IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISON, PRETORIA

**CASE NO.: 36780/2022**

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| **1)** | **REPORTABLE: YES** |
| **(2)** | **OF INTEREST TO OTHER JUDGES: YES** |
| **(3)** | **REVISED: Yes** |

16/1/23

**Signature** **Date**

In the matter between:

**BLACK INSURANCE ADVISORS COUNCIL** Applicant

and

**CITY OF TSWANE METROPOLITAN MUNICIPALITY** Respondent

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**JUDGEMENT**

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**SARDIWALLA J:**

[1] This is an urgent application in terms of the provisions of Rule 6(12)(a) of the Uniform Rules of Court to interdict and restrain the Respondent as a result of its decision to call for a bid/tenders for the appointment of service providers to provide medical aid brokerage services, under tender number: GHCM 03-2022.23 and in Part B of the application also seeks a declaratory order that, it is the employees of the Respondent that have an inherent right to appoint a brokerage service provider for the purposes of securing Medical Aid Scheme coverage for the employees.

[2] The Applicant brought this application seeking an interdict in terms of Part A of the application against the Respondent to protect the interests of a number of its members currently enrolled with the Applicant. The interdict is to prohibit the arbitrary effects of the Respondent's unreasonable and unlawful decision pending the finalization of a review application in Part B to be instituted against the decision of the Respondent taken on 10 June 2022.

**Background to the Application:**

[3] On 10 June 2022 the Respondent advertised a tender for the appointment of service providers to provide medical aid brokerage services. The Closing date of the tender was 21 July 2022. In terms of the tender the Respondent seeks to appoint qualified independent brokers for the provision of medical aid services for a period of 36 months.

[4] The Applicant alleged that in terms of section 65 of the Medical Schemes Act 131 of 1998, the Respondent has no authority or right in law to appoint any broker on behalf of the employees. The matter was before me in urgent Court on 19 July 2022 where I granted the following urgent interim relief:

*" **PART A***

1. *Condoning the non-compliance with the riles of the above honourable Court as provided for in Rule 6(12) of the Uniform Rules of this Court pertaining to time and form, and directing that this application be heard on an urgent basis.*

2. *Pending the determination of Part B in this matter, this Honourable Court issue an order:*

*2.1 Interdicting and restraining the Respondent from accepting bids/tenders for the appointment of services providers to provide medical aid brokerage services, under tender number: GHCM 03-2022.23 for the period of (3) years ("the tender"), contained in an advertisement of 10 June 2022 and annexed to the funding affidavit as annexure D;*

*2.2 Interdicting and restraining the Respondent from performing any act, services, or functions calculated at implementing the above tender.*

*2.3 Ordering the Respondent, and its department responsible for procurement of the tender and pending the resolution of the Applicant's review application herein, to ensure that all the existing agreements and arrangements between the Respondent's employees, their preferred medical aid schemes; and their brokerage service providers are not terminated or interfered with;*

*2.4 Ordering the Respondent's departments comply with the provisions of this order, to ensure that the said divisions and departments remain interdicted and restrained from performing any functions, services, and/or acts calculated at implementing the tender.*

*2.5 Ordering the Respondent, and/or its department/institution responsible for the procurement of the above Tender and pending the finalization of the review application pending before Court, to ensure that:*

*2.5.1 The participating departments of the Respondent are interdicted and restrained from collecting bids, evaluating same and making an award of the Tender; and*

*2.5.2 The Respondent remains interdicted and restrained from communicating any information to all or any Medical Aid Schemes, employees and/or brokerage service providers, including the Applicant's and the Applicant's members, intended to interfere, terminate with, and altering the existing agreements between the latter parties; and*

*2.5.3 The Respondent does not do anything calculated at implementing the said*

*Tender.*

3. *That pending the finalization of all the processes contemplated in circular 35 of 2022 regarding the Amendment of Circular 20 of 2010 dealing with the question of who, between the employee and the employer, has the inherent right to appoint a brokerage service, the Respondent be and is hereby interdicted and restrained from proceeding with the collection, evaluation of the bids/tenders; awarding the Tender; and doing anything necessary to implement same.*

4. *That the relief sought in prayers 2-3 above operate as interim relief with immediate effect pending the finalization of Part B of the review application referred to above, or process of Amending Circular 20 of 2010 whichever comes first;*

5. *That should the Respondent oppose this application, then and in that event, it be ordered to pay the costs thereof at a scale as between client and attorney."*

[5] The Respondent opposed the application.

**Applicant's Argument**

[6] The Applicant contends that there is a dispute between the parties arising from an issue whether or not the Respondent is entitled to appoint a broker for its employees or pensioners for purposes of medical aid covers and that the Respondent is not a "group employer" as envisaged in regulation 28 (7) of the Act. Therefore, the matter is urgent and that it took the necessary steps to approach the Court from the time the matter came to its attention on or about 20 June 2022 until the launch of the matter on 6 July 2022.

[7] It is the Applicant's argument that it is only the inherent right of the employees and pensioners to appoint a brokerage service and therefore the Respondent's conduct violates their constitutional rights and interferes with the existing contractual rights between the employees, their brokerage providers and the medical aid schemes. The Applicant submitted that the Council for medical Schemes Circular 20 of 2010 holds

the view that it is the employee that has the right to appoint brokers for the medical aid schemes.

[8] The Applicant avers that it has a *prima facie* right as it represents brokers who are its members and who have vested rights emanating from the tripartite they concluded with the Respondent's employees and have a right to participate in the in the Tender and that the current terms and conditions of the tender are exclusionary in their effect against them which renders the relief sought as urgent. It submits that the Respondent has no basis in law to discriminate against these potential service providers and that such right to participate is a real right. It further submits that it had attempted to resolve the matter internally by demanding an undertaking from the Respondent that it would not proceed with the tender or appoint a broker until the dispute has been resolved which the Respondent refused to do thus forcing of the current application. It submits that once the Respondent appoints a broker for the 17000 contracts that it would be difficult to set those contracts aside and reinstate the status quo at a later stage. Therefore the Applicant and its members will suffer irreparable harm as there is no alternative relief available to it if the Respondent is not interdicted pending the finalization of Part B of the application or the process commenced by the Council to amend Circular 20 of 2010 which process seeks to clarify an issue central to the dispute between the parties. However, there will be little or no prejudice to the Respondent.

**Respondent's Argument**

[9] The Respondent opposes this application on the basis that the application lacks urgency and is without merit as the Applicant did not take immediate action and approach the Court. It argues that from 28 June 2022 until 6 July 2022 when the matter was launched the Applicant has not fully explained the steps it has taken and therefore the inordinate delay demonstrates that the Applicant did not regard the matter as urgent.

[10] The Respondent submits that the Applicant has failed to establish a *prima facie* right or the remainder of the requirements specifically to show that it has no other remedy available. It also contends that the Council for medical Schemes should have been

joined to the application as it has a substantial interest in the matter. The Respondent also attached the commissioning of the founding affidavit in that it avers the Commissioner failed to set out his prescribed full details in terms of the Act and regulations thereof which has rendered the affidavit invalid.

[11] The Respondent argued that in terms of regulation 28(7) of the Act that it makes it clear that an employer has the power to discontinue the service of a broker which includes the power to appoint a broker and that this is settled law. With regards to the exclusionary requirements of the tender the Respondent submits that the Respondent is entitled in law to determine certain tender specifications in line with its needs to ensure that it attracts the most competent services providers who are eligible to render the services which it desires. It therefore submitted that the tender specifications were line with the requirements of section 217 of the Constitution which requires that when an organ of state contracts for goods and services, it must do so with the principles of fairness, equitability, transparency, competitiveness and cost effectiveness. Therefore it concluded that the application was an abuse of process and should be dismissed.

**Urgency**

[12] The general principles applicable in establishing urgency are dealt with in Rule 6(12) of the Uniform Rules of this Court. The importance of these provisions is that the procedure set out in Rule 6(12) is not there for the mere taking. Notshe AJ said in **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others** [1]in paras 6 and 7 as follows:

*'[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal*

[1] (11/33767) [2011] ZAGPJHC 196 (23 September 2011)

*course laid down by the rules it will not obtain substantial redress.*

*[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.*

[13] This leaves the requirement of the Applicant's ability to obtain proper substantive redress in due course, for consideration. Obviously, and where a matter is struck from the roll for want of urgency, then the merits of the application remains undetermined. It follows that the application can still be considered and granted by a Court in the ordinary course. But I understand that in this case, there is a unique consideration. Considering the undeniable realities of litigating in the ordinary course, by the time the matter before the Council for Medical Schemes proceeds and is resolved , the Applicant would be prevented from submitting a bid for the tender which closes on 21 July 2022. The Applicant is therefore not able to obtain substantive redress in the ordinary course. However even if the application failed on urgency, it is possible, in appropriate circumstances, to even dispose of the matter on the merits, where a matter is regarded as not being urgent, instead of striking the matter from the roll. The Court in **February v Envirochem CC and Another**[2] dealt with this kind of consideration, and even though the Court accepted that urgency was not established, the Court nonetheless proceeded to dismiss the matter in the interest of finality and so the matter should be dealt with once and for all.

**Interim Interdict**

[14] A request for an interim interdict is a court order preserving or restoring the status quo pending the determination of rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not affect their final determination. In this regard the Constitutional Court said the

[2] *(2013) 34 ILJ 135 (LC) at para 17. See also Bumatech (supra) at para 33; Bethape v Public Servants Association and Others [2016] ZALCJHB 573 (9 September 2016) at para 53.*

following:[3]

"*An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.' The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo.*"[4]

[15] The requirements for the granting of an interim interdict are the following: a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, that the balance of convenience favours the granting of an interim relief, and that the applicant has no other satisfactory remedy.[5] **In this regard Holmes JA**[6] **said the following:**

***"****The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by INNES, J.A., in Setlogelo v Setlogelo, 1914 AD 221 at p. 227. In general the requisites are –*

*(a) a right which, 'though prima facie established, is open to some doubt';*

*(b) a well-grounded apprehension of irreparable injury;*

*(c) the absence of ordinary remedy.*

*In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes*

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*[3] In National Gambling Board v Premier, Kwa-Zulu Natal and Others 2002(2) SA 715 CC*
*[4] At 730 - 731[49]*
*[5] See: Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another 1973(3)SA 685 (A)*
*Knox D Arcy Ltd v Jamison and Other 1996(4) SA 348 (A) at 361*
*[6] In Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another, supra, at 691.*

*called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see Olympic Passenger Service (Pty.) Ltd. v Ramlagan, 1957 (2) SA 382 (D) at p. 383D - G. Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration.*"

[16] Where the right is clear *"... the remaining questions are whether the applicant has also shown:*

*(a) an infringement of his right by the respondent; or a well-grounded apprehension of such an infringement;*

*(b) the absence of any other satisfactory remedy;*

*(c) that the balance of convenience favours the granting of an interlocutory interdict."*[7]

[17] In this case the applicant seeks an interdict the Respondent's refusal to suspend the tender process for a medical aid brokerage pending the determination of the review application and or the amendment to Circular 20 of 2010 of the Council of Medical Aid Schemes. There is also a dispute about whether it is an employee or employer who has a right to engage and appoint a broker. The question therefore is whether it has established a *prima facie* right. The approach to be adopted in considering whether an applicant has established a *prima facie* right has been stated to be the following:[8]

"*The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction*

[7] *Knox D'Arcy Ltd and Others v Jamieson and Others 1995 (2) SA 579 (W) at 592 – 593.*
[8] *In Simon NO v Air Operations of Europe AB and Others 1999 (1) SA 217 (SCA).*

*by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed.*"[9]

**The Audi Alteram Partem Rule**

[18] In a number of decisions in South Africa, including in such cases as **South African Football Union v President of South Africa[10]** and **the South African Roads Board v Johannesburg City Council[11]** the view was expressed that the *audi alteram partem rule* should not necessarily depend on whether proceedings were administrative, quasi-judicial or judicial.

[19] A basic rule of fairness is that a person who will be adversely affected by an act or a decision of the administration or authority shall be granted a hearing before he suffers detriment[12]. Peach sums up the *audi* rule as follows:

"*The audi alteram partem rule implies that a person must be given the opportunity to argue his case. This applies not only to formal administrative enquiries or hearings, but also to any prior proceedings that could lead to an infringement of existing rights, privileges and freedoms, and implies that potentially prejudicial facts and considerations must be communicated to the person who may be affected by the adverse decision by the decision-maker, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party."* (See **Peach, VL (2003) "The application of the audi alteram partem rule to the proceedings of commissions of inquiry" Thesis (LL.M. (Public Law))—North-West University, Potchefstroom Campus (Accessed at http://hdl.handle.net/10394/58), 8**.)

[20] The requirement that in certain circumstances decision-makers must act in accordance with the principles of natural justice or procedural fairness has ancient origins. In general terms, the principles of natural justice consist of two component parts; the first is the hearing rule, which requires decision-makers to hear a person before adverse

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[9] *At 228;*
*See also Webster v Mitchell 1948 (1) SA 1186 (W) at 1189,*
*Manong & Associates (Pty) LTD v Minister of Public Works and Another 2010 (2) SA 167 (SCA) at 180.*

[10] ***1998 (10) BCLR 1256***
[11] ***1991 (4) I (A)***
[12] *(See* ***De Smith, SA (1955) "The right to a hearing in English Administrative Law" 68(4) Harvard Law Review 569-599, 569.)***

decisions against them are taken. The second and equally important component is the principle which provides for the disqualification of a decision-maker where circumstances give rise to a reasonable apprehension that he or she may not bring an impartial mind to the determination of the question before them. The latter aspect is not relevant in this matter. The principles of natural justice are founded upon fundamental ideas of fairness and the inter-related concept of good administration. Natural justice contributes to the accuracy of the decision on the substance of the case.

[21] The rules of natural justice help to ensure objectivity and impartiality, and facilitate the treatment of like cases alike. Natural justice broadly defined can also be seen as protecting human dignity by ensuring that the affected individual is made aware of the basis upon which he or she is being treated unfavourably, and by enabling the individual to participate in the decision-making process. The application of the principle of natural justice has proved problematic.

[22] The challenge is always how to strike the right balance between public and private interest. Whilst this court, in the circumstances of this matter seems compelled to respond to the vulnerability of the Applicant and its members, I am at the same time aware that the court has to avoid a situation where the unconstrained expansion of the duty to act fairly threatens to paralyse its effective administration of the Respondent.

[23] In my respectful view, the public interest necessarily comprehends an element of justice to the individual. The competing values of fairness and individual justice on the one hand and administrative efficiency on the other hand constitute the public and the private aspects of the public interest. It seems plain to me that the principles of natural justice are intended to promote individual trust and confidence in the administration. They encourage certainty, predictability and reliability in government interactions with members of the public, irrespective of their stations in life and this is a fundamental aspect of the rule of law.

[24] In a delicate balancing act, it is the duty of the courts to uphold and vindicate the constitutional rights of the Applicant's members and their rights to be included in the tender process but cannot have the effect of precluding the Respondent from discharging its duties and responsibilities exclusively assigned to it in terms of Medical

Schemes Act. However, such an inquiry may only proceed in a manner which strictly recognises the right of the Applicant and its members to have the inquiry conducted in accordance with natural justice and fair procedures.

**Analysis and findings**

[25] It is common cause between the parties that the Respondent's refusal to suspend the appointment of a brokerage service until the process of the amendment of the Circular 20 of 2010 is completed regarding the proper interpretation of regulation 28(7) for the 10 June 2022 tender directly affects the Applicant's members as accredited institutions and adversely affects the rights of the employees of the Respondent who are required to be provided the service. The Respondent proffers no explanation to this Court for its refusal of the Applicant's demand to have the process suspended pending the finalization of the process relating to the interpretation of the Circular other than to suggest that the Applicant has not exhausted all other remedies before approaching this Court. However in arriving at the decision to refuse the Applicant was a decision that would adversely affect the Applicant, its members and the employees of the Respondent and the Applicant ought to have been given a right to make representations before it suffered any detriment. It is important to note then that the Respondent never sought it fit to engage with the Applicant at any stage prior to this application being launched which in my view could have prevented the current litigation. The Respondent although clearly entitled to conduct its administrative functions, in terms of the principles of natural justice is also expected to interact with a person or institute whose rights may be adversely affected. In the present matter the Respondent refused to do so leaving the Applicant with no alternative but to approach this Court for relief. I am satisfied that the applicant has a *prima facie* right more particularly to challenge and present its version or evidence relating to the Respondent's Tender specifications for a brokerage service provider.

[26] It cannot be disputed that the Respondent's refusal to stay the process pending the

conclusion of the process commenced by the Council of medical Schemes to amend Circular 20 of 2010, which will provide clarity on the dispute between the parties, is threatening the Applicant's aforesaid right to natural justice and fair procedures. It cannot be denied that if the Applicant is not granted the relief that it seeks that the Applicant's members will suffer irreparable harm and will interfere with their constitutional rights. The Respondent has offered no cogent reason other than mere technicalities of non-compliance, non-joinder, lack of urgency why the Applicant has no *prima facie* right to the relief which it has claimed. The Respondent has failed to set out what prejudice if any it will suffer and therefore this Court must accept that there is no prejudice to be suffered by the Respondent. I am therefore satisfied that the balance of convenience favours the Applicant.

[27] It is important to note that the proceedings that the Applicant seeks to institute is against the decision of the Respondent include to review and set aside the decision by the Respondent. On the version of the Applicant and the lack of evidence to the contrary by the Respondent there are strong prospects of succeeding in the review wherein the Applicant will be granted the opportunity to clarify the Circular 20 of 2010 and whether or not it is the employee or the employer that has the inherent right to appoint a broker. However should the interdict not be granted the damage to the Applicant's members by virtue of the possibility of termination of thousands of contracts would be irreversible. The Applicant and its members will suffer prejudice if the interim interdict is not granted to which I am satisfied that there is no alternate remedy. A failure to grant the interim interdict would mean that the actions of the first Respondent for failure to observe procedural fairness go unanswered.

[28] **Accordingly, the following order is made:**

1. **Condoning the non-compliance with the riles of the above honourable Court as provided for in Rule 6(12) of the Uniform Rules of this Court pertaining to time and form, and directing that this application be heard on an urgent basis.**

2. **Pending the determination of Part B in this matter, this Honourable Court issue an order:**

**2.1 Interdicting and restraining the Respondent from accepting bids/tenders for the appointment of services providers to provide medical aid brokerage services, under tender number: GHCM 03-2022.23 for the period of (3) years ("the tender"), contained in an advertisement of 10 June 2022 and annexed to the funding affidavit as annexure D;**

**2.2 Interdicting and restraining the Respondent from performing any act, services, or functions calculated at implementing the above tender.**

**2.3 Ordering the Respondent, and its department responsible for procurement of the tender and pending the resolution of the Applicant's review application herein, to ensure that all the existing agreements and arrangements between the Respondent's employees, their preferred medical aid schemes; and their brokerage service providers are not terminated or interfered with;**

**2.4 Ordering the Respondent's departments comply with the provisions of this order, to ensure that the said divisions and departments remain interdicted and restrained from performing any functions, services, and/or acts calculated at implementing the tender.**

**2.5 Ordering the Respondent, and/or its department/institution responsible for the procurement of the above Tender and pending the finalization of the review application pending before Court, to ensure that:**

**2.5.1 The participating departments of the Respondent are interdicted and restrained from collecting bids, evaluating same and making an award of the Tender; and**

**2.5.2 The Respondent remains interdicted and restrained from communicating any information to all or any Medical Aid Schemes, employees and/or brokerage service providers, including the Applicant's and the Applicant's members, intended to interfere, terminate with, and altering the existing agreements between the latter parties; and**

**2.5.3 The Respondent does not do anything calculated at implementing the said Tender.**

3. **That pending the finalization of all the processes contemplated in circular 35 of 2022 regarding the Amendment of Circular 20 of 2010 dealing with the question of who, between the employee and the employer, has the inherent right to appoint a brokerage service, the Respondent be and is hereby interdicted and restrained from proceeding with the collection, evaluation of the bids/tenders; awarding the Tender; and doing anything necessary to implement same.**

4. **That the relief sought in prayers 2-3 above operate as interim relief with immediate effect pending the finalization of Part B of the review application referred to above, or process of Amending Circular 20 of 2010 whichever comes first;**

5. **That should the Respondent oppose this application, then and in that event, it be ordered to pay the costs thereof at a scale as between client and attorney.**

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C SARDIWALLA
JUDGE OF THE HIGH COURT

Appearances:

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|---|---|
| For the Applicant: | T J Machaba SC |
| Instructed by: | MT Raselo Incorporated |
| For the Respondent: | Adv P Mthombeni |
| Instructed by: | MB Mabunda Incorporated |
| Date of hearing: | 19 July 2022 |
| Date of handdown: | 16 January 2023 |