

SUPREME COURT OF APPEAL OF SOUTH AFRICA

PRESS RELEASE

29 November 2007

STATUS: Immediate

Hosmed Medical Aid Scheme v Thebe Ya Bophelo Healthcare [2007] SCA . .
. . (RSA)

*Please note that the media summary is intended for the benefit of the media
and does not form part of the judgment of the Supreme Court of Appeal*

The Pretoria High Court, in 2006, set aside an arbitration appeal tribunal's award, in terms of s 33 of the Arbitration Act 42 of 1965, on the basis that the appeal tribunal had exceeded its powers. Thebe had claimed fees as a broker for ongoing services to members of Hosmed, a medical aid scheme, despite the fact that it had agreed with Hosmed that it would forego the fees, both being under the mistaken impression that new regulations prohibited the charging of such fees. Hosmed resisted the claim because of the agreement between the parties that such fees would not be charged. The dispute was referred to arbitration.

The arbitrator found for Thebe. He held that Thebe had been entitled to claim the fees and that the agreement not to do so was invalid since the shareholder in Thebe had not authorized it as required by s 228 of the Companies Act 61 of 1973. Hosmed appealed to an arbitration appeal tribunal, constituted in accordance with the arbitration agreement. The appeal tribunal considered a defence, raised for the first time by Hosmed at the appeal hearing, that the agreement had been authorized by the unanimous assent of the sole shareholder of Thebe, its holding company. It held that there had been such unanimous assent, the agreement was valid, and that

therefore Thebe was not entitled to claim the fees. The matter was remitted to the arbitrator to consider the amount of the fees payable.

Thebe applied to the high court to set aside the appeal tribunal's award. It succeeded. The Supreme Court of Appeal today upheld the finding that the appeal tribunal had exceeded its powers. It held that the appeal tribunal was bound by the terms of reference of the arbitration agreement. The agreement stated that the issues to be determined were defined by the pleadings of the parties. Nowhere in the pleadings was the question of unanimous assent raised and the parties had not agreed to extend the ambit of the arbitrator's powers. Nor had it been canvassed in evidence before the arbitrator.

The court below had, however, substituted its own order for that of the appeal tribunal, and ordered that the dispute be remitted to the arbitrator to determine the quantum of fees payable.

The Supreme Court of Appeal held that although the award had been correctly set aside, the court below had no power to substitute its own order for that of the appeal tribunal. Hosmed requested that, in the event of its appeal against the setting aside of the award failing, the dispute should be referred back to the appeal tribunal. The Supreme Court of Appeal held that the dispute had to be referred back to a new appeal tribunal in terms of s 33(4) of the Arbitration Act.

It accordingly dismissed the appeal in part, setting aside the appeal tribunal's award, but upheld the appeal against the terms of the court's order that it be remitted to the arbitrator. It ordered that the dispute be remitted to a new appeal tribunal constituted in accordance with the arbitration agreement.

The full judgment can be found on www.supremecourtofappeal.gov.za
