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REPUBLIC OF SOUTH AFRICA

CASE NO.38/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

CONSOLIDATED EMPLOYERS MEDICAL AID SOCIETY — FIRST APPELLANT

AFFILIATED MEDICAL ADMINISTRATORS (PTY) LTD — SECOND APPELLANT

THE SOUTHERN LIFE ASSOCIATION LTD — THIRD APPELLANT

and

ANTHONY MICHAEL LEVETON — RESPONDENT

BEFORE: VIVIER, HOWIE, SCHUTZ, ZULMAN JJA and FARLAM AJA

HEARD: 13 NOVEMBER 1998

DELIVERED: 27 NOVEMBER 1998

SCHUTZ JA

JUDGMENT

SCHUTZ JA:

The respondent ("Leveton") has had a long association with the medical aid industry. The main deponent for the three appellants, one Scott, pays him the compliment, perhaps deliberately in the past tense, that he was regarded as the guru of medical aids. But by the time that the events which are the subject of this appeal occurred Leveton's relationship with the appellants had become less than affable.

As long ago as 1963 he had become a member of the first appellant (Consolidated Employers Medical Aid Society - "Cemas"). During 1990 he was appointed executive chairman of two businesses controlled by the third appellant

(Southern Life Association Limited - "Southern"). One of the businesses was conducted by the second appellant (Affiliated Medical Administrators (Pty) Ltd - "Ama"). Ama was an employer member of Cemas and was controlled by Southern. Leveton took proceedings by way of motion in the Witwatersrand Local Division against Cemas as first respondent, Ama as second respondent and Southern as third respondent. He lost before Streicher J, but succeeded on appeal to the Full Court before Cameron J and Wepener and Pretorius AJJ. Special leave to appeal was granted on petition to the Chief Justice.

Clause 12 of Leveton's letter of employment (addressed to him by Southern) provided:

> "You shall remain, during the subsistence of this agreement, a member of the provident fund and medical aid schemes of which Ama *is a member* and all membership fees and contributions shall be borne by Southern. *On termination of this appointment you will remain as a member of the medical aid and provident fund, and be treated in this regard as if you had retired.* In regard to the provident fund all contributions from the date of termination of this appointment shall be borne by you." (Own

emphasis).

Whilst his employment continued, as between Southern and himself at least, Leveton "remained" a member of Cemas "of which Ama [was] a member", all in accordance with clause 12. Southern undertook, in the letter of employment, to procure and ensure that Ama would carry out all Southern's obligations. After serious differences of opinion had arisen between him and the executives of Southern, a settlement agreement dated 12 August 1991 was concluded, in terms of which he relinquished the executive chairmanship of Ama with immediate effect. Notwithstanding that his employment contract would terminate only on 30 June 1992, he was released from all obligations and was entitled to take up other employment before that date. In terms of clause 5.1 Southern agreed to honour up to that date the terms and conditions of certain paragraphs of his letter of employment, including clause 12 (medical aid and provident fund - quoted above). Clause 5.3 provided:

"It is agreed that, *after 30 June 1992, Mr Leveton will be entitled to remain a member of the Provident fund and Medical Aid schemes referred to in paragraph 12 of the letter of employment as a retired member*, paying contributions applicable to a retired member." (Own emphasis.)

Leveton left Southern and to all outward appearances remained a retired member of Cemas for nearly three years. Although claiming later that it was unaware of the settlement agreement, Ama continued paying his contributions. There was an abrupt end to this state of affairs when Leveton received a letter dated 9 March 1994 from Ama informing him that "Ama has made the decision to transfer all our continuation members [retired members] to Southern Health medical aid (comprehensive plan) with effect from 1 April 1994." Unlike Cemas, Southern Health was controlled by Southern. No legal basis for this "transfer" was advanced. Leveton responded by referring to paragraph 12 of his letter of appointment and the terms of Cemas's rules, which entitled a retiring member to continue his membership. Relying on these he expressed his insistence that his

membership of Cemas "and the arrangements with Ama attendant thereto"be left undisturbed. Ama responded by referring to the plurality of the word "schemes" in the expression "the provident fund and medical aid schemes of which Ama is a member" in clause 12, and advanced this as the justification for its actions. In other words it was saying that Leveton was not entitled to insist on Cemas membership, but that Ama could impose upon him any other scheme of which it was a member and so satisfy the obligations of Southern and itself under clause 12. This alleged justification was not pursued in argument before us, but it was the contemporaneous basis advanced in Ama's fax for its decision "to adhere to our decision to transfer your membership, along with all our other continuation members, to Southern Health Medical Aid." The debate continued, with Leveton's pointing out that Ama's interpretation of clause 12 was mistaken but that, in any event, when it came to his membership of Cemas, it was not clause 12, but that body's rules, read with the Medical Schemes Act, that really mattered. He

expressed the confidence that Cemas would not act *ultra vires* its rules. The debate ended without Leveton obtaining satisfaction from any of the three appellants.

Leveton then appealed to Cemas's disputes committee. The nature and significance of this body needs explanation. The activities of medical aid schemes are governed by the much-amended Medical Schemes Act 72 of 1967. S 20 (1) provides for certain matters which must be contained in a scheme's rules. One of these is set out in s 20 (1) (g) as

> "*the settlement* by a person or persons not forming part of the management of the scheme concerned, designated for the purpose under the rules, of *any dispute* arising out of the administration of the scheme, *between a member or former member* or prospective member or any person deriving his claim from a member . . . *and the scheme*." (Own emphasis.)

S 22 provides that the rules of a scheme are binding upon it, its members and its officers. During 1994 the rules in force (I shall refer to them as "the new rules") provided for the election of a disputes committee at the annual general

meeting (rule 31 being the relevant one). This rule, after meeting with the Act's requirements, concluded by saying that "The decision of the Disputes Committee shall be final and binding; provided that such decision is not inconsistent with these Rules and subject to appeal to the Council for Medical Schemes."

In putting his case to the disputes committee, Leveton referred to rule 6 as entitling him to retain his membership upon retirement, and stated his wish to continue his membership. The relief he sought was thus couched:

> "I contend that my membership must be reinstated retrospectively to 1 April 1994 and that I should continue to participate in the Society's Plan 100 Option."

The disputes committee disagreed with the Cemas management committee's decision, on the ground that in terms of rule 6 read with the Act it was not competent to transfer only a selected group of members (as had been done, including Leveton). Accordingly the disputes committee recommended to the management committee that its earlier decision should be rescinded and that the

"pensions/continuation members" be re-admitted to Cemas. The management committee's reaction was that "no cognisance will be taken" of the decision, "which will not be recognised by the management committee". Two grounds were given. The first was that the disputes committee had no power to resolve a dispute between Leveton and his former employer. The second was that the disputes committee had been improperly constituted. No more was heard of these reasons during the appeal. The registrar of medical schemes expressed his disapproval of the actions of the management committee, suggesting that it was not open to it to "rescind" the decision of the disputes committee without the intervention of the court. The management committee did not take the disputes committee's decision on review. Nor did it appeal to the Council for Medical Schemes. Upon the management committee's continuing to refuse to recognise the disputes committee's decision, Leveton launched his application.

The main relief he sought was a declaration that the decision of the disputes

committee was binding upon Cemas and an order that he be re-admitted to membership. The alternative relief was based on the settlement agreement of 12 August 1991. Ama or Southern or both were claimed to have breached it by effecting the "transfer". A declarator to that effect was sought, as also an order that they reverse their decision and cause Leveton to be restored to membership.

In the three appellants' joint answer a new wind began to blow. Cemas and Ama distanced themselves from the settlement agreement, pointing out that they were not parties to it, and even denying knowledge of its existence. The main defence now became Leveton's alleged ineligibility under the Cemas rules, with the consequence, so it was said, that he, once having been removed from membership could not be re-instated. Putting forward this defence in the face of the indisputable facts was a matter of some delicacy. Thus it was said that Leveton "was not strictly speaking eligible for membership" and that he was a continuation (retired) member "only from a contribution point of view."

Nevertheless, the following important statement was made:

> "While, technically, the applicant does not fall within the definition of 'member' in terms of the Rules, because of the terms of the Settlement Agreement, the respondents do not contest that he became a member."

I shall return to this passage. Before I do so I need to explain the nature of the new defence. It was broadly to the effect that because in 1992 Leveton had not been shown to have retired to a life of leisured ease, he had not "retired" in the sense of the rules, so that he did not enjoy the right to continued membership which he would have had, had he truly "retired". The matter is a little more complicated than that. Leveton annexed to his founding affidavit a version of the relevant rule (6 (d) was annexed), which read in part "in the event of *retiring on pension*, . . ." In their answer the appellants accepted that this was the correct rule (a matter for astonishment, at least in the case of Cemas), and the matter was first argued before Streicher J on that footing. After he had reserved judgment, Leveton learned that the rules had been amended with effect from 1 January 1994,

so that what I call the "new rules" (in contrast to the "old rules") were in force at the time of the "transfer" of membership. He successfully applied for the re-opening of the case and the matter was re-argued on the basis of the new rules. Differing interpretations of the new rules led to the opposed decisions at first instance and on appeal to the Full Court. The new rule 6.3 (which replaced the old rule 6 (d)) reads:

> "A member shall be *entitled to retain his membership of the Scheme in the event of his retiring from the service of his employer*, or in the event of his employment being terminated by his employer on account of age, ill-health or other disability; provided that: . . ." (Own emphasis.)

The amendment of rule 6 was plainly a consequence of the amendment of s 20 (1) (d) of the Act in 1993, so as to require the inclusion of a rule:

> "for the continuation, subject to the prescribed conditions, of the membership of a member *who retires from the service of his employer* or whose employment is terminated by his employer on account of age, ill health or other disability." (Own emphasis.)

Up to 1993 s 20 (1) (d) had employed the same phrase as the old rule 6 (d),

"who retires on pension." The appellants based their interpretation argument chiefly on the interplay of new rules 6.3 and 10.2. The latter reads:

> "*Subject to Rule 6.3 a member who leaves the service of the employer for any reason shall cease to be a member*, and all rights of participation in the benefits under these Rules in respect of himself and his dependants shall thereupon cease, except for claims in respect of services rendered prior to cessation of membership." (Own emphasis.)

Since the time of their answering affidavit the appellants have contended that what Leveton did in 1992 was to "leave", in the words of clause 10.2. He did not "retire", so as to become entitled to the benefit of clause 6.3.

Even supposing that the appellants' argument on interpretation is good, does it allow them to ward off the main relief sought by Leveton? I think not. The principal argument advanced by Mr *Goodman* on behalf of the appellants was that Leveton's seeming membership between 1 July 1992 and 31 March 1994 was a nullity. In other words, he was not a member although he was, if I may be permitted to put it that way.

The circumstances show quite clearly that he was. One starts with the definition of "member" in s 1 of the Act. He is "a person who has been enrolled or admitted as and is still a member of the scheme, or who in terms of the rules of the scheme is a member of the scheme." The definition of "member" in the old rules says that member means "an individual [who is an employee and] who has been admitted and registered with the Society in terms of these Rules, and who has not ceased to be so registered under the provisions of these Rules." The definition in the new rules lacks the words in brackets. Otherwise it is the same. In his founding affidavit Leveton stated that he became a member of Cemas on 1 April 1963 and that at all material times he was a member of its Plan 100. He annexed a membership certificate issued by Cemas showing that he had been a member from 1 April 1963 to 31 March 1994. All of this was admitted. Then there is the passage I have already quoted, where in their answer the appellants admit that because of the terms of the settlement agreement they do not contest that Leveton

became a member (meaning, no doubt, on 1 July 1992). The attempts to hedge this plain admission around are futile. Indeed I think Mr *Badenhorst*, counsel for Leveton, is correct in his submission that the original defence was premised upon Leveton's continued membership. This is demonstrated by the passage following. After stating that Cemas was not a party to the settlement agreement and was not bound by its terms, the answer proceeded:

> "It was [Southern] who determined [Leveton's] membership of [Cemas], by virtue of the Settlement Agreement. *The Rules of [Cemas] are accordingly of no application.* Even if they do apply [Leveton] does not fall within the ambit of Rule 6 (d) . . .." (Own emphasis.)

The fact is that Leveton was a member on 31 March 1994 when his "transfer" was supposed to have been effected. Various justifications for the transfer have been advanced in the past. By the time of the appeal they had all been abandoned. For this reason I consider that Leveton was entitled to re-instatement.

There is a further reason. It has to do with the disputes committee. It is my opinion that the management committee acted in a high-handed manner. S 20 (1) (g) expressly contemplates a person or tribunal independent of management. What is intended is something at least akin to arbitration; something which avoids the expense of going to court. Quite apart from the express provision for finality in the rules, I consider that the expression "the settlement" in the Act indicates an intention that a decision of a disputes committee shall be final as between a member and the scheme and its managers. It is not for the management committee to ignore or brush aside such a decision, as has happened in this case. Moreover, the disputes committee is empowered by the subsection, as repeated in the rules, to settle "any dispute". This must include disputes involving law or the interpretation of the rules. I would very much doubt the validity of the proviso to Cemas's rule to the effect that a decision is binding only if it is in accordance with the rules, if the proviso were to bear the interpretation that the appellants seek to

place upon it: namely that if the management committee disagrees with the disputes committee's interpretation of the rules, its decision can simply be ignored. This would involve a negation of s 20 (1) (g), which is designed to ensure that the management will not be judge in its own cause. If it does not have that meaning then I doubt that it has much significance, as I would have thought that even without it the duty of the disputes committee is to act in accordance with the rules.

When the management committee thought that the disputes committee had not done so it was not without remedy. It could have appealed, but did not. It might have taken the decision on review. Here also I think it would be fair to say that it did not. It is true that a notice of counter-application was filed, claiming the setting aside of the decision of the disputes committee, but that committee was not even cited: see *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 671. Nor was it called on to produce the record of its proceedings. What the management committee *did* do was to behave

as if it were a court of appeal or review. That was a remedy to which it was *not* entitled.

The disputes committee had before it an application that Leveton's "transfer" should be set aside. Having heard both sides and having had regard to the rules it granted Leveton the relief claimed. In my opinion its action stands, notwithstanding all Cemas's attempts to set it at nought. All that we need do is to affirm the Full Court's declaration that Leveton remained a member after 31 March 1994 and its consequent order for re-instatement.

Because of the reasons already given it is unnecessary for us to decide the interpretation question involving the new rules, and particularly rules 6.3 and 10.2. This is perhaps as well, as I suspect that more information should have been placed before us as to what was the mischief that was addressed by the 1993 amendment of the Act. The primary enquiry is into the meaning of the Act. The rules merely follow on, at least as regards the phrase "who retires from the service

of his employer". I shall not attempt to interpret these words, even less attempt to apply them to this case. Suffice it to say that whatever the phrase means, it is wider than the old phrase "retires on pension."

There is, however, one aspect of the argument for the appellants with which I would like to deal. In argument we were told that rule 10.2 ("leaves the service") is the general rule, whereas rule 6.3 ("retires from the service of his employer") is the exception. The argument proceeded, that if Leveton was correct in saying that he had "retired" under rule 6.3, when all that had happened was that he left with his employer's agreement in order to proceed with his own further activities, then rule 6.3 would not amount to an exception and would conflict with rule 10.2.

Upon enquiry it emerged that appellants' counsel was indeed relying on the venerable maxim *generalia specialibus non derogant* (general words (rules) do not derogate from special ones). A common application of it is quoted by Gutsche J in *R v Gwantshu* 1931 EDL 29 at 31 as follows:

> "Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly . . . altered . . . merely by force of such general words, without any indication of a particular intention to do so."

What applies to earlier and latter enactment applies with at least equal force to earlier and later provisions in the same enactment (*Gwantshu loc cit*). I agree with the learned author Christie when he says that there is no reason why the maxim should not be used also in interpreting contracts: Christie *The Law of Contract in SA* 3 ed 245.

However, I fail to see how it is to be applied in this case. In the first place the rule is that the general yields to the special, whereas the argument for the appellants seems to be that the special yields (or should yield) to the general. Moreover, it seems to me that the potential for the application of the maxim only arises when the general and special words on their face cover the same subject matter. That is not the case here. Rule 6.3 deals with retirement. Rule 10.2 deals

with all other departures. Particularly is this so when the statute requires retirement to be dealt with in a certain way. The correct method of interpretation would seem to me to be to ascertain what retirement (in its context of course) means. Once that has been done the exclusion in rule 10.2 ("Subject to Rule 6.3") would be given content and the rest of rule 10.2 would speak for itself. Perhaps another way of reaching the same result would be to say that the maxim does not apply where a contrary intention appears, and that such an intention is expressed in the words "Subject to Rule 6.3". The upshot is that the maxim, useful as it sometimes is, does not apply in this case.

The appellants have made common cause in resisting the appeal, so that it is right that they should pay costs jointly and severally in the event of their failure.

I find it unnecessary to go into the reasoning of the Full Court. Suffice it to say that I agree with the order it made, which included a declaration that the decision of the disputes committee is binding and an order that Cemas re-admit

Leveton as a member.

The appeal is dismissed with costs, such costs to be paid by the appellants jointly and severally.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
VIVIER JA
HOWIE JA
ZULMAN JA
FARLAM AJA