IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 24261/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

E.M. KUBUSHI **DATE: 02 NOVEMBER 2022**

In the matter between:

SOUTH AFRICAN POLICE SERVICE MEDICAL SCHEME	Applicant
and	
REGISTRAR OF THE COUNCIL FOR MEDICAL SCHEMES	First Respondent
COUNCIL FOR MEDICAL SCHEMES	Second Respondent
MINISTER OF HEALTH	Third Respondent
MINISTER OF FINANCE	Fourth Respondent

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 02 November 2022.

INTRODUCTION

[1] The South African Police Service Medical Scheme (“POLMED"), as the Applicant, had approached Court, on an urgent basis, seeking an order in two parts, namely, Part A and Part B. Part A of the proceedings has already been adjudicated upon, as will appear more clearly later in this judgment. This court is, as such, seized only with Part B of the proceedings.

[2] POLMED is a closed medical scheme registered under the Medical Schemes Act (“the MSA”),[1] serving only members of the South African Police Service,[2] and their dependants are eligible to be members.

[3] The application is opposed by the First Respondent, the Registrar of Medical Schemes (the "Registrar"), the Second Respondent, the Council for Medical Schemes ("the CMS") (who are represented by the same counsel), and the Fourth Respondent, the Minister of Finance (“the Minister”). The Minister of Health as the Third Respondent, is not taking part in these proceedings. For ease of reference, the Registrar, the CMS and the Minister shall, collectively, in this judgment, be referred to as the Respondents.

[4] At the outset it is important to lay out the factual matrix pertaining to the application.

FACTUAL MATRIX

[5] POLMED states in its papers that the application became necessary after learning from a confidential source that the Registrar and/or the CMS had embarked on a course of action to bring an *ex parte* application to place POLMED under curatorship. Upon hearing this information, POLMED, sought to confirm the veracity thereof in order to establish whether its rights would be infringed. POLMED, further, sought an undertaking that in the event the Registrar intends to make an application to place the applicant under

[1] Act No 131 of 1998.
[2] Appointed under the South African Police Service Act No 68 of 1995.

curatorship, it should do so by giving advance notice sufficient to allow POLMED an opportunity to exercise its rights to *audi alteram partem*. The Registrar failed to provide such an undertaking.

[6] POLMED approached Court in anticipation that the Registrar will solely or amongst others rely on section 5(1) of the Financial Institutions (Protection of Funds) Act ("the F I Act"),[3] to bring the curatorship application without notice. POLMED made an application seeking that the Court direct the Registrar and the CMS, to give a notice to POLMED of any intended application to place POLMED under curatorship in terms of section 56 of the MSA read with sections 5(1) of the F I Act. This is, Part A of the application.

[7] That application served before Moosa AJ who upheld the issue of urgency and made an order dismissing the application with costs. Only an order for the dismissal of the application with costs was issued, without the reasons.

[8] The Applicant has appealed the order of Moosa AJ and simultaneously applied for the reasons for judgment which to date of the hearing of this matter, had not been provided. During the hearing of the matter before this Court there appeared to be a misunderstanding as to whether the appeal had been abandoned or not. It was, however, ascertained that the appeal is still pending.

[9] Despite having appealed the judgment and order of Moosa AJ, the applicant, nevertheless, proceeded with Part B of the application, which is what is before this Court for determination.

[10] From the heads of argument of the Registrar and the CMS, this Court learnt that in the meanwhile, the Registrar made an *ex parte* application for an order to provisionally place POLMED under curatorship. The Court as *per* Fabricius J ordered that POLMED and other parties should be given notice for bringing such an application. Concomitantly, POLMED was given such notice.

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[3] Act No 28 of 2001.

However, the application was later withdrawn on account of the reasons that require no elaboration in the current proceedings.

[11] Before this Court, the Registrar and the CMS have, in opposition to the relief sought by POLMED raised two points *in limine*, which are supported by the Minister. The points *in limine* pertains to the issues of *res judicata* and/or *lis pendens* and the lack of *lis* between the parties. This Court will deal with the preliminary issues, hereunder.

PRELIMINARY ISSUES

The Matter is *Res Judicata* and/or *Lis Pendens*

[12] The Registrar and the CMS' argument, on this issue, is that this Court has as *per* Moosa AJ already determined the issues and gave judgment against POLMED on the same issues that are currently before this Court. The contention is that the matter in which Moosa AJ ruled was between the same parties and was based on the same cause of action and subject matter which renders this matter *res judicata*.

[13] It is trite that the principle of *res judicata* posits that once a matter is decided by a competent court on the same cause of action, for the same relief and between the same parties, such a matter should not be revisited in another court.

[14] The rationale for the principle of *res judicata* was eloquently adumbrated in the judgment of the then Appeal Court (now the Supreme Court of Appeal), in *Evins v Shield Insurance Co Ltd*,[4] by Corbett JA, as follows:

> "Closely allied to the 'once and for all' is the principle of *res judicata* which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject-matter and based on the same cause of action is not permissible, and, if attempted by one of them, can be met by *exceptio rei judicatate vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a

[4] 1980 (2) SA 814 (A) at 835E-G.

defendant by a multiplicity of actions and possibility of conflicting decisions." (own emphasis)

[15] From the reading of the above passage it can be ascertained that in order to succeed on a defence of *res judicata* the following principles must be established, namely, that (a) there must be a final judgment given by a competent Court; and (b) the subsequent litigation must not be (i) between the same parties or their privies; (ii) in regard to the same subject matter; and (iii) based on the same cause of action.

[16] It is common cause that this matter previously served before Moosa AJ who dismissed Part A of the application and granted judgment in favour of the Registrar and the CMS. The judgment was handed down on 30 June 2020. It is, also, not in dispute that the parties in Part A of the application are the same parties that are appearing before this Court, and that the subject matter in both Part A and Part B of the application, is the curatorship of a medical scheme brought on an *ex parte* basis. Thus, three requirements as stated in *Evins v Shield Insurance Co Ltd*, have been satisfied.

[17] What appears to be in dispute between the parties, which ought to be established, is the principle of whether the subsequent litigation is based on the same cause of action. The question, therefore, is whether Part A and Part B of the application are based on the same cause of action.

[18] The Registrar and the CMS are contending that Part A and Part B of the application are based on the same cause of action. The contention is based on the fact that the issues that are raised and argued before this Court are the same issues that served before Moosa AJ when Part A was considered.

[19] POLMED's suggestion is that Part A and Part B are not founded on the same cause of action because the relief sought in Part A is different from the relief sought in Part B, hence the issues that served before Moosa AJ are not the same issues that are argued before this Court.

[20] As it appears from the founding affidavit, the relief sought by POLMED in Part A, is for an order directing the Registrar in concurrence with the CMS, to give advance notice, by service, to POLMED, of any impending application for curatorship. A case was also made out in the founding affidavit for an interdictory relief, in the alternative, in the event the Court finds that the relief sought was substantive rather than procedural in nature.

[21] In the proceedings before this Court, POLMED seeks an order declaring that section 5(1) of the F I Act, insofar as it is a blanket authorisation for an *ex parte* approach to Court for the appointment of a curator: constitutes an unjustified infringement of a medical scheme's right to oppose such curatorship in terms of section 34 of the Constitution; is inconsistent with the Medical Schemes Act, and must be read down to apply to instances where an *ex parte* application is justified on the facts. Such facts must justify the dispensing with notice to the medical scheme, based on the facts at hand and/or on the basis of urgency.

[22] The cause of action set out in POLMED's founding affidavit is that an application for curatorship made by the Registrar and the CMS must be on notice, failing which a fair hearing as contemplated in the Constitution and section 34 of the Constitution, will be violated, and that an *ex parte* application should be justified on facts before it can be granted. The cause of action straddles the relief sought in both Part A and Part B of the application.

[23] It is clear from what is stated here above that the relief sought by the POLMED in Part A is different from the relief it seeks in Part B. However, there is only one cause of action set out in POLMED's founding papers. The question is, under such circumstances, is POLMED entitled to seek two separate remedies based on the same cause of action. Put differently, can it be said that Part A and Part B are not based on the same cause of action only because POLMED is seeking a different relief in each Part of the application.

[24] The Registrar's counsel in oral argument before this Court, argues that the relief POLMED seeks in the current matter is the same as that was sought in Part A. This, counsel contends is so because the issues raised in POLMED's founding affidavit and the arguments that were ventilated before Moosa AJ, are the same issues that are being argued by POLMED before this Court.

[25] The record of the proceedings before Moosa AJ was not made visible to this Court, as such it is not easy to can say what it is that was actually canvassed before Moosa AJ, that resulted in the order that was eventually granted. This is, further, compounded by the fact that Moosa AJ issued an order without providing the reasons for such order. The Court Order reads simply that "*the application is dismissed with costs including the costs consequent upon the employment of two counsel*."

[26] When reading the heads of argument that were uploaded on Caselines in preparation for the hearing of Part A of the application, it becomes apparent that all the issues that are being argued before this Court were indeed traversed at the hearing of Part A. The Notice of Appeal which is, also, uploaded on Caselines, indicates that the appeal sought is in regard to the issues that are being argued in this Court.

[27] In essence, the issues in the application are convoluted, in the sense that, both Part A and Part B were argued on the same issues, and in fact could not have been argued otherwise. This is so because the two remedies sought, are based on the same factual matrix and, might I say, on the same cause of action.

[28] It is clear from the Notice of Motion that POLMED is contending for two remedies, one in Part A and the other in Part B. This Court is of the view that nothing prevents a party in litigation from requesting two remedies premised on the same cause of action. As already indicated earlier in this judgment, there are two distinct remedies that POLMED is contending for in the Notice of Motion. The remedy sought in Part A is for POLMED to be notified of any

curatorship application, the Registrar intends bringing to court. Concomitantly, POLMED seeks a remedy for a declaration of the constitutionality of section 5(1) of the F I Act read with section 56 of the MSA, in Part B. The relief prayed for by POLMED, both in Part A and in Part B, flows from the same cause of action, and each relief can be properly granted.[5]

[29] Based on the aforementioned reasons it is this Court's view that the point *in limine* based on *res judicata* must fail.

[30] In addition, the Registrar and the CMS argue that as POLMED has lodged an appeal against the order of Moosa AJ, the matter is *litis pedentis* and this application should, on this argument, be dismissed.

[30] *Lis alibi pendens* is a special plea that can be raised where there is litigation pending between the same parties, based on the same cause of action, and in respect of the same subject matter.

[31] Hence, it is trite that the party wishing to raise a defence of *lis alibi pendens* bears the *onus* of alleging and proving that there is pending litigation between the same parties or their privies, based on the same cause of action in respect of the same subject matter. The other party must then satisfy the court that, despite the fact that all the required elements are present, the balance of convenience and equity are in favour of allowing the case to proceed.[6]

[32] In this instance, it is common cause that POLMED has launched an appeal against the judgment of Moosa AJ, which appeal has not been prosecuted to finality and is, thus, pending. POLMED argues, however, that Part B of the application is not dependent on Part A for its continuation.

[33] Having concluded that the remedies in Part A and Part B are distinct from each other, it stands to reason that they are not dependent on each other.

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[5] See Erasmus: Superior Court Practice Volume 2 2nd ed at D1-233.

[6] See Harms: *Amler's Precedents of Pleadings* 7th ed p263 – 264.

This Court's view is that the appeal pending in Part A of the application does not prevent the continuance of Part B of the application. This point falls, as well, to be dismissed.

There is no *Lis* between the Parties

[34] The Registrar and the CMS submits in the alternative, that the parties are in agreement as to the approach to be followed in an *ex parte* application for an appointment of a curator of a medical scheme, notably the requirement that such an application has to be justified on the facts. As such, so it is contended, there is no actual controversy or living dispute between the parties in this matter. The application has to be dismissed on this basis, as well.

[35] In support of the argument raised by the Registrar and the CMS, in this regard, their counsel relied on the leading case of *Geldenhuys and Neethling v Beuthin*[7] which established the long standing principle in our law to the effect that the courts do not decide abstract, academic and hypothetical questions. The effect of this principle is that there should exist between the parties an "actual controversy which (the court) undertakes to decide as a living issue".[8]

[36] Based on the reasons that follow hereunder, it is the view of this Court that there is, in essence, no *lis* between POLMED and the Respondents. Firstly, as earlier stated in this judgment the *ex parte* application for an order to provisionally place the applicant under curatorship was withdrawn.

[37] POLMED in its founding papers avers that it approached Court after it learned that the Registrar and/or the CMS, have embarked on a course of action to bring an *ex parte* application to place POLMED under curatorship. When launching the application, POLMED was of the view that nothing justified

[7] 1918 AD 426 at 441.

[8] See Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others 2001 (2) SA 872 (SCA) para 8.

the launching of a curatorship application given that from a financial perspective, POLMED was in a healthy condition. The *ex parte* application that POLMED wanted to challenge has been withdrawn, as such, there is no existing dispute between the parties.

[38] Secondly, to the extent that POLMED wants to pursue its argument that an *ex parte* application for the appointment of a curator has to be justified by the facts that warrant such *ex parte*, the Registrar and the CMS have submitted in their supplementary affidavit that it has always been their position that an *ex parte* application for the appointment of a curator has to be justified by the facts that warrant such *ex parte*. This has, also, been conceded by POLMED in the heads of argument, by stating that the Registrar and the CMS are not at variance with its contention that the use of an *ex parte* procedure to place a medical scheme under curatorship must be justified.

[39] Thus, the parties are in agreement that an *ex parte* application has to be justified by the facts of each case. Consequently, the parties being in agreement, there is no *lis* between them.

[40] To the extent that POLMED continues to argue that if the Respondents are in agreement with POLMED's submission that section 5(1) of the F I Act should not be interpreted to mean that the Registrar has a blanket authority to bring the curatorship application *ex parte*, the relief it seeks ought to be granted, the argument is without merit. This is so because POLMED seeks to declare section 5(1) of the F I Act, insofar as it is a blanket authorisation, unconstitutional. POLMED explains 'the blanket authorisation' to mean that the Registrar is entitled as of right to bring an *ex parte* application whether such application is justified or not. But this is not what section 5(1) of the F I Act, says. Section 5(1) of the F I Act, specifically states that the *ex parte* application must be on good cause shown. The section in its own language precludes a blanket authorisation to bring an *ex parte* application.

[41] POLMED seems to take umbrage to the fact that the Registrar is the one that makes a decision as to whether or not to bring the curatorship application *ex parte*. This does not assist POLMED's case because every applicant, the Registrar included, makes a decision whether or not to bring the application on an *ex parte* basis, but there is a caveat to that – the application must be on good cause shown. This is what is required by section 5(1) of the F I Act. That caveat is what is to be established before the Court, it cannot be decided by the Registrar. The Registrar is empowered by section 5(1) of the F I Act to bring an *ex parte* application before the Court. The section further grants the Registrar the discretion to decide whether to bring an application on an *ex parte* basis or not. Once the Registrar exercises the discretion to bring the application on *ex parte* basis, the application must be brought on good cause shown. It means that the Registrar must convince the Court that there is justification to grant the application *ex parte* without notice to the other party.

[42] The Respondents agree that if an application is to be brought for *ex parte* relief, it must be on good cause shown. They agree that section 5(1) of the F I Act does not give the Registrar a blanket authorisation to bring the application *ex parte* as of right. This, is a further confirmation that there is no *lis* between the parties.

[43] This Court is in agreement with the Respondents' submission that there is no room, either in fact or in law, for an interpretation of section 5(1) of the F I Act. The section is clear and requires no interpretation.

[44] Additionally, POLMED's proposition that POLMED is entitled in terms of section 21(1)(c) of the Superior Courts Act,[9] to be granted a declarator by the Court even where there is no *lis* between the parties is meritless.

[45] Section 21(1)(c) of the Superior Courts Act provides that a High Court has the power to, in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or

[9] Act No 10 of 2013.

obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

[46] The section does not state that a Court can grant a declarator where a dispute does not exist. On the contrary the opposite prevails. The author Erasmus in *Superior Court Practice*,[10] states that the Court may, in the exercise of its discretion, decline to deal with a matter where there is no actual dispute. Erasmus further state that a Court may decline to grant a declaratory order if it regards the question asked as hypothetical, abstract and academic.

[47] In the exercise of its discretion, this Court declines to deal with this matter because there is no actual dispute as it has found. In this Court's view, since there is no actual dispute between the parties, the question, that POLMED wants to be determined is hypothetical, abstract and academic, and on that basis this Court cannot grant a declaratory order sought by POLMED.

[48] Lastly, the contention by POLMED that section 21(1)(c) of the Superior Courts Act authorises the Court to grant a declaratory order in respect of contingent rights, is not sustainable on the evidence before this Court. There is no evidence on record that indicates a contingent right that requires the granting of a declaratory order by this Court.

CONCLUSION

[48] This court is of the view that on the basis pf the preliminary point that there is no *lis* and/or dispute between POLMED and the Respondents, as contended for by the Respondent, the application falls to be dismissed. The point, as such, is dispositive of the application as a whole and there is no need to delve into the merits of the application.

[10] Erasmus: Superior Court Practice Volume 1 2nd ed. at A2-128.

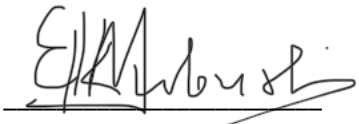
COSTS

POLMED and the Respondents are successful in that POLMED is successful in regard to the point *in limine* of *res judicata*, whereas, the Respondents succeeded on the *in limine* point that the there is no *lis* between the parties. However, the respondents are substantially successful because the *in limine* point in their favour disposed of the application as a whole. The result is that the Respondents are entitled to the costs of the application, such costs to be inclusive of costs consequent upon the employment of two counsel – one senior and one junior.

ORDER

[49] Consequently, I make the following order:

1. The application is dismissed.
2. The Applicant is ordered to pay the costs of the First, Second and Fourth Respondents.
3. Such costs to include the costs consequent upon the employment of two counsel (one senior one junior), in respect of the First, Second and Fourth Respondents.



E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

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