *ex parte* application. He further stated that HMI failed to disclose numerous 'critical and material facts' about its own conduct in related litigation and in relation to the

liquidation of Calabash. The alleged facts which had not been disclosed included the following:

(a) That Medshield had, in affidavits in related litigation between the parties and correspondence, alleged that the claims of HMI and Agility against Calabash were acquired by fraud, and that the allegation has never been answered, in all likelihood because HMI and Agility do not have a defence to it;

(b) That for the estate of Calabash to have no funds was directly linked to the fraudulent manner in which HMI and Agility extinguished their debts to Calabash by retrospectively creating fictitious liabilities to Agility on the part of Calabash, which were credited against a substantial loan account owing by HMI to Calabash, thereby stripping Calabash of its only substantial asset;

(c) There was no explanation by HMI and Agility as to why, if they were genuine and *bona fide* creditors of Calabash, they did not, like Medshield, institute an action against Calabash in pursuit of their alleged claims as creditors;

(d) That HMI deliberately misinformed the Court about the nature and credibility of Medshield's claims against Calabash, in particular HMI's statement that Medshield's claim comprised an unliquidated damages claim. Medshield denied that allegation as misleading as it asserts that all its claims are liquidated, credible and justified;

(e) That HMI and the deponent to the *ex parte* application, Mr Roper, were in possession of certain books and financial records of Calabash, and had refused to supply them to Medshield or to the joint liquidators, thus deliberately preventing the joint liquidators from defending Medshield's action against Calabash;

(f) That Calabash's alleged counterclaim against Medshield was speculative and can never be proved, as HMI had said as much in one of the related

interlocutory applications, by stating that it was not in possession of the inaccurate membership data.

[22] The rest of Mr Langa's affidavit regarding the omission of alleged material facts is devoted to attempting to show that the supposed counterclaim on behalf of Calabash has no merit. This, according to Mr Langa, was because Calabash had stopped paying claims under the capitation agreement on 18 March 2008, despite the fact that it continued to receive payments from Medshield in respect of the agreement until May 2008. Mr Langa referred to a schedule of payments in substantiation of this contention. Mr Langa referred to the draft particulars of claim for the supposed counterclaim by Calabash against Medshield. I have referred to the draft particulars earlier in paras 16 -18 above.

[23] Mr Langa said that that the said draft particulars contained a series of inaccuracies and contradictions. In particular, he pointed out that the allegation that Calabash had paid claims during the period April to September 2008, could not be correct given his earlier statement that Calabash stopped paying claims on 18 March 2008. Mr Langa further stated that in any event, Calabash's counterclaim, if any, had long since prescribed as Calabash's representatives had knowledge of the alleged inaccurate membership data as long ago as 2007.

[24] Among the reasons why Medshield contended that the *ex parte* order was erroneously sought and granted, was the following: For HMI to have been successful in the *ex parte* application, it was required to have shown the Court either that the decision of the joint liquidators not to defend Medshield's action was not *bona fide* or, if it was, that it was so unreasonable that no reasonable liquidator would have come to the same decision. Medshield pointed out that this aspect was not addressed at all in HMI's *ex parte* application. Mr Langa pointed out that HMI failed to even allege that the decision of the joint liquidators was not *bona fide*. Neither did HMI make out a case in its *ex parte* application that the decision of the liquidators was so unreasonable that no reasonable liquidator would have come to the same decision. Mr Langa then set out a number of grounds to demonstrate that the decision was

reasonable, and in the circumstances, the order granted by Van der Merwe DJP fell to be rescinded.

The court *a quo*'s judgment in the rescission application

[25] In its judgment handed down on 30 January 2014, all of Medshield's arguments found favour with the court *a quo*. In particular, the Court found that: Medshield was a party affected by the order and had substantial interest in the *ex parte* application; there had been a non-disclosure of material facts in the *ex parte* application; Medshield had failed to make out a case in the *ex parte* application as to why it had to be substituted for the joint liquidators; that HMI's constitutional rights to litigate would not be infringed if HMI were not allowed to act as contemplated in the order; the order had been erroneously sought and granted as contemplated in rule 42(1)(a) of the Uniform Rules.

Leave to appeal

[26] HMI sought leave to appeal on several grounds, most of which are discussed below. In granting leave to appeal, the learned Judge *a quo* observed that the parties have substantial claims against each other, and that it would be in the interests of justice for another Court to determine (a) whether the judgment was dispositive of the matter and therefore had the effect of denying HMI and in particular Calabash the opportunity of challenging Medshield's claims; and (b) whether Medshield had a substantial interest in the *ex parte* application.

Issues that do not require determination on appeal

[27] In this Court, HMI did not pursue its constitutional argument that if it were to be denied the right to defend Medshield's claims against Calabash and to institute a counterclaim on behalf of Calabash against Medshield, this would constitute a violation of the constitutional rights of Calabash, its creditors and HMI, in terms of s 34 of the Constitution, to have these issues determined by a Court. What also cannot be disputed is that Medshield would be entitled to have the steps taken by HMI pursuant to the *ex parte* order, set aside, in the event the appeal is dismissed. That would follow naturally, as those steps are dependent on the *ex parte* order. If it

is rescinded, i.e. this appeal is dismissed, they fall off, consequentially. Similarly, Medshield's prayer for an order precluding HMI from seeking similar relief in the future does not arise in this appeal. That order was sought in the rescission application. It was not granted by the court *a quo*, it having found that Medshield had not made out a case for such an order. There is no cross-appeal against that finding, and thus, the issue does not arise before us.

[28] During the hearing of the appeal, counsel for Medshield raised, for the first time, the issue whether the judgment and order of the court *a quo* rescinding the *ex parte* order is appealable. Accordingly, the parties were directed to file supplementary written submissions on this question, which they did. I shall briefly set out the contentions of the parties in this regard.

Issues for determination

[29] The issues which fall to be determined in the appeal have thus crystallised into the following four crisp questions:

(a) whether the judgment and order rescinding the ex parte order is appealable;

(b) whether Medshield is a party affected by the *ex parte* application;

(c) whether there had been a non-disclosure of material facts in the *ex parte* application;

(d) whether HMI, in seeking to replace the liquidators' decision not to defend Medshield's action against Calabash, made out a proper case for that relief.

[30] I consider in turn, the above issues.

Appealability of the rescission order

[31] Relying mainly on the test established in *Zweni v Minister of Law and Order*[1] counsel for Medshield contented that the rescission order does not have the attributes of a final order as it is not definitive of the rights of the parties or disposing

[1] *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (A).

of at least a substantial portion of the relief in the main proceedings. But, as counsel correctly pointed out, the *Zweni* attributes are not cast in stone, as observed in *Moch v Nedtravel.*[2] Even where a decision does not bear all these attributes it may nevertheless be appealable if some other considerations are evident, including that the appeal would lead to a just and reasonable prompt resolution of the real issue between the parties.

[32] Counsel for Medshield contended that the effect of the rescission order is to afford Medshield the opportunity to ensure its version as to why the relief in the *ex parte* application ought not to have been granted, is placed before Court. This, so is the argument, paves the way for the parties' respective versions to be fully ventilated, thereby ensuring a resolution of the real issues between the parties. I disagree. The real issues between the parties cannot be resolved in application proceedings, as there are distinct and clear disputes of fact. This is the reason why the parties' respective claims were expunged by the Master, directing that the issues be resolved by way of action proceedings. Precisely for that reason, Medshield instituted an action against Calabash.

[33] The real issues between the parties are set out in Medshield's action against Calabash, and Calabash's draft particulars of claim against Medshield. Both actions arise from the capitation agreement. Those are the real issues between the parties, and not, as Medshield contends, whether HMI is entitled to defend Medshield's action against Calabash. That, with respect, is an ancillary issue to the main issues between the parties. It is therefore disingenuous for Medshield, after heeding the Master's call to have the disputes resolved through action proceedings (by instituting action against Calabash) to now seek to reduce the dispute to HMI's entitlement to defend that action. In any event, that path is likely to prolong the determination of the real issues between the parties, because if HMI were to be refused permission to defend Medshield's action, there would be the likelihood of an appeal against that order, which would further prolong the determination of the real issues between the parties.

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[2] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F-11C.

[34] Counsel for HMI argued, correctly in my view, that the overriding consideration should be that of the interests of justice, with reference to *Philani-Ma-Afrika v Mailula.*[3] There, the Supreme Court of Appeal adapted the general principles on the appealability of interim orders, and concluded that what is of paramount importance in deciding whether a judgment is appealable is the interests of justice. The approach of the Supreme Court of Appeal received the imprimatur of the Constitutional Court in *Intl Trade Administration v SCAW.*[4] The Constitutional Court observed that the Supreme Court of Appeal had adapted the general principles to accord with the equitable and the more context-sensitive standard of the interests of justice favoured by the Constitution.[5]

[35] For all the above considerations, I conclude that, in the interests of justice, the order rescinding the *ex parte* order is appealable.

[36] I turn now to the issues raised in the merits of the appeal, commencing with whether Medshield was a party affected by the *ex parte* order.

An affected party

[37] The court *a quo* took a view that Medshield was an affected party as it had a substantial interest in the *ex parte* application, and stated the following reasoning for that conclusion.

'The procedural irregularity complained about was that the order was erroneously sought in the absence of the applicant (Medshield) despite a clear indication that the applicant had a direct and substantial interest in the relief sought in the *ex parte* application and where the said application was launched mainly as a result of the action instituted by the applicant against Calabash.'

[38] The learned Judge, having stated that Medshield had 'direct and substantial interest' in the *ex parte* order, did not go further to explore that concept. As I shall demonstrate below, the test has always been whether the right of a party not before the Court could prejudicially be affected by the judgment or order granted *ex parte*.

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[3] *Philani-Ma-Afrika v Mailula* 2010 (2) SA 573 (SCA).
[4] *Intl Trade Administration Commission v SCAW SA (Pty) Ltd* 2012 (4) SA 618 (CC).
[5] Para 52.

The starting point is the wording of rule 42(1)(a) of the Uniform Rules, and how it has been interpreted by our courts over the years. The rule provides:

'(1) A court may, in addition to any powers it may have, *mero motu* or upon application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.'

[39] The phrase 'any person affected' is a very wide one. An applicant for rescission of a judgment under Uniform Rule of Court 42(1)(a) must show that he has an interest in the subject matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted. See for example, *United Watch v Disa Hotels.*[6] In *Standard General v Gutman* [7] Corbett J explained the concept of 'direct and substantial interest' as follows:

'A direct and substantial interest can be connoted as an interest in the right which is the subject matter of the litigation and ... not merely a financial interest which is only an indirect interest in such litigation. This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions and it is generally accepted that what is required is a legal interest in the subject matter of the action which could be prejudicially affected by the judgment or the order.' [8]

[40] The test is the same as that applied in intervention applications. Dealing with an intervention application in *Ex Parte Moosa*[9] this Court remarked that:

'In an application for leave to intervene, the intervening party must show that that he has a legal interest, not merely a financial interest in the subject matter of the litigation, and that his legal interest could be prejudicially affected by the judgment of the Court. It is not necessary for him to satisfy the Court that it will necessarily succeed in the litigation in which it seeks to intervene. It is sufficient for him to make such allegations as would show that he has a *prima facie* case, and that his application is made seriously and is not frivolous.'[10]

(My underlining for emphasis)

[41] At 416E the Court remarked that at the stage of application for leave to intervene, the Court must not be over-concerned with the intrinsic merits of dispute,

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[6] *United Watch & Diamond Co (Pty) Ltd v Disa Hotels* Ltd 1972 (4) SA 409 (C) at 415.
[7] *Standard General Insurance Co Ltd v Gutman* NO 1981 (2) SA 426 (C).
[8] At 434.
[9] *Ex Parte Moosa: In re Hassim v Harrop Allin* 1974 (4) SA 412 (T).
[10] At 414B-C.

which can only be fully canvassed and fought out in the main proceedings. In my view, the above remarks are apposite to the present case. To summarise on this aspect, the authorities referred to above, amply demonstrate that a 'direct and substantial interest' in a matter refers to a right which might be prejudicially affected by a court order.

[42] In the present case Medshield's right to pursue its action against Calabash has not been affected, let alone prejudicially so, by the *ex parte* order. That right remains intact and extant. What has been affected is the manner of enforcement of the claims, i.e whether by way of default judgment or by defendant action. Put in another manner, Medshield does not have the right to obtain default judgment against Calabash – it only has a right to pursue its action through the normal court processes. It should therefore not complain about the process or the manner of enforcement. At the risk of repetition, the *ex parte* order did not deal with the factual and legal substratum of the dispute. It by no means affected Medshield's existing rights and interests.

[43] To sum up on this point, the *audi alteram partem* rule is not violated where the party who claims that he or she was denied the opportunity to be heard fails to prove that he or she has rights and interests which were prejudicially affected.[11] To hold differently would, in my view, be putting form above substance.

Non-disclosure of material facts

[44] It is trite that in an *ex parte* application the utmost good faith must be observed by an applicant. Failure to disclose fully and frankly all material facts known to him or her may lead, in the exercise of the court's discretion, to the setting aside of the order, on that ground alone.[12]

[45] In this regard, the court *a quo* said:

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[11] See for example, *Mankatshu v Old Apostolic Church of Africa & others* 1994 (2) SA 458 (TkA) at 462D; *Seloadi & others v Sun International (Bophuthatswana) Ltd* 1993 (2) SA 174 (B) at 179I-180A; *Masinga v Minister of Justice, Kwazulu Government* 1995 (3) SA 214 (A) at 221J-224B; *Gordon v Department of Health, KwaZulu Natal* 2008 (6) SA 522 (SCA);[2009] 1 All SA 39 (SCA).

[12] See for example, *Estate Logie v Priest* 1926 AD 312 at 323; *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-350B; *Trakman N.O. v Livishitz and others* [1995] 1 All SA 434 (A) para 11.

'Although HMI annexed the summons to the application it failed to deal with the numerous allegations against it, one of them being that it manipulated accounting entries to transform HMI and Agility from their status as debtors to being creditors of Calabash. I agree with submission on behalf of the applicant that HMI was obliged to deal with and challenge documentary evidence placed before the court, even though the said court *a quo* was not called upon to determine the merits of such allegations. It was (sic) trite that an applicant in an *ex parte* application, has a duty to display the utmost good faith and to disclose all material facts, whether such facts count in his favour or not, especially where such facts might have influenced the decision of the court.'

[46] The court *a quo* was correct in stating the general principle regarding the duty for full disclosure in *ex parte* applications. It was also correct in stating that even if HMI had disclosed the allegations made by Medshield against it and Agility, the Court was not called upon to determine the merits of the allegations. This is so because the nature and extent of the disclosure would always depend on the circumstances of each case. All what the duty entails is that all material facts which have an impact on the order sought, should be disclosed.

[47] Obviously, what is material in each case, would depend on a number of factors, including the nature of the relief sought and the likely impact the order sought would have on the party not before court. As poignantly stated by Lord Stevn in *R v Daly*,[13] 'in law context is everything'. Therefore, the duty to make a full disclosure in *ex parte* applications is not immutable. It must be decided in the context and circumstances of each case. The 'one size-fits-all' approach is therefore inappropriate. In *Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere*[14] it was held that the *audi alteram partem* rule cannot be separated from the context in which it is applied.

[48] The context in the present matter is this. The parties make allegations and counter-allegations against each other. For example, Medshield accuses Calabash of having breached the capitation agreement. HMI, on the other hand, makes the same accusation against Medshield, on behalf of Calabash. Attached to the *ex parte*

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[13] *R (Daly) v Secretary of State for Home Affairs* [2001] 2 AC 532.
[14] *Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere* 2001 (3) SA 472 (SCA) at 479I/J to 480C. Compare also *Van Huyssteen*'s case at 305C-D where the Court held that what is of importance is that 'the principle and procedures which, in the particular situation or set of circumstances, are right and just and fair' are applied.

application, were the following: Medshield's summons against Calabash; a number of affidavits deposed to on behalf of Medshield; correspondence and other documents referring to Medshield's claims; and Calabash's draft particulars of claim against Medshield. Even before the application was launched, the Deputy Judge President was informed of the extended litigation and various disputes between the parties, in the letter dated 11 December 2012.

[49] Medshield's major complaint as far as non-disclosure is concerned, is that HMI and Agility are not the true creditors of Calabash, but in fact, its debtors. Medshield says that HMI and Agility's claims against Calabash were created by manipulating accounting entries in terms of the agreements they concluded with Calabash. Medshield says that it had repeatedly alleged in correspondence and in litigation between the parties that the transformation of HMI and Agility from debtors to creditors of Calabash was fraudulent, to which HMI has not answered. For this reason, Medshield contends, HMI is not entitled to defend its action against Calabash.

[50] While I agree that HMI did not disclose the allegations of fraud made by Medshield against it and Agility, I do not share Medshield's contention that the consequences of that failure should be the setting aside of the *ex parte* order. That contention is based on an over-simplification of what the duty of disclosure requires. At the risk of repetition, that duty requires the disclosure of material facts. Medshield's allegations remain exactly that. They are not facts. That they have been repeated on numerous occasions without rebuttal, does not translate them into facts. Only as a result of a trial, would a competent court find otherwise. The court *a quo* acknowledged that much when it said that it the Deputy Judge President was not called upon to determine the veracity of those allegations at the stage of the *ex parte* order.

[51] Medshield contends that had its allegations of fraud against HMI and Agility been brought to the attention of Van der Merwe DJP, it would have affected his decision to grant HMI permission to defend Medshield's action and institute a counterclaim against Medshield on behalf of Calabash. I doubt that. Given the clear

importance of the matter, gleaned from the documents attached to the *ex parte* application, the huge sums of money being claimed by the parties against each other, and the acrimonious tenor in the affidavits and correspondence, it is highly unlikely that the learned Deputy Judge President would have allowed a situation where one of the parties would ultimately obtain judgment by default. On the contrary, those considerations, in my view, would have impelled him to allow the issues to be ventilated in a trial. As stated earlier, the duty to disclose is not an inflexible one, and failure to adhere to it should not always result in the setting aside of an order obtained *ex parte*. I therefore conclude that the lack of disclosure in the present case was not material to the relief which was sought, and is accordingly of no consequence.

No proper case made to substitute the liquidators' decision

[52] When a company is in liquidation, proceedings on behalf of the company must be brought by the liquidator in the name of the company. However, if the liquidator refuses to do so, it is competent for the Court to empower a member of the company to bring such proceedings in the name of the company, subject to an indemnity as to costs. This is regulated by s 387(4) of the old Companies Act, which provides that any person aggrieved by any act or decision of the liquidator may apply to the Court after notice to the liquidator and thereupon the Court may make such order as it thinks just. That is the sub-section which HMI relied on in its *ex parte* application.

[53] As stated earlier, the court *a quo* accepted Medshield's argument that for HMI to be permitted to defend Medshield's action on behalf of Calabash, it was supposed to have shown that the decision of the joint liquidators not to defend Medshield's action was *mala fide* or unreasonable. The main hurdle for HMI, according to the learned Judge, was that the liquidators had failed to explain their decision not to defend Medshield's action, even after Calabash's books had been handed over to them by HMI. It seems to have been the learned Judge's view that in the absence of such explanation, it could not be assessed whether the liquidators' decision was unreasonable or *mala fide*. Therefore, HMI had to be non-suited, since, according to the learned Judge, it had failed to establish *mala fides* or unreasonableness on the part of the joint liquidators.

[54] In my view, the court *a quo* was not competent to delve into such an enquiry. In essence, that enquiry concerns whether HMI had established the necessary jurisdictional facts to bring the *ex parte* application. According to Medshield, the jurisdictional facts are either *mala fides* or unreasonableness, absent which, HMI could not be permitted to defend Medshield's action against Calabash. Whether HMI had established the necessary jurisdictional facts in the *ex parte* application, is an aspect that would have been considered by Van der Merwe DJP when granting the order. If HMI had failed to establish those, in spite of which the order was granted, the learned Deputy Judge President would have committed an error of law. Such an order cannot be subject of a challenge in a rescission application in the context of rule 42(1)(a) of the Uniform Rules. To do so, would seek to confer on a single Judge, appeal powers over another Judge, which, of course, is incompetent.

[55] If Medshield's view is that HMI had not established the jurisdictional facts to substitute the decision of the liquidators, the course open to it should have been an appeal against Van der Merwe DJP's order, instead of a rescission application. Medshield contends that it cannot appeal against an order in a matter in which it was not party to. This is not correct. A party can of course do so, subject to it establishing that it has a direct interest in the order or judgment. See *National Director of Public Prosecutions v Zuma.*[15]

[56] The court *a quo* therefore misdirected itself when it purported to review or question the correctness of the order of Van der Merwe DJP on the basis that HMI had failed to make out a case for the relief it sought. I agree with the contention on behalf of HMI that the basis relied upon by Medshield does not fall within the ambit of rule 42(1)(a) of the Uniform Rules, which is limited entirely to instances of procedural irregularity or mistake. As explained in the preceding paragraph, a single Judge cannot determine an appeal in respect of a judgment or order of another Judge. Put differently, a court cannot hear an appeal in respect of its own judgment, and to the extent the learned Judge *a quo* purported to do so, she erred. HMI, says that in any event, it had made out a case for the relief it had sought. It mentions factors, which it

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[15] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 85, and the authorities cited there.

submits, demonstrate its case. Given the view I take on the incompetence of a court to consider an appeal in respect of its own judgment, I find it unnecessary to consider HMI's submissions. This is such a trite principle that there is no room for any other conclusion.

Conclusion

[57] For the reasons I have given earlier in this judgement, I am satisfied that Van der Merwe DJP has exercised this Court's discretion judiciously in granting the *ex parte* order, given the exigencies and circumstances of the case and the overarching interests of faimess and justice. My colleague Tuchten J, like the court *a quo*, non-suits HMI on the basis that Medshield was a party with interest in the *ex parte* application, and had the right to be served with the application. As demonstrated with reference to the authorities earlier, that is only part of the enquiry. A further, crucial question, is whether any of Medshield's rights had been prejudicially affected by the order obtained *ex parte*, which, in the present case, there is none.

[58] As stated earlier when considering the appealability of the court *a quo*'s judgment, it is in the interests of justice that the real disputes between the parties should, without delay, be ventilated in a trial. Medshield should not be permitted to obtain judgment by default against Calabash in circumstances where its claims are strenuously disputed and where there is a counterclaim against it. Whether HMI and Agility have become creditors of Calabash through fraud and manipulation, or whether Calabash's intended counterclaim has no merits or has prescribed, are issues that can only be determined in a trial. If Medshield's claims are as strong as stated in this appeal, it should not be bothered to put them to the scrutiny of a trial for proper ventilation.

[59] Accordingly, I take a view that the court *a quo*, for all the reasons stated in this judgment, erred in rescinding the *ex parte* order. It was not erroneously sought or granted. The order did not prejudicially affect any of Medshield's rights. In my view, the Court ought to have dismissed Medshield's application. I would therefore have allowed the appeal. With regard to costs, there is no reason why costs should not follow the event. Both parties have employed two counsel. It is understandable,

given the nature of the issues involved, as well as the importance of the matter to the parties. Costs should therefore include costs of two counsel.

[60] Given that this is a minority judgement, I make no order. But, for completeness' sake, I would have allowe the appeal with the following order:

1. The appeal succeeds;
2. The order made by Tlhapi J on 30 January 2014 is set aside and its place the following order is substituted:

   'The application for rescission of the order made on 18 December 2012 is dismissed with costs, including costs attendant upon employment of two counsel.'

3. The first respondent is ordered to pay the costs of the appeal, inclusive of costs attendant upon employment of two counsel.

TM Makgoka
Judge of the High Court

Tuchten J:

[61] The facts are set out in the judgment of Makgoka J which I have had the privilege of reading in draft. I regret that there is an issue in which I differ from the conclusion reached by Makgoka J, which means that I think that the appeal should not succeed. The issue in question is whether the appellant was obliged to give the first respondent notice of its intention to apply in the first instance for the relief sought in its notice of motion dated 12 December 2012.[16]

[62] The basis for the relief sought by the appellant was that the decision of the liquidators not to defend the action or institute a counterclaim in the name or on

[16] The relief sought by the applicant is set out in the judgment of my learned brother at para 13 of his judgment.

behalf of Calabash had the consequence that, absent an order of court, it would not be legally competent for any party to defend the first respondent's action against Calabash or recover in the name or on behalf of Calabash any money allegedly owed by the first respondent to Calabash.

[63] Although the decision in question of the liquidators is not administrative action, I think that by analogy the reasoning in *MEC for Health, Eastern Cape and Another v Kirland Investments t/a Eye & Lazer Institute*[17] and *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[18] is applicable. In paragraph 101 of *Kirland*, the Constitutional Court held as follows:

> The essential basis of *Oudekraal* was that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process.

[64] One of the grounds on which this conclusion was reached is set out in *Kirland* at para 103:

> The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid.

[65] It is to my mind inconceivable that in the administrative law context, an approach to a court to vary or set aside an administrative decision could competently be made unless all those who had organised their lives on the basis of the impugned decision were given notice of the approach in question to the court.

[66] Translating this concept to the present facts in my view means that notice should have been given to those persons who had organised their lives on the basis of the liquidators' decision not to defend the action which the first respondent had instituted against Calabash and not to bring a counterclaim against the first

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[17] 2014 3 SA 469 CC

[18] 2004 6 SA 222 SCA

respondent. At that level, the person most affected by the liquidators' decision was the first respondent. As a result of that decision, the first respondent was entitled to organise its affairs on the footing that it need not prepare itself for costly and prolonged legal proceedings, because the liquidators, the only persons empowered by law to make the relevant decisions, had decided in the first respondent's favour.

[67] In common law, it is settled that, absent a waiver, a court will not deal with issues in which a third party has a direct and substantial interest unless that party is joined in the suit or other adequate steps are taken to ensure that its judgment will not prejudicially affect that party's interests.[19] As is pointed out in Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa*,[20] to avoid this prejudice, it has been practice to order that a rule *nisi* should issue.

[68] The question is not in my view, as found by Makgoka J,[21] whether the first respondent's right to pursue its action against Calabash was left intact but whether the first respondent was bound to submit to that action's being defended by someone other than the liquidators and to meet a counterclaim brought by someone other than the liquidators. One can test the proposition, again by analogy: where the Director of Public Prosecutions has declined to prosecute and an application is brought to set the decision of the DPP aside, it is inconceivable that the applicant for review will be excused from giving notice to the potential subject of the prosecution on the ground that such person's right to defend himself in any prosecution brought pursuant to the review is not affected.

[69] I accordingly make the following order:

1. The appeal is dismissed with costs, including the costs of the application under rule 27(1) and 49(6) brought by the appellant, such costs to be taxed on the basis that the employment of both senior and junior counsel was justified.

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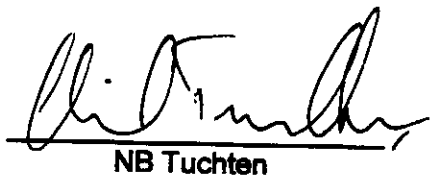
[19] *Amalgamated Engineering Union v Minister of Labour* 1949 3 SA 637 A 659

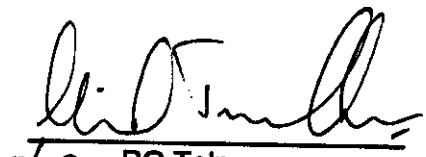
[20] 5th ed, Vol 1 291

[21] Para 42 of his judgment



NB Tuchten
Judge of the High Court

I agree



060 RG Tolmay
Judge of the High Court

Date of hearing:	27 January 2016
Supplementary written arguments:	10 February 2016
Judgment delivered:	10 June 2016

Appearances:

For the Appellant:	Adv J.J. Brett SC
	Adv. E. Kromhout
Instructed by:	Gildenhuys Malatji Inc., Pretoria
For the Respondent:	Adv. A. Subel SC
	Adv. N. Rajab-Budlender
Instructed by:	Hogan Lovells (South Africa) Inc,, Johannesburg
	Friedland Hart Solomon & Nicolson, Pretoria