HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 20th June 2023

SIGNATURE

Case No. 60445/2021

In the application of:

SOUTH AFRICAN POLICE SERVICE MEDICAL SCHEME (POLMED)	First Applicant
MEDSCHEME HOLDINGS (PTY) LTD	Second Applicant

and

METROPOLITAN HEALTH CORPORATE (PTY) LTD	First Respondent
MOMENTUM HEALTH SOLUTIONS (PTY) LTD	Second Respondent
MOMENTUM CONSULTANTS AND ACTUARIES (PTY) LTD	Third Respondent

In re: *The interlocutory application of:*

METROPOLITAN HEALTH CORPORATE (PTY) LTD	First Applicant
MOMENTUM HEALTH SOLUTIONS (PTY) LTD	Second Applicant

MOMENTUM CONSULTANTS AND ACTUARIES (PTY) LTD Third Applicant

and

SOUTH AFRICAN POLICE SERVICE MEDICAL SCHEME (POLMED) First Respondent

MEDSCHEME HOLDINGS (PTY) LTD Second Respondent

JUDGMENT

The judgment and order are published and distributed electronically.

VERMEULEN AJ

[1] This is an application for leave to appeal to the Supreme Court of Appeal alternatively the Full Bench of the North Gauteng Division of the High Court of South Africa, held in Pretoria in terms of Section 17(1)(a) of the Superior Court Act, Act no. 10 of 2013 against the whole of the judgment and order handed down by myself on the 9th of May 2023.

[2] Both the First- and Second Applicants have respectively filed applications for leave to appeal.

[3] For these ease of reference I will refer to the parties as they were referred to in the Rule 30A interlocutory application and in my judgment that was handed down on the 9th of May 2023 (Rule 53 judgement and order).

[4] In the Rule 53 judgment and order I ordered Polmed (first respondent) to produce the record of proceedings (Rule 53 record) in terms of Rule 53(1)(b) of the Uniform Rules of Court.

[5] In the Rule 53 judgement and order I held that the issues raised by both the first respondent and Medscheme (second respondent), that the first respondent's decision is not reviewable in terms of Rule 53 in that the first respondent is neither an Organ of State nor a private party exercising a public power, and that its decision therefore falls outside of the scope of PAJA, cannot be raised at this stage and is premature. I also dismissed the first respondent's counter-application for a declarator in terms of Section 21(1)(c) of the Superior Court's Act wherein the declarator was sought that the first respondent was not an Organ of State and that the interlocutory application instituted by the Applicants should be dismissed.

[6] The test whether to grant leave to appeal is provided by the provisions of Section 17(1)(a) of the Superior Court Act 10 of 2013 (the Act). The section provides as follows:

> "*17(1)(a)* *Leave to appeal may only be given where the judge or judges concerned are of the opinion that:*
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> *(i)* *the appeal would have a reasonable prospect of success; or*
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> *(ii)* *there is some other compelling reason why the appeal should be heard, including conflicting judgment on the matter under consideration ...*"

[7] In the present application for leave to appeal reliance is placed by the respondents on the provisions contained in both 17(1)(a)(i) and 17(1)(a)(ii).

[8] It is trite that with the coming into operation of the Act, the relevant test has been amended in that the word "*would*" is used in determining the conclusion to which

the Judge or Judges must come before leave to appeal can be granted. It has been held that the amended wording of this sub-section raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted.[1]

[9] In ***Notshokovu v S***[2] it was held that an appellant faces a higher and stringent threshold in terms of the Act and this sub-section, compared to the provisions of the repealed Supreme Court Act 59 of 1959.

[10] In respect of the second portion of the test, it is submitted that each application for leave to appeal must be decided on its own facts and that there is not an exhaustive list of criteria.[3]

[11] Counsel appearing on behalf of the Applicants referred me to the matter of ***TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others*** [4] where the Supreme Court of Appeal went to strike the appeal from the roll even though special leave to appeal was granted by the same Court. It did so on the basis that:

> *"the fact that leave to appeal has been granted upon application to the President of this Court is not decisive of whether a case meets the criteria for special leave. It still remains for us to consider whether we should entertain the appeal at all".*
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> and that:
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> *" .... the orders made by the Full Court do not meet the requirements of appealability to this court. As a result despite special leave having been granted by two judges of this court the appeal is not properly before this court and the appeal must be struck from the roll."*

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[1] *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen, unreported, LCC Case No. LCC14R/2014 dated 3 November 2014, cited with approval by the Full Court in "The Acting National Director of Public Prosecution v Democratic Alliance (unreported) GP Case no. 19577/09 dated 24 June 2016) at par. 25;*

[2] *unreported, SCA Case no. 157/15 dated 7 September 2016 at par. [2];*

[3] *Transnet Durban (Pty) Ltd v eThekwini Municipality, unreported KZD case no. D4178/2020 dated 8 February 2021 at par. [13];*

[4] *(2023)ZASCA 63 (5 May 2023)*

[12] The consequence of the aforementioned is that the presiding Judge hearing an application for leave to appeal has a duty to ensure that the application for leave to appeal complies with the requirements of Section 17(1)(a) of the Superior Courts Act prior to granting leave. Such a presiding Judge must be diligent in analysing whether the applicants for leave to appeal (the Respondents in the present matter) comply with the individual requirements of Section 17(1)(a).

APPEALABILITY OF ORDER:

[13] The Applicants submitted that the Rule 53 order which I made is not appealable. In the first instance it was submitted that the order is interlocutory in nature. Secondly it was submitted that the issue that I decided upon was simply "*a procedural right to the record*" in terms of Rule 53(1)(b) with reference to the matter of ***Fizik (Pty) Ltd t/a Umkhombe Security Services v Nelson Mandela Metropolitan University***[5]).

[14] I do not agree with the submissions of the Applicants in this regard.

[15] It has now been authoritatively held by the Supreme Court of Appeal in the matter of ***The Commissioner for the South African Revenue Service and 1 Other v Richards Bay Coal Terminal (Pty) Ltd***[6] that such an order is appealable. In paragraph 7 of that judgement the Supreme Court of appeal held:

> "*First, in Competition Commission of South Africa v Standard Bank (Standard Bank) the Constitutional Court held that an order compelling a respondent in a review to deliver the record of its decision in terms of rule 53, is indeed appealable...* ".

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[5] *2009 (5) SA 441 (SE*

[6] *(1299/2021) (2023) ZASCA 39 (31 March 2023);*

[16] In the matter of ***Competition Commission of South Africa v Standard Bank of South Africa Ltd***[7], the Honourable Justice Theron, in the minority judgment held as follows in respect of the appealability of a Rule 53 order:[8]

> *"[47] The rule 53 order is final in effect and determinative of the relevant rights between the Commission and Standard Bank. This is because the order requires the Commission to disclose the record – which would have the final effect of furnishing Standard Bank with the information it seeks to pursue its review under rule 53. The handing over by the Commission of the record under rule 53 would be irrevocable. Standard Bank would have access to the information contained in it, and no subsequent court order could materially change that."*

[17] In the premises I am satisfied that the first- and second respondents may request leave to appeal against the Rule 53 order which I made.

MERITS OF APPLICATION FOR LEAVE TO APPEAL:

[18] Both Respondents adopted a united front in their submissions to me in respect of why leave should be granted. In summary their arguments are:

[18.1] Polmed as a medical scheme is not an Organ of State and it does not exert public power. Rule 53 can therefore not apply to the decision of Polmed in regard to the award of a commercial tender;

[18.2] The reviewability of such a decision is a threshold matter that can be decided and should be decided before the hearing of the review application.

[19] Both Respondents placed reliance on the matter of ***Commission for the South African Revenue Service & Another v Richards Bay Coal Terminal (Pty) Ltd***[9]

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[7] *2020 (ZACC2; 2022(4) BCLR 429 CC*
[8] *From par. [47]:*

in support of their submissions. In particular I was referred to the content of paragraph 7 where reference was made to the Constitutional Court's decision of ***Competition Commission of South Africa v Standard Bank***[10]. In referring to the Constitutional Court judgment the Supreme Court of Appeal held as follows:

> *"[7] .... Second, both the majority and minority (ibid paras 118 – 119) in Standard Bank held that the court may only order the production of the record of a decision under rule 53 after it has determined that it has jurisdiction in the review. The minority put it as follows:*
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> *'Therefore, (rule 53) enables an applicant to raise relevant grounds of review, and the court adjudicating the matter to properly perform its review function. However, for a court to perform this function, it must have the necessary authority. It is not prudent for a court whose authority to adjudicate the review application is challenged to proceed to enforce rule 53 and order that disclosure should be made, before the issue of jurisdiction is settled. The object of rule 53 may not be achieved in a rule that lacks jurisdiction.*
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> *For these additional reasons, we agree with the first judgment (of Theron J.) that Boqwana JA erred in ordering that the Commission should disclose its record of investigation before the question of jurisdiction was determined. Once carried out, and in the event that the Competition Appeal Court concluded that it has no jurisdiction, what is to be done in terms of the order cannot be undone. (ibid paras. 202 – 203)"*[11]

[20] Both Respondents submitted that in raising the defences aforementioned, it challenged this Court's jurisdiction to entertain a Rule 53 review application in the

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[9] (2023) ZASCA 39

[10] *supra;*

[11] *The portion of the Constitutional Court judgment in Competition Commission of South Africa v Standard Bank is found at paras. [118] to [122];*

present matter. In the premises I was obliged to deal with this aspect first and the court erred in finding that the issue raised was premature.

[21] In view of the Respondents' reliance upon the matters of ***Competition Commission of South Africa v Standard Bank of South Africa Ltd*** and ***Commission for the South African Revenue Service & Another v Richards Bay Coal Terminal (Pty) Ltd*** the Court will carefully analyze the facts of those matters.

[22] In the ***Competition Commission*** matter, the dispute was whether the Court of first instance had jurisdiction at all to entertain the application for review. This much is clear from paragraph [33] of that judgment in which the following is stated:

> *"The Commission contended before Boqwana JA that the Competition Appeal Court did not have the jurisdiction to hear the review as a court of first instance and that a single judge was not empowered to order the production of a rule 53 record under section 38(2)(A). On 22nd June 2018, Boqwana JA directed the Commission to produce the rule 53 record in the review proceedings. Boqwana JA did so without first determining whether the Competition Appeal Court had jurisdiction to hear the review as a court of first instance. The Commission seeks leave to appeal against the direction on the ground, amongst others, that Boqwana JA should first had determined the question of jurisdiction before granting the direction (review appeal)".*

[23] The question the Constitutional Court had to decide was whether Boqwana JA could have ordered the production of the record before deciding whether the Competition Appeal Court had jurisdiction, as court of first instance, to hear the review application. They held that the answer must be no. They held that although the information contained in the Rule 53 record might later be relevant to determining jurisdiction, once Standard Bank has supplemented its founding

papers, Boqwana JA should have first decided the question of jurisdiction on the founding papers before her.

[24] In ***Commission for the South African Revenue Service & Another v Richards Bay Coal Terminal (Pty) Ltd*** the question was whether a party seeking to challenge a tariff determination is confined to the wide statutory appeal envisaged by s 47(9)*(e)* of Customs and Excise Act 91 of 1964, to the exclusion of review proceedings under PAJA.

[25] The Supreme Court of Appeal held that the court's power to review in terms of PAJA was not excluded. In arriving at this decision, the court inter alia referred to the ***Competition Commission*** matter above in paragraph 7 of the judgement:

> *" [7] Parenthetically, it is perhaps necessary to pass certain preliminary observations. First, in Competition Commission of South Africa v Standard Bank[1] (Standard Bank) the Constitutional Court held that an order compelling a respondent in a review to deliver the record of its decision in terms of Rule 53, is indeed appealable.* ***Second, both the majority and minority[2] in Standard Bank held that the court may only order the production of the record of a decision under Rule 53 after it has determined that it has jurisdiction in the review.*** *The majority put it as follows:*
>
> > *'Therefore, [rule 53] enables an applicant to raise relevant grounds of review, and the court adjudicating the matter to properly perform its review function. However, for a court to perform this function, it must have the necessary authority. It is not prudent for a court whose authority to adjudicate a review application is challenged to proceed to enforce rule 53 and order that disclosure should be made, before the issue of jurisdiction is settled. The object of rule 53 may not be achieved in a court that lacks jurisdiction.*
> >
> > *For these additional reasons, we agree with the first judgment [of Theron J] that Boqwana JA erred in ordering that the Commission should disclose its record of investigation before the question of jurisdiction was determined. Once carried out, and in the event that the Competition Appeal Court*

> *concluded that it has no jurisdiction, what is to be done in terms of the order cannot be undone.*[13]

[26] In my Rule 53 judgement and order I adopted the view that because the Competition Commission matter related to a challenge of jurisdiction proper, it was not applicable to the issues that served before me. There was no jurisdictional challenge at all on the papers before me. It was submitted by counsel acting for the applicants that in reaching these conclusions the court did not err. It was submitted that nowhere in the answering affidavit to the Rule 30A application, or in its counter application, does the respondents contend that this Court has no jurisdiction to entertain the review application. On the contrary the applicants founding affidavit demonstrates the opposite. I agree.

[27] In the ***Competition Commission*** matter the constitutional Court again confirmed the legal position where it has been established that a court has jurisdiction as follows:

> "[119] *Boqwana JA was correct to find that the rule 53 record may be relevant to jurisdiction, since the test for assessing the jurisdiction of the Competition Appeal Court in a review application is connected to the grounds of review. This does not, however, imply that jurisdiction should not be established up front on the basis of what is pleaded in the founding papers. The court chosen by an applicant in a review application must be able to assert its jurisdiction on the basis of the founding papers. Where no facts are alleged in the founding papers upon which jurisdiction could be founded, the applicant is not entitled to the production of the record in the hope that it will help clothe the court with the necessary jurisdiction. Standard Bank was required to first establish jurisdiction in its founding papers before the Competition Appeal Court could direct the production of a rule 53 record. As mentioned, the question of jurisdiction has not yet been adjudicated*

by the Competition Appeal Court. Boqwana JA should not have directed that the rule 53 record be produced without first deciding whether the Competition Appeal Court was competent to hear the review application as a court of first instance.

[120] This finding is entirely consistent with what the Supreme Court of Appeal and this Court have said about the importance of the rule 53 record and its availability to litigants. This is because a distinction must be made between the jurisdiction of the forum to hear the review application and the merits of the review application. If a review application is launched in a forum that enjoys jurisdiction, then a party is entitled to the record even if their grounds of review are meritless. As the Supreme Court of Appeal put it, "the obligation to produce the record automatically follows upon the launch of the application, however ill-founded that application may later turn out to be". This is because, as recognised by the majority decision in Helen Suzman, rule 53 envisages the grounds of review changing after the record has been furnished.[147] The record is essential to a party's ability to make out a case for review. It is for this reason that a prima facie case on the merits need not be made out prior to the filing of record.

[121] I accept that there are good reasons for the obligation to produce the record following automatically upon the launching of a review application. Delaying the production of the record is inimical to the exercise of the courts' constitutionally mandated review function. A lengthy delay may impede the courts' ability to assess the lawfulness, reasonableness, and procedural fairness of the decision in question and undermine the purpose of judicial review. One reason for this is that documents and evidence, which should be included within the rule 53 record, may be lost if there is a considerable delay in the production of the review record. This does not, however, imply that a court should order production of a rule 53 record without first determining its competence to hear the review application. "

(emphasis added)

[28] In the ***Commission for the South African Revenue Service & Another v Richards Bay Coal Terminal (Pty) Ltd*** matter to which I was referred to by both counsel appearing on behalf of the respondents, the Supreme Court of Appeal

again confirmed that once a court has jurisdiction a party is compelled to provide the record:

> *"[28] It remains to add that even on its own approach, namely that because the appeal under s 47(9)(e) is a wide appeal, RBCT can raise 'any ground, including grounds that resemble grounds of review', SARS can hardly resist production of the record. How, it must be asked, can RBCT meaningfully raise 'grounds that resemble grounds of review', without the benefit of the record. It is unclear why SARS refuses to disclose the documents. It could have disclosed the record without prejudice to its rights to raise the jurisdiction point but elected not to. What discernible benefit SARS hoped to derive by adopting this course, remains unexplained. On the other hand, the prejudice to RBCT is plainly self-evident. There is no gainsaying that if a review application is launched in a forum that enjoys jurisdiction, then a party is entitled to the record even if their grounds of review are meritless. SARS accordingly accepts that if the institution of the review proceedings is competent (as we have found), then it does not dispute that it is obliged to produce the record of its decision under Uniform rule 53. This conclusion renders it unnecessary to consider RBCT's alternative case founded upon Rule 35."*[12]
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> (emphasis added)

[29] In respect of the grounds of opposition raised by the respondents in their answering affidavit and counter application, it is evident that the only true question is, whether the issue or issues raised by the Respondents in opposition can be construed as an attack on the jurisdiction of the court to hear the Rule 53 application. I am of the opinion they do not. At no time was there an attack on the jurisdiction of the court proper on the papers before me. The issues raised relate to the merits of the review application that should be raised and determined after production of the Rule 53 record.

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[12] *Par 28*

[30] In the premises I am not persuaded that the appeal would have a reasonable prospect of success. I am also not satisfied that there is some other compelling reason why the appeal should be heard as contemplated in section 17(1)(ii) of the Act.

[31] In the premises the following order is made:

[31.1] The application for leave to appeal is dismissed;

[31.2] The First and Second Respondents (in the main application) are ordered to pay the costs, inclusive of the costs incumbent upon the employment of two counsel.

P J VERMEULEN
Acting Judge of the High Court
Gauteng Division, Pretoria

Appearances

Counsel appearing on behalf of Applicant: (in Rule 30A interlocutory application)	ADV. JG WASSERMAN SC ASSISTED BY ADV. A GOVENDER **ADV.** S TSHIKILA
Attorney for applicant: (in Rule 30A interlocutory application)	FAIRBRIDGES WERTHEIM BECKER ATTORNEYS
Counsel appearing on behalf of 1ST Respondent (in Rule 30A interlocutory application):	ADV. E C LABUSCHAGNE ASSISTED BY ADV I HLALETHOA
Attorney for 1st respondent (in Rule 30A interlocutory application):	MALULEKE INCORPORATED
Counsel appearing on behalf of 2nd Respondent (in Rule 30A interlocutory application):	ADV. MA CHOHAN SC ASSISTED BY ADV M LENGANE
Attorney for 2nd respondent (in Rule 30A interlocutory application):	WERKSMANS ATTORNEYS
Date of Hearing:	8TH June 2023
Judgment delivered:	20TH June 2023