



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

CASE NO: 016179/2022

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

DATE

SIGNATURE

26/06/2023

.....

In the matter between:

DISCOVERY HEALTH (PTY) LTD

APPLICANT

and

ROAD ACCIDENT FUND

FIRST RESPONDENT

**MINISTER OF TRANSPORT
RESPONDENT**

SECOND

In re:

DISCOVERY HEALTH (PTY) LTD

APPLICANT

and

'This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 26 June 2023.

JUDGMENT

N V KHUMALO J

Introduction

[1] This is an Application in terms of s 18 (1) and (3) of the Superior Court Act 10 of 2013 (the Act), a sequel to a decision by Mbongwe J dismissing an application brought by the Road Accident Fund ("the Fund"), for leave to appeal a judgment Mbongwe J delivered on 6 October 2022 that was in favour of the Discovery Health Pty Ltd ("Discovery") the Applicant. In the judgment Mbongwe J set aside and interdicted the implementation of the Fund's internal directive issued by its Acting Chief Claims Officer on 12 August 2022 for the rejection of claimants' claims for past medical expenses in circumstances where such expenses had not been paid by the claimants but by their medical aid schemes. The directive was declared unlawful. The Applicant being the victorious party, is in terms of s 18 (1) and (3) Application seeking an order for leave to put the interdictory order into operation, notwithstanding the decision on the leave to appeal pending.

[2] The Applicant first brought the s 18 (1) and (3) Application ("s 18") before Mbongwe J on 2 December 2022 when it was heard simultaneously with the Fund's Application for leave to appeal. Mbongwe J dismissed the Fund's Application for leave to appeal and did not decide the s 18 Application except for granting a costs order against the Fund. The Applicant has alleged that it since approached Mbongwe J for a decision on the s 18 Application who, despite the Application

having been fully argued before him, refused to decide on the matter. The Fund, that is the 1st Respondent in this application (For convenience will continue to be referred to hereinafter as the Fund), proceeded to launch its application for leave to appeal Mbongwe J's judgment at the Supreme Court of Appeal (SCA). As a result, the Applicant reinstated its s 18 Application in the urgent court, pending the decision of the SCA. I have not decided the Application that was before Mbongwe J as per one of the orders sought by the Applicant but heard the Application anew. I have taken judicial notice that the SCA has since refused the leave to appeal which the Fund had proceeded to launch at the Constitutional Court.

The legal framework

[3] Sections 18 (1) reads:

“Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and the execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.”

Whilst section 18 (3) reads:

“A court may only order otherwise as contemplated in subsection 1 or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.”

[4] Irreparable harm to the impending Appellant being envisaged, the automatic suspension of the operation and the execution of an order on appeal was prior s 18 (3) a common law accepted rule of practice. The purpose thereof being to circumvent causing irreparable harm to the impending Appellant, by execution of the judgment pending the appeal; either by levy under a writ of execution or in any other

matter appropriate to the nature of the judgment appealed from.¹ In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*² Corbett JA outlined the position under the Supreme Court Act as follows:

“it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make a special application. ... The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from. ... The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet, 49.7.3; *Ruby's Cash Store (Pty.) Ltd. v Estate Marks and Another*, [\[1961 \(2\) SA 118](#) (T)] at p. 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. *Fismer v Thornton*, [1929 AD 17](#) at p. 19). In exercising this discretion, the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:

(1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;

(2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;

(3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted

¹ see *Reid and Another v Gidart and Another* 1938 AD 511 at p.513.

² 1977 (3) SA 534 at 545B

not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and

(4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.

[5] Reflecting on s 18 (3) and clarifying the impact thereof, Binns-Ward J (with Fortuin and Boqwana JJ concurring) in *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another*³ opined as follows:

“Section 18(3) has introduced an absolute threshold that did not exist at common law: the applicant must prove that the loser will not suffer irreparable harm if the application is granted, and that it will suffer such harm if the application is refused. If it fails to do so, the application cannot succeed whatever the equities of the case might be. As Sutherland J observed in *Incubeta Holdings*, ‘Two distinct findings of fact must now be made, rather than a weighing-up to discern a “preponderance of equities.”’ There is thus no longer any scope for factor (4) in Corbett JA’s description of the nature of the court’s exercise of its discretion. There is also no longer any basis to regard the incidence of the *onus* as debatable; the *onus* is now unambiguously on the Applicant.” (My emphasis).

[6] For the Applicant to make a case for deviation from the default position (which is the automatic suspension of the operation or execution of the order) it is required to unambiguously show, and the court as a result to find:

- (i) that sufficient exceptional or peculiar circumstances exist, that makes more tolerable the harm if any envisaged on the part of the intended Appellant; see *Incubata* and
- (ii) on a balance of probabilities that the Applicant will suffer irreparable harm whilst the intended Appellant will not suffer irreparable harm.

³ (20806/2013) [2016] ZAWCHC 34 (1 April 2016)

[7] On what would be regarded as exceptional circumstances in the first leg, Mpati P in the matter of *Avnit v First Rand Bank Ltd*⁴ stated the following to give context to the phrase:

“[4] The term ‘exceptional circumstances’ is one that has been used in various different statutory provisions in varying contexts over many years. It was first considered by this Court in the context of its power in exceptional circumstances to direct that a hearing be held other than in Bloemfontein. The question arose in *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395, where Innes ACJ said at 399:

‘The question at once arises, what are “exceptional circumstances”? Now it is undesirable to attempt to lay down any general rule. Each case must be considered upon its own facts. But the language of the clause shows that the exceptional circumstances must arise out of, or be incidental to, the particular action; there was no intention to exempt whole classes of cases from the operation of the general rule. Moreover, when a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the Court, one would think, will best give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption, and by carefully examining any special circumstances relied upon.’ (my emphasis)

[5] Later cases have likewise declined any invitation to define ‘exceptional circumstances’ for the sound reason that the enquiry is a factual one. A helpful summary of the approach to the question in any given case was provided by Thring J in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C) where he said:

‘1. What is ordinarily contemplated by the words ‘exceptional circumstances’ is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different: ‘besonder’, ‘seldsaam’, ‘uitsonderlik’, or ‘in hoë mate ongewoon’.

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

⁴ (20233/14) [2014] ZASCA 132 (23 September 2014)

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different: the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional."

[8] Mpati P's conclusion was that "in all circumstances it is said the overall interest of justice will be the final determinative feature."

[9] I however in considering the context in which the phrase was analysed by Mpati P taken heed of J P Sutherland's warning in *Incubeta Holdings & another v Ellis & another*⁵ "...(*from which I have quoted extensively as well*) against importing from one kind of enquiry into another kind of enquiry, an understanding of a familiar phrase. He implores one to be mindful that "A given phrase in any statutory provision has a function specific to that provision and to that specific statute and the primary aim of the interpreter is to discover the function it performs in that specific context. It may perform a different function in another statute and one must avoid being seduced by beguiling similarities."

[10] In *Incubeta*⁶ supra, J P Sutherland determined the following circumstances to give rise to 'exceptionality' as contemplated by the subsection:

- (i) The predicament of being left with no relief, regardless of the outcome of an appeal, which warrant a consideration of putting the order into operation.

⁵ 2014 (3) SA 189 par [20]

⁶ At par [27]

- (ii) The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances'

[11] The second requirement founded on subsection 18 (3) that the Applicant has to satisfy, dictates a higher threshold than that of the common law, to justify the granting of the order sought that goes against the norm. In *Incubeta Holdings supra*⁷ Sutherland J gave the following analogy of the subsection:

"[24] The second leg of the s 18 test, in my view, does introduce a novel dimension. On the South Cape test, No 4 (cited supra), an even-handed balance is aimed for, best expressed as a balance of convenience or of hardship. In blunt terms, it is asked: who will be worse off if the order is put into operation or is stayed. But s 18 (3) seems to require a different approach. The proper meaning of that subsection is that if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. A hierarchy of entitlement has been created, absent from the *South Cape* test." (my emphasis)

[12] The court that granted the judgment will consequently, after considering the submissions made on the factors to be established, exercise its discretion whether or not to grant leave to execute. The decision is based on the facts, as outlined by Sutherland J in *Incubeta Holdings supra*⁸ without deciding on the merits of the main application. Sutherland J was also however of the opinion that the decision was not based on the prospects of the Application for leave or the Appeal's success, but solely fact specific. The Supreme Court of Appeal (SCA) in *Justice Alliance supra* held otherwise, namely that the prospects of success in the appeal remain a relevant factor and, therefore, 'the less sanguine a court seized of an application in terms of s 18 (3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that

⁷ on 1951- 196C

⁸ at para 22

judgment pending the appeal. The same, quite obviously, applies in respect of a court dealing with an appeal against an order granted in terms of s 18 (3).'

[13] Furthermore in the context of departing from a fixed rule, Mpati P in *Avnit supra* was of the opinion that "Prospects of success alone do not constitute exceptional circumstances." According to him a case must truly raise a substantial point of law, or be of great public importance or demonstrate that without leave a grave injustice may result. The third alternative being relevant to this matter. Such cases will be likely to be few and far between because the judges who deal with the original application will readily identify cases of that ilk.

[14] The SCA's perspective gives credence to the fact that in *casu* the s 18 (3) Application should have been decided by Mbongwe J. He was in good stead to do so being the court that granted the judgment for which leave to appeal was being sought, also as the issue of prospects of success in the two applications is intertwined. It therefore was not necessary to burden another court with a decision on the matter. If consideration was that at the time of the application leave to appeal was refused and no leave to appeal at a higher court pending, (whether right or wrongly) it then became appropriate for him to decide on the matter after the Application for leave to appeal was launched at the SCA. A diligent following of the defined processes and procedures is encouraged to avoid conflicting outcomes in the same matter on the same issues and to prevent delay.

[15] The court has therefore to determine if the Applicant has made a proper case for nonconformity with the default position (that is the suspension or staying of the operation of the decision pending the decision on appeal).

Application

[16] On 2 December 2022 when the Applicant brought this Application before Mbongwe J, it alleged to be acting in its own interest, plus that of medical schemes administered by it and their members in terms of s 38 (c), and also in the public interest in terms of s 38 (d) of the Constitution. The Application was subsequently brought before me with the Applicant declaring to be acting only in its own interest

and that of the medical schemes administered by it. The Applicant also alleged to have brought the Application on an urgent basis for the reason that they both continue to be prejudiced by the Fund's conduct that is based on its unlawful directive which continues to inflict irreparable harm on the medical schemes, depriving it of the benefit of the order. It as a result by this Application trying to protect itself since the harm is irreparable.

[17] The Fund is alleged to continue everyday making unlawful settlement offers to finalise claims of victims of road accidents (the Claimants)' excluding past medical expenses that have been paid by a medical scheme, consequently continuously inflicting irrecoverable losses to the Applicant and the medical schemes whilst the Fund exhausts the appeal process.

[18] According to the Applicant a significant number of Claimants are likely to accept the unlawful settlement notwithstanding the exclusion of past medical expenses in order to avoid a further delay in receiving payment under other heads of damages due to the fact that past medical expenses are just one of the various heads of damages included in the claim in as much as victims of an accident may claim. In most of the cases the Claimant is depended on the damages paid by the Fund to support themselves or their families. Moreover, the Fund takes long to process the claims when in many cases the Claimants have been waiting for long to receive compensation.

[19] The Applicant pointed out that the medical schemes cannot direct their member claimants to refuse to settle these matters as their rules generally only impose an obligation on member claimants to include past medical expenses in their claims and to reimburse the medical scheme of any amounts recovered from the Fund. Furthermore, the settlement of the claim is binding and in full and final settlement of all of the Fund's liability in respect of the accident. Consequently, every time an unlawful tender is accepted and settled, the medical schemes are deprived of the potential to recover the past medical expenses where the medical scheme had already paid for the medical expenses. The result, is the irrecoverable loss in the region of R500 Million per year. Since August 2022 the medical schemes suffered irrecoverable loss to at least R138 Million as 15% of the S A population has private

medical insurance. The losses are alleged to be undisputed by the Respondent in the main application, __

[20] The Applicant further pointed out that, failure to put Mbongwe J's order in operation will not only result in the irreparable loss inflicted on the medical schemes but also on the medical schemes' member Claimants, because non-reimbursement results in their being unable to access any other medical treatments as a result of their coverable limits and medical savings being exhausted.

[21] As a final point, the Applicant offered an Undertaking on behalf of the Applicant and all the other medical schemes that it administers, to ring fence payments received from the Fund as compensation for past medical expenses of their members that were caused by motor vehicles accidents regulated by the Fund's directive, the subject matter of the Application. It also undertakes after the final determination of any Applications for leave to appeal or appeal against the order granted by Mbongwe J, to return those payments to the Fund in the event that it succeeds in setting aside the order. In that way the Applicant reckons that would deal with any irreparable harm that might have been envisaged on the part of the Fund.

Fund's response

[22] The Fund disputed the allegation that the Applicant conducts a business of a medical scheme and that it is the Applicant's money that is used to pay for the benefits to which the medical scheme's member Claimants are entitled in law, arguing that the Applicant is only an administrator of medical schemes, and the money paid out is from the medical schemes, therefore the Applicant does not suffer any harm when it makes such payments. The medical schemes it administers also do not suffer any loss when they pay the benefits they owe to their members. It accordingly argues that no direct loss is suffered either by the Applicant or the medical schemes.

[23] The Fund denied that what the Applicant raised amount to or constitute exceptional circumstances as per s 18 (1), pointing out that the Applicant's allegation

that if the execution of the order remains suspended and implementation of the Fund's directive continues the medical schemes lose approximately R500 Million per year, which amounts constitute what the Applicant would have paid and not able to recover is actually not a loss. According to it those are monies which the law requires the schemes to pay and have themselves agreed to pay their members and therefore not entitled to be re-imbursed. Accordingly the circumstances under which the Applicant suggests the medical schemes are entitled to recover those monies, lawfully paid by it to its members, are not those contemplated in s 59 and thus not recoverable in terms of the Medical Schemes Act 131 of 1988 ("the MSA"). For that reason, it is not correct to suggest that monies paid by medical schemes in terms of their legal obligations arising from s 59 of the MSA and their own rules can be classified as a loss on medical schemes. It is therefore further incorrect for the Applicant to contend that medical schemes are somehow entitled to be repaid the monies paid by them in terms of s 59 (2) which they are not.

[24] On the Applicant's suggestion that, the fact that if the relief sought in this application is not granted, medical schemes may be forced to amend their rules and exclude claims for medical expenses that arise from motor vehicle accidents, which may result in members of the medical schemes being accordingly required in such instances to incur the costs of their medical treatments upfront and individually attempt to recover such costs from the RAF, constitutes exceptional circumstances that justifies the relief it is seeking, the Fund argued that members would be entitled to be reimbursed such costs by the scheme if incurred in the treatment of prescribed minimum benefit conditions, as no medical scheme is entitled to impose a condition which absolves it from paying those costs which is the basis for which they are contracted. The purpose of medical schemes would then be defeated and contrary to the terms of the medical schemes that have been agreed upon.

[25] The Fund has also denied the allegation that this case is unusual due to the contemptuous attitude it has adopted towards the rule of law and constitutional rights of the affected persons, including the medical schemes and their members to just administrative action, and exceptional because the effect of its conduct is to inflict irrecoverable losses to the medical schemes that runs into millions. The Fund argued that the mere fact that the directive has been found to be unlawful does not

necessarily mean that it is contemptuous towards the rule of law and the constitutional rights of affected parties.

[26] On the issue of an undertaking, the Fund pointed out that nothing was going to happen to the medical schemes if they do not receive the money during the suspension of the order, since it was not going to be paid to or used by the schemes but ring-fenced by the Applicant pending the final decision on the leave to appeal or appeal. According to the Fund that shows that the money is not actually immediately or urgently required for use to prevent the perceived/alleged harm, therefore, there is no immediate hardship that will be experienced by either the medical schemes or the victims of road accidents hence the amounts will be ring-fenced. These are monies for past expenses the purpose of which has been fulfilled already. The Applicant has failed to point out or identify any real hardship or harm that will be endured by the medical schemes during the period of the suspension which would be difficult to repair or loss irrecoverable. As none of the monies was going to be used pending the final determination of the matter.

[27] On the Applicant's allegation that by deciding that the matter was urgent and issuing an interdictory order preventing the Fund from continuing with the offending act, it was proof that with the continued operation of the directive, the Applicant will suffer harm that is not capable of full repair at a later stage, the Fund argued that whether or not that was right forms part of the merits of the leave to appeal. The court hearing the main Application was therefore on that basis obliged to decide the questions raised by s 18 (1) and (3) that is whether or not exceptional circumstances exists and/or that no irreparable harm envisaged or will be suffered by the Fund. Only if such a decision has been arrived at can a question whether or not to suspend the operation of the interdictory order be interrogated. The Fund's response is obviously incontrovertible otherwise it would not have been necessary to decide the issue again.

Applicant's reply

[28] In reply the Applicant brought up the issue of absence of mechanism in which the medical scheme can recover the losses once the settlement agreement between the Fund and the member claimant has been concluded.

[29] Furthermore, the Applicant now in reply also referred to the infliction of irreparable harm to the members who are victims of the road accidents because of none reimbursement by the Fund of past medical expenses. It alleged that such members will not be credited in the amounts that the Fund is obliged to refund to a victim, which would then result in the victims being unable to access other medical treatment as a result of their coverage limits and medical savings being exhausted which would have to be paid for by the medical schemes, had the Fund not implemented the unlawful directive.

[30] The Applicant alleges that failure by the Fund to dispute the allegations of irrecoverable damages that are to be suffered by its members and the victims of accident is significant in the establishment of irreparable harm. The Fund however did dispute that any harm will be inflicted to the medical schemes or their members and or that if inflicted they are without recourse.

[31] It was also the Applicant's contention that failure to grant it the relief it seeks will result in them forfeiting a substantive amount that it won before Mbongwe J as the substantive relief entitled the medical schemes to be reimbursed through members by the Fund for past medical expenses for which the Fund is liable to compensate the victims of road accidents. According to it the irrecoverable losses in respect of those amounts are piling up with every day that is passing whilst the Fund continues to enforce its unlawful directive. In that instance no matter what is the outcome of the appeal in respect of those sums, the order of Mbongwe J will be empty and meaningless in the hands of the Applicant, which predicament amounts to both an exceptional circumstance and irreparable harm.

[32] Although the Applicant did not conversely allege any non-irreparable harm on the part of the Fund in its Founding Affidavit, in reply it alleged that since the Fund provided no evidence that indicate that it will suffer any prejudice if the order is put into operation pending the appeal, nor could the Fund have done so, given that the

Applicant has undertaken to ring fence any funds paid over by the Fund as reimbursement for past medical expenses and to pay over those funds in the event the Respondent is successful, the Fund could suffer no harm.

[33] The Applicant further denied that it ever stated that in the interim period, medical schemes needed the funds to remain financially viable but actually that if the Fund is allowed to implement the unlawful directive pending the appeal, therefore not pay over the money to the Applicant, the unlawful settlement agreements entered into by the Fund and the victims of road accident who have no incentive to protect the financial interest of the medical schemes will result in millions of Rands of irrecoverable losses.

[34] Finally, The Applicant alleges that the Fund has made a concession by contending that its officials do not reject the claim or the unlawful directive does not apply where the Fund is furnished with an agreement between a member and the medical schemes confirming that the medical expenses need to be paid to the medical schemes. They argue that, that is new and contradicted by the Fund's officials who have refused to reimburse victims of road accident whether or not they provide an agreement that demonstrate a duty to reimburse a medical scheme for monies paid over by the Fund. As a result, the Fund has no basis for an appeal or to resist this Application. The Applicant also refutes the Fund's statement that not all medical schemes have a rule of reimbursement. The Applicant refers to the Draft model rules that were published in the Medical Schemes Act and allege to have been adopted by the medical schemes.

[35] As part of its Supplementary Affidavit the Applicant has filed the Health Funders Affidavit who have indicated their support for the Application and that their failure to do so earlier was not a sign of the fact that their member medical schemes are not going to suffer any irreparable harm as a result of the unlawful directive but was due to logistics. Applicant also filed a supplementary Affidavit deposed to by a Professor Roseanne Harris, whose capacity in this matter was not explained. The Affidavit has not been considered for the purpose of a decision in this matter.

Issues arising

[36] Taking into consideration the requirements of s 18 (1) and (3), the issues in this matter are whether the Applicant demonstrated a sufficient degree of exceptional facts, that indicate an irreparable harm suffered by it, and no harm on the side of the Fund, justifying the granting of the order sought. Other than these delineated basics, the Fund raised the issue of the Applicant's interest in the matter in relation to the facts to be established to determine if a proper case has been made.

Analysis

Exceptional Circumstances

[37] The Applicant, in outlining the exceptional circumstances required to obtain the relief sought in this Application, alleged to have approached the court on an urgent basis due to the irreparable harm resulting from irrecoverable losses of Millions of Rands that was being inflicted continuously on the medical schemes due to the conduct of the Fund. It alleged the conduct to be based on the Fund's unlawful directive that was set aside and against which an interdictory order was issued. The Applicant's principal purpose for being before court was therefore to secure and protect the interest of medical schemes.

[38] The Applicant had also alleged to be protecting its own interest. Its authority and standing for acting in the interest of medical schemes as an administrator having not been placed in dispute, its indication to be also acting in its own personal interest was correctly disputed by the Fund. Unless the Applicant is also a medical scheme and has members (victims of road accidents) for which it has made or on behalf of whom it is obliged to make payments, the Applicant has no direct interest that is affected. The Applicant therefore personally suffers no prejudice, a vital fact that should be before us when the exceptional circumstances alleged to have been established and harm suffered are considered.

[39] The Applicant has also in the midst of its averments alleged to be acting in the interest of the members of the schemes to prevent prejudice to them as victims of

the road accident and in the interest of the general public in terms of s 38 (b) and (d) of the Constitution, the former allegation being also disputed by the Fund.

[40] The monies alleged to be irrecoverable losses are those paid by the medical schemes in accordance with the benefit schemes regulations for medical costs incurred by their members who have been victims of road accidents. The Applicant has alleged that although the medical schemes are entitled to recover the money paid from the Fund, it however results into irrecoverable losses due to the conduct of the Fund that is based on its unlawful directive. The conduct allegedly leaves the medical schemes with no remedy unless the suspension of the interdictory order against the directive is uplifted (the interdictory order is executed).

[41] Notwithstanding having no tangible interest, the gist of the Applicant's case is still that, it together with the medical schemes it administers continue to suffer irrecoverable losses as they are left with no remedy by the suspension of the Mbongwe J order interdicting and or setting aside the Fund's directive. The suspension renders the losses irrecoverable as the Fund continue making unlawful settlement offers to the Claimants, excluding past medical expenses paid by a medical scheme, in full and final settlement on the basis of the unlawful directive, whilst exhausting the appeal process, leaving it without a remedy, thus irreparable harm.

[42] The losses are allegedly estimated to be in the region of R2 Million Rand a day, which is approximately R500 Million Rand per year and to have since August 2022 risen to R138 Million Rand, a fact the Applicant alleges was not disputed by the Respondent in the main application. The Applicant alleges therefore by this Application to be trying to protect itself against the irreparable harm being inflicted as it is left without a remedy.

[43] The Fund's directive that is interdicted by the order of Mbongwe J, directs its officials to reject or decline claims for past medical expenses where such has been paid by the medical schemes on the basis that the claimant has not suffered a loss. The interdictory order is as a result intended to prohibit the outright rejection or decline of such claims by the Fund. The circumstances interdicted, which is the

rejection or decline of the claims, are not only different from the situation the Applicant is complaining about (the amicable settlement of claims) but also on such circumstance happening, neither the medical schemes nor their member Claimants are left without a remedy. The member Claimants can enforce their claim against the Fund and the medical schemes remain with their alleged right to claim against their member Claimants on the latter's recovery of the payments from the Fund. The judgment for which leave is sought also weighed in on other remedies such as subrogation and cession albeit deciding that they would be too expensive a process to follow. (*Rand Mutual Assurance Co Ltd v Road Accident Fund* [2008] ZASCA 114; 2008 (6) SA 511 (SCA) at para 24). Subrogation embraces a set of rules providing for the reimbursement of an insurer which has indemnified its insured under a contract of indemnity insurance (Lawsa (reissue) vol 12 para 373). It is also a matter between the medical schemes and their member Claimants.

[44] The suspension of the interdictory order against the Fund's directive to reject or decline claims for medical expenses as a result does not render the past medical expenses losses irrecoverable. The Claimants to whom compensation is owed, will always have a legal claim against the Fund, and can therefore anytime within the prescribed period challenge the rejection. The Fund's directive cannot extinguish or threaten the Claimant's right to claim compensation. The loss is recoverable to the member on behalf of whom the past medical expenses were paid and from whom the medical scheme allege to have a right of recourse for reimbursement. The Applicant or the medical schemes therefore cannot claim directly from the Fund, the expenses that were incurred on behalf of the member Claimants; see *Rayi NO v Road Accident Fund*⁹ circumventing the involvement of the Claimants that has got a right of compensation. The Applicant by offering that the monies be paid directly to it when it as part of an Undertaking seems to want to avoid the Claimants right with regard to the compensation, with the result that the Claimants right to compensation is interfered with without counsel or notice.

[45] The Applicant further seeks, with the execution or implementation of the interdictory order that sets aside the Fund's directive, to impose or place an embargo (which legally it cannot do), on the amicable negotiations between the Claimants and the Fund that result in the conclusion of settlement agreements that excludes past

⁹ (343/2000) [2010] ZAWCHC 30 (22 February 2010)

medical expenses. It alleges that the settlement leaves it with irrecoverable losses without remedy.

[46] The submission that leave to uplift the suspension of the interdictory order will stop or provide the Applicant with a remedy against the continued settlement negotiations between the Fund and the member Claimants that compromises the Applicant and the medical schemes' right to recover the loss from the claimants, is incorrect. The interdictory order cannot and was not intended to prevent or stop the parties to an action or the Fund and the road accident Claimants who have a right to claim compensation for expenses incurred, from voluntarily negotiating an amicable outcome that may or may not include past medical expenses. The allegation that such negotiations and resultant settlement agreements are consequently unlawful and causing irrecoverable losses that causes the medical schemes irreparable harm has no merit.

[47] Furthermore, the settlement agreements are not only legal and binding but certainly not a unilateral rejection of a claim by the Fund but a negotiated outcome whereupon the member Claimants are entitled to exercise their right to reject or accept the offers even to initiate the settlement discussion themselves if they so wish. Under the circumstances the Applicant rightly conceded that it cannot directly challenge, stop or direct its members to refuse to negotiate as their rules generally only impose an obligation on members to include past medical expenses and to reimburse the medical scheme any amounts recovered from the Fund. There is no enforceable or binding agreement per se that lawfully prohibits the claimants from agreeing to a settlement excluding past medical expenses. A legal interdict therefore also not possible. The alleged prejudice, if any will not be resolved by staying the suspension of the interdictory relief or effect or be rectified by its implementation or application.

[48] The Applicant had however argued that such settlement negotiations result in a negative outcome for the Applicant, causing irreparable harm or irrecoverable losses to the medical schemes, as the matter becomes *res judicata*. It is left without a remedy on failure by the member claimants to reimburse the medical schemes for the paid past medical expenses. Nevertheless, the implementation of the interdictory

order as indicated will not assist the Applicant as the order has no hold on the member Claimants and the Fund with regard to their negotiations.

[49] The allegation by the Applicant that every time the alleged unlawful tender is accepted and settled, the medical schemes are deprived of the potential to recover the past medical expenses where they had already paid, which thus results in irrecoverable losses to them, such settlement agreements therefore inflicting harm to the medical schemes that is irreparable cannot be factually substantiated. The agreement that is entered into between the medical schemes and its members is not based on the fact that the medical schemes will be reimbursed of the benefits that they pay to the members. The payment of benefits is instead depended on the monthly premiums that the medical schemes receive from their members. The Applicant has conceded that the obligation to reimburse only arises if the member has recovered the medical expenses. So that is triggered immediately the Claimant receives payment from the Fund for the past medical expenses. The right to recover the loss being that of the Claimant (victim of the road accident) who then losses out on the benefits as a result of having failed or not being able to recover the expenses paid on his behalf, as it would affect his future benefits. As pointed out the victims of road accidents are generally legally represented. The medical schemes cannot prevent, through the order of the court, their duly legally represented members to negotiate a settlement.

[50] The Applicant has not only admitted that the settlement agreements that are concluded cannot be prevented as the parties are entitled to negotiate, it had also by its statement that "it is the medical schemes that are incurring irrecoverable losses, however such losses are ultimately to be borne by its members, the victims of road accidents since it will affect their benefits," agreed that the ultimate bearer of the risk of loss is accordingly the Claimant or victim of the road accident. The Applicant alluded also to the benefits of a medical scheme member Claimants being affected by the failure to recover the paid past medical expenses so as to reimburse the medical scheme. The harm if any, is ultimately to be inflicted on or suffered by the Claimants. The Applicant's statement therefore that the Claimants have no incentive to protect the financial interest of the medical schemes is misguided.

[51] The most important factor is that the membership of the Claimants is not based on the recoverability of the losses by the member but on the premiums payable. As a result there is no tangible harm that will be suffered by the Applicant or the medical schemes on claims being rejected or compromised, as long as the Claimant still remains with an enforceable claim. Regulation 8 of the general regulations promulgated under the MSA reads:

“(1) Subject to the provisions of this regulation, any benefit option that is offered by a medical scheme must pay in full, without co-payment or the use of deductibles, the diagnosis, treatment and care costs of the prescribed minimum benefit conditions.”

[52] Conversely, when regard is had to the fact that an aggrieved claimant remains entitled to institute proceedings against the Fund for past medical expenses that are declined, it cannot be said that the losses contemplated or perceived are irrecoverable or that the failure to grant leave for the operation of the interdictory order would prejudice the member Claimants as well. The Fund correctly argued that assuming the Applicant and medical schemes have a claim against member Claimants of medical schemes whose claims are or have been rejected and as a result pursued or are to be pursued in court, the Applicant would have failed to prove that the matters deserve urgency otherwise they will not obtain substantial redress at a hearing in due course, or that the claim rejected will be extinguished and not pursuable in Court at any time thereafter. The claim if legitimate, does not dissipate as a result of being rejected and the aggrieved party has a right to enforce his claim. The reimbursement obligation if any is triggered on recovery of the loss by the Claimant.

[53] It is also significant to note that generally in almost all circumstances where an action is instituted against the Fund for compensation in road accident claims, the victims or claimants are legally represented. In some instances, such Claimants are represented by more than one legal practitioner depending on how huge is the claim. It is incumbent of those legal practitioners to protect the interest of their clients articulating their position in these matters, rather than the Applicant bypassing such representation claiming to be acting within the realms of the Constitution when in

actual fact its conduct is encroaching on the right of the member Claimants. The Applicant cannot approach the court on behalf of represented parties who can protect their rights acting in their own stead or capacity. In the instance of a breach of the terms of the scheme as a result of which the Applicant and the medical schemes allege to have suffered any prejudice, they have a remedy of enforcing the agreement. There is no predicament of being left with no relief, regardless of the outcome of an appeal, as the Applicant would like us to believe which would ordinarily constitute exceptional circumstances which warrant a consideration of putting the order into operation.

[54] The Applicant has also referred to irreparable harm inflicted on the member Claimants of medical schemes because the non-refund by the Fund of past medical expenses will result in the members not being able to access other medical treatment due to their coverage limit and medical savings being exhausted, which normally would be paid for by their medical schemes had the Fund not implemented the unlawful directive. The member's accounts will not be credited in the amounts that the Fund is obliged to refund to the members. All these can be corrected through the claim the member Claimants have against the Fund on rejection of their claims for past medical expenses which claims remains despite the suspension of the interdictory order.

Irreparable harm on the Fund

[55] On the Applicant's allegation that since the Fund provided no evidence that indicate that it will suffer any prejudice if the order is put into operation pending the appeal, nor could the Fund have done so, given that the Applicant has undertaken to ring fence any funds paid over as reimbursement for past medical expenses and to pay back over those funds in the event the Fund is successful, it could suffer no harm. The context of the proper meaning given to subsection 18 (3) becomes imperative in addressing that contention. It is properly articulated in *Incubeta Holdings supra* by Sutherland DJP stating that:

“if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor

irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. A hierarchy of entitlement has been created, absent from the *South Cape* test.”

[56] It consequently is of no assistance to the Applicant to argue that the Fund has not shown or alleged any harm. It remains of importance that the Applicant has not succeeded in showing any harm or hardship that is irreparable that the Applicant or the medical schemes would endure to justify the exceptional order sought if the order remains stayed.

Undertaking

[57] The Applicant’s suggestion that “medical schemes are suffering irrecoverable losses of millions of Rands on a daily basis” is incorrect and does not constitute an exceptional circumstance. Its offer for an Undertaking requires the Fund to pay over to the Applicant the monies that are payable to the member Claimants so as to ring – fence the money based on the misguided and incorrect premise that medical schemes have a reimbursement claim to recover “millions of Rands” from their members through the Fund which will be negated whilst the appeal procedures are pursued. The right to compensation being enforceable by the member Claimant there is therefore no legal basis for payment to be made to the Applicant. In addition, If any harm or hardship that is unbearable will during that period be suffered, the demand for the payment only for it to be ring fenced does not make sense.

[58] The Applicant has failed to demonstrate sufficient degree of exceptionality that indicates any harm that is irreparable to justify the extra ordinary order for the upliftment of the suspension.

The following order is therefore made:

1. The s 18 (1) and (3) Application is dismissed with costs, costs to include costs of two Counsels

N.V. Khumalo
Judge of the High Court
Gauteng Division, Pretoria

For the Applicant: Adv Nick Ferreira
Adv Annabel Raw
Instructed by: Edward Nathan Sonnenbergs Attorneys
dbrand@ensafrica.co.za
C/O Macintosh Cross Farquharson
cfe@macintoshcross.co.za

For the 1st Respondent: Adv Kennedy Tsatsawane SC
Adv Realeboga Tshetlo
Instructed by: Malatji & Company
tmalatji@mcince.africa
seloff@mcinc.africa