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

Case number: A393/2019

KEYHEALTH MEDICAL SCHEME **Appellant**

and

GLOPIN (PTY) LTD **Respondent**

JUDGMENT

MOGOTSI, AJ (van der Westhuizen & Collis, JJ., concurring)

INTRODUCTION

1. The appellant, Key Health Medical Scheme, is a medical scheme as defined in the Medical Schemes Act, 131 of 1998. The respondent is Glopin (Pty) Ltd, a Financial Services Provider regulated under the Financial Advisory

and Intermediary Services Act 37 of 2002. It also acts as "broker" in a medical scheme sphere and is accredited with the Council for Medical Schemes.

2. On or about the 20th October 2004, the Appellant and the Respondent entered into a broking agreement.

3. At some stage during the subsistence of this agreement, the Appellant accused the Respondent of having an improper relationship with its trustees, and on the 14th of February 2017 furnished the Respondent with a notice of termination.

4. The Appellant brought an application for urgent interim relief. The parties reached a settlement which was later made an order of court on the 28th February 2017. In terms of the agreement the Appellant was obliged to continue making payments due to the Respondent pending the finalization of action proceedings to be instituted by the appellant.

5. The Appellant, thereafter, purported to withdraw its own disputed termination of the Broking agreement and revoked the mandate contained in the broking agreement between the parties. The Respondent classified this revocation, as a repudiation and a second interim relief was sought in terms whereof Fabricius J made an order preserving the *status quo*, pending the outcome of the action.

6. The Respondent then instituted an action against the Appellant and that action is the subject matter of this appeal. In terms of the action proceedings, the Respondent, claimed the following relief:

CLAIM A

Declarators that:

(a) The broking agreement dated 20 October 2004, is of full force and effect;

(b) The Key Health cancellation of 14 February 2017, is unlawful and invalid;

(c) The Key Health revocation of the Glopin authority under clause 2.1 and 3.1 is unlawful.

2. Confirmation of the mandamus and final interdict in terms of the interim order of 28 February 2017 contained in paragraph 1 and 2 of the order.

3. Costs, including the costs of the urgent interim interdict.

CLAIM B

1. In the alternative to claim A, and not withholding the revocation of Glopin's authority in clause 2.1, 3.1, and 3.2 and the declarator and that Keyhealth must in respect of 'such members', continue to:

   1.1 pay to Glopin all remuneration due in terms of the agreement;

   1.2 pay to Glopin broker compensation due in terms of the agreement;

   1.3 render an account by the 25th day of each month recording all premiums paid by 'such members' to Keyhealth and setting forth the commission due to Glopin consequent thereupon;

   1.4 pay to Glopin commission due to it on or before the last day of the month.

7. The *court a quo* granted the following order:

1. It is declared that:

1.1 The written broking arrangement entered into between the plaintiff and the defendant on 20 October 2004 is of full force and effect.

1.2 The defendant's revocation of the plaintiff's authority under clauses 2.1, 3.1 and 3.2 of the broking agreement on 21 March 2017 is unlawful and invalid.

1.3 The plaintiff is not intitled to any broker compensation in respect of the members of the Retired Municipal Employees Association.

2. The defendant is directed, for so long as the broking agreement remains extant between the parties to:

2.1 Pay to the plaintiff of remuneration due in terms of the broking agreement concluded between the

plaintiff and the defendant's predecessor, Munimed Medical Scheme, dated October 2004.

2.2 Continue to make payment of the broker compensation and other remuneration due under the broking agreement to the plaintiff to in consequences of having its clients underwritten by the defendant, and for that purpose:-

2.2.1 render an account of the plaintiff by no later than 25th day of each month recording all premiums paid by the plaintiff's clients and setting forth the commission due to the plaintiff as the consequent thereupon;

2.2.2 pay the plaintiff the compensation due on or before the last working day of each month.

2.2.3 Continue to accept new business that the plaintiff will seek to place with the defendant from time to time.

2.2.4 Continue to permit the plaintiff the access it enjoyed immediately prior to the cancellation letter to the plaintiff's database administered by the contracted administrator of the scheme, so as to allow the plaintiff to render service to the plaintiff's clients without interruption or hindrance.

3. *The defendant shall pay the plaintiff's cost of suit, including the costs of two counsels, on the attorney client scale, and further such costs shall include the reserved costs of the urgent application brought by the plaintiff as applicant against the defendant as respondent in this court under case number 11645/17.*

ARGUMENTS ADVANCED BY APPELLANT

8. On behalf of the appellant, the following arguments were advanced. Firstly, that the agreement *in casu* is a nominate contract of mandate. Counsel further submitted that the

phrases *"Glopin wishes to introduce and admit new members to Munimed"* in clause 2.1, *"Munimed agrees to accept the appointment of Glopin"* in clause 2.2 and *"Glopin is authorised"* in clause 3.1 of the Broking Agreement indicates that the agreement *in casu* is a mandate simpliciter. He further submitted that clause 3.1 of the Broking Agreement authorizes the Respondent to submit to the Applicant, on behalf of the Respondent's clients, application for the products for the benefit of the Respondent's clients and to provide ongoing broker services. Counsel argued, that this clause must be read in conjunction with clause 2.1 which stipulates that Glopin wishes to introduce and admit new members to Keyhealth. Furthermore, it was submitted that the court *a quo* conflated the issues and created a defence which was at variance with the pleadings. Consequently, the court *a quo* lost sight of the fact that the revocation of the mandate on 31 March 2018 preceded the alleged repudiation of February 2018. He further submitted that the court *a qou* erred in finding that the revocation of 31 March 2018 was unlawful and invalid.

ARGUMENTS ADVANCED BY THE RESPONDENT

9. Counsel for the Respondent, on the other hand, submitted that the contractual relationship between the parties is not an instance of a nominate contract of mandate. According to counsel, the concept "mandate" is not applied with precision. From the analysis of the Broking Agreement *in casu* the Appellant did not authorise the Respondent to enter into contracts on its behalf, it merely endowed the Respondent with authority to find potential members for the appellant.

10. Counsel for the Respondent further submitted that clause 4 of the Broking Agreement does not allow for the free termination of the broking agreement by revocation of the mandate contained therein. He submitted that the duration of the Broking Agreement is dependent on the accreditation of the Respondent by the Council for Medical Schemes (CMS) by virtue of clause 4.1.

11. He further submitted that the Appellant does not pay the Respondent for services rendered by the Respondent to the

Appellant. The appellant is a neutral payment functionary. The role of the Appellant is to pass fees payable by the consumers, who are its members to different FSPs, inclusive of the Respondent.

12. Counsel for the Respondent further submitted that from his analysis of the Broking Agreement, the Appellant did not authorise the Respondent to enter into contracts on its behalf. It did not confer upon the Respondent an authority to enter into contracts that would bind the Appellant.

ISSUE ON APPEAL FOR DETERMINATION

13. The issue for determination before us, is whether clauses 2.1, 2.2 and 3.1 of the Broking Agreement is a mandate simpliciter, or a binding contract. In this regard the following clauses require consideration.

14. Clause 2.1 reads as follows:

> *"Glopin wishes to introduce and admit new members to Munimed and provide ongoing services in relation*

to the products of Munimed for the benefit of Glopin's clients".

Clause 2.2 reads as follows:

"Munimed has agreed to accept the appointment of Glopin, subject to the terms and conditions of this agreement".

Clause 3.1 reads as follows:

"Glopin is authorised, with effect from the commencement date, to submit to Munimed, on behalf of Glopin's clients, applications for the product for the benefit of Glopin's clients and provide ongoing broker services".

ANALYSIS

15. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* **2012 (4) SA 593** (SCA) para 18 Wallis JA said:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to,

and guard against, the temptation to substitute what they regard as reasonable, sensible, or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

16. In the matter of *Novartis South Africa (Pty) Ltd and Maphil Trading (Pty) Ltd* case no. (20229/2014) [2015] ZASCA 111(3 September 2015) the Supreme Court of Appeal discussed the issue of interpretation of contracts and held as follows:

"I do not understand these judgements to mean that interpretation is a process that takes into account only

the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention'.

17. The unchallenged version of Mr Johannes Jakobus Crawford, which is common cause, is that the Appellant collected the premiums from the clients and paid the portion thereof to the Respondent for the services rendered by the latter to the clients shared by both. These monies are fees earned by the Respondent for the services it rendered to its clients who are also clients of the Appellant and the appellant is merely a neutral payment functionary. Consequently, the Respondent is not on the pay roll of the Appellant.

18. It well established principle that the parties' subsequent common conduct is admissible evidence in the interpretation of a contract. It is a demonstration of how the parties conducted themselves in implementing the terms of the contract.

19. The Respondent on one hand, and Johannes Jakobus Crafford and Retired Municipal Employee Association on the other hand, entered into an agreement. In terms of this agreement the Respondent was to provide broker services

to the Retired Municipal Employees Association (RMEA) and its members. That contract is an agreement between the Respondent, Johannes Jacobus Crowford and the Retired Municipal Employees Association only. The Appellant is not mentioned in this contract. In the premises, it is our view that the Respondent, in its dealings with the clients shared by both parties, did not create an illusion that it represented the Appellant. In our view, Counsel for the Respondent was correct in submitting that the Broking Agreement did not authorise the Respondent to enter into contracts that are binding on the Appellant.

20. Clause 4 of the Broking Agreement deals with the issue of duration and termination and it reads as follows:

> *"This agreement shall commence on 1 September 2004 and shall continue for a period of accreditation of Glopin by the Council for Medical Schemes and may be terminated by either party hereto, pursuant to the terms contained on the agreement".*

21. In our view, clause 4 is unambiguous and unequivocal. For as long as the Respondent is accredited by the Council for Medical Schemes, the Broking Agreement cannot be revoked by either party. Mr Johannes Jakobus Crawford testified that the Respondent was so accredited. Counsel for the Respondent, correctly submitted, that the life of the agreement *in casu* is linked to accreditation of the Respondent with the Council for Medical Schemes.

22. In our view, the Broking Agreement read in its entire context, the following clauses thereof are apposite to the determination of the issues *in casu*.

23. Clause 3.2 reads as follows:

> *"Glopin's authority in terms of this agreement is limited to what is set out in 3.1 above, without limiting the generality of the aforegoing, Glopin is not appointed as agent or representative of Munimed and is not authorised to or purport to:*

3.2.1 Contract on behalf of or in any way bind Munimed;

3.2.2 Incur any debts or liability or accept any insurance risk on Munimed's behalf".

24. Clause 9.2 reads as follows:

"Glopin agrees that Glopin shall be liable for all damages (including all legal costs incurred, determined on the attorney and own client scale) suffered by Munimed owing to any breach of the provisions of this clause".

25. Clause 12.1 reads as follows:

"Should Munimed institute legal actions against Glopin for the recovery of any money owing to it arising from the terms and conditions of this agreement, Glopin undertakes to pay the cost of such action on the scale as between attorney and own client".

26. A contract of mandate is a consensual contract between one party, the mandator, and another, the mandatary, in terms of which the mandatary undertakes to perform a mandate or commission for the mandator. This agreement may be revoked at any time by either party.

27. A contract of mandate is defined in LAWSA as –

> *"A contract of mandate is a consensual contract between one party, the mandator, and another, the mandatary, in terms of which the mandatary undertakes to perform a mandate or commission for the mandator. In essence the mandatary undertakes to do something at the request or on the instruction of the mandator.*
>
> *Although the mandate is usually performed gratuitously, provision may be made for the payment of a reward or remuneration, Because the word "mandate" suggests an instruction or "command" given by the mandator, the impression may be created*

that a mandate is constituted by the unilateral act of the mandator in giving the mandate. Such impression is erroneous, since the contract of mandate requires consensus between the parties thereto. There must hence be an agreement between the parties brought about, by an identifiable offer, in the form of a request that the mandate in question be performed, and an acceptance of that offer in the sense of acceding to that request, together with an undertaking to carry out the mandate and to perform the various duties imposed by it. For the rest, the agreement must comply with all the requirements for a valid and enforceable contract. A mandate should be distinguished from an authority or power of attorney. An authority gives the authorised party the power to perform juristic acts in the name, or on behalf of the grantor of the authority, while a mandate does not necessarily include any power to represent the mandator legally."

28. Having regard to the conspectus of evidence placed before us, we therefore, conclude that the Broking

Agreement *in casu* falls squarely within the definition a contract. It is not a mandate simpliciter. It creates obligations between the parties, it is legally enforceable, and cannot be terminated by either party unless clause 4 is triggered which is not the case *in casu*. Clause 3.2 unequivocally states that the Respondent is not an agent of the Appellant and the former, during the subsistence of the agreement acted accordingly. The Appellant does not remunerate the Respondent for services rendered by the latter to the former.

29. The court a quo reached a correct decision on the issue. The argument that this Broking Agreement is a mandate simpliciter is rejected, and the appeal stands to be dismissed.

COSTS

30. Counsel for the Appellant submits that the court a quo should have ordered the Respondent to pay costs of the suit including costs of two counsels. He further submits that the court a quo should have ordered the Appellant to pay the

reserved costs in respect of the urgent application under case number 11645/17 instituted by the Respondent, including costs of two counsels.

31. Counsel for the Respondent submits that the punitive costs order awarded by the court a quo should not be interfered with.

32. In our view, the court *a quo* was correct in awarding the punitive cost order given the manner in which the Appellant approached the entire issue. The Plaintiff cancelled the agreement and this resulted in the Kollapen, J., order and endeavoured to remedy the situation by raising the revocation issue and the consequential Fabricius, J., order. The conduct of the Appellant is deserving of a punitive cost order.

ORDER

1. The appeal is dismissed;

2. The appellant is to pay the costs, including the costs consequent upon the employ of two counsel, on the scale as between attorney and client.

MOGOTSI
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:	14 April 2021
For the Appellant:	A F Arnoldi SC
	A Thompson
Instructed by:	Kotze & Roux Attorneys In.
For the Respondent:	P F Louw SC
	D Vetten
Instructed by:	Edward S Classen & Associates
Date of Judgment:	