REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2022-012058

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 10 August 2023 E van der Schyff

In the matter between:

THE BOARD OF HEALTHCARE FUNDERS NPC	APPLICANT
and	
COUNCIL FOR MEDICAL SCHEMES	FIRST RESPONDENT
REGISTRAR FOR MEDICAL SCHEMES	SECOND RESPONDENT
MINISTER OF HEALTH	THIRD RESPONDENT

JUDGMENT

Van der Schyff J

Background

[1] The applicant instituted review proceedings during August 2022, amongst others, seeking the review of decisions of the first respondent pertaining to the first respondent's failure to grant medical schemes an exemption that enables them to offer Low-Cost Benefit Options (LCBOs) in terms of s 8(h) of the Medical Schemes Act 131 of 1998, and a declarator that the first and third respondent's failure to develop and implement Low-Cost Benefit Guidelines for medical schemes to be irrational, unlawful and/or unreasonable.

[2] The first and second respondents delivered the Rule 53 record during September 2022. The applicant, however, is of the view that the record produced by the first and second respondents is incomplete. It comprises mainly of documents sourced from the first respondent's website, which documents had already been accessible to the applicant and the public. The applicant alleges that many of the source documents upon which the decision-making is based and documents reflecting the deliberations regarding how the respondents came to make the impugned decisions, are not included in the Rule 53 record.

[3] The applicant subsequently launched a Rule 30A application. The applicant provided a detailed list of documents that ought to have been provided by the first and second respondents. The respondents, amongst others, contended that some of the documents sought do not exist and are only assumed by the applicant to exist, and that the Rule 30A application constituted an abuse of court process.

[4] The Rule 30A application was heard by Botha AJ, and a judgment was delivered on 10 July 2023. In the judgment, Botha AJ explains that the respondents requested that, if the Rule 30A application was successful, a period longer than the ten days required in Rule 30A be provided for the documents to be delivered. Botha AJ, however, was unsure as to whether the extension could be granted and ordered the respondents to comply with Rule 53(1)(b) within ten days of the order. The first and second respondents failed to comply with the order.

[5] An urgent application comprising a contempt of court application, and application in terms of section 18(3) of the Superior Courts Act 10 of 2013 (s 18(3) application), was filed by the applicant on 26 July 2023. It was served by email at 9h32. An application for leave to appeal Botha AJ's judgment and order was filed by the first and second respondents on 26 July 2023. It was delivered by email at 10h24.

Urgency

[6] Counsel for the applicants submitted that s 18(3)- and contempt of court applications are inherently urgent. This principle, counsel submitted, is borne out by a wealth of case law.

[7] Counsel for the respondents submitted that the application is not urgent, although counsel for the first and second respondents submitted that these respondents want the application to be finalised. The issue of urgency, however, is not only relevant to the parties but also to the court sitting as an urgent court in a very busy Division. The integrity of the process needs to be protected to ensure that only deserving matters are dealt with in the urgent court.

[8] To regard applications of this nature, i.e., contempt of court and s 18(3) applications, as inherently urgent, does, not mean that applicants can indiscriminately approach the urgent court on the basis of extreme urgency without having regard to the context and facts of each individual application. It is emphasised in the Practice Manual of the Gauteng Division that while an application may be urgent, it may not be sufficiently urgent to be heard at the time selected by the applicant.

[9] In *MT v TH and Another; In re: MT v TH,*[1] the court held that:

[1] (10211/2020) [2020] ZAGPJHC 247 (2 October 2020) at par [12].

> ‘All cases dealing with urgency, must be read in the context of the time. For instance, our well-known *Luna Meubels* was decided in a time when access to court on the normal court roll in a very short time was possible (good law as it undoubtedly still is). Similarly, judgments of the 1980’s, 1990’s and 2000’s were given when access to court in a very short time on the normal court roll, was possible. These matters differ between divisions. Longer periods for enrolment, may require greater flexibility in the urgent court to ensure access to justice but this does not mean a rough-and-ready approach is permissible. There is a belief that all contempt of court matters are so-called “*inherently urgent*”. Under this reasoning, adequate time for a respondent to obtain legal representation, take advice, put up a defence, and prepare for a hearing, are often jettisoned. Nothing could be farther from the truth. These matters require appropriate time limits, dependent on the facts of each case. If ignored, they too stand to be struck from the roll.’

[10] The fundamental question that needs to be answered when it is considered whether a matter is to be heard on the date it is set down to be heard by the applicant in the urgent court, is whether an applicant will be afforded substantial redress if a matter is heard in the due course, and not on the set down date. ‘Due course’ likewise depends on several factors. For example, with the introduction of the Family Court in this division, family matters are generally enrolled to be heard within four to five weeks of applications being issued. It is thus not the case that applicants have to wait months before their matters will be heard. The same applies to applications for leave to appeal. Once an application for leave to appeal is correctly filed with the appeals registrar, and not merely uploaded to the CaseLines file, the judge in question should provide a date for the application to be heard as soon as possible. Since the prospects of success on appeal is a factor that a court takes into consideration in exercising its discretion to execute an order pending appeal once the jurisdictional requirements of s 18(3) are met, it is preferable, although not obligatory, that the judge who heard the main application hear the s 18(3) application.

[11] No reasons were proffered why Botha AJ would not be able to hear the application for leave to appeal, and simultaneously decide the s 18(3) application within the foreseeable future. No case was made out for the s 18(3) relief sought to be so extremely urgent that the applicants will not be afforded substantial redress in due course if the s 18(3) application is not heard together with the application for leave to appeal.

[12] Irrespective of whether contempt of court applications are inherently urgent, it cannot be that these applications are inherently extremely urgent. The facts of this matter do not render the application so extremely urgent that it justifies filing the application on 26 July 2023, requiring the respondents to deliver their notices of intention to oppose by 12:00 on 27 July 2023 and filing their answering affidavits by 31 July 2023. The context and facts of this application do not justify the truncation of the time periods akin to what is only expected in matters of extreme urgency.

Costs

[13] All the parties were represented by two counsel. However, the legal principles involved in this urgent application do not justify the involvement of two counsel. As for the submission that a punitive costs order should be granted against the applicant, it is trite that punitive costs orders are only justified in extraordinary circumstances. No such circumstances are found to exist in this application.

ORDER

In the result, the following order is granted:

1. **The application is struck from the roll with costs.**

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E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:	Adv. B.E. Leech SC
With:	Adv. S.L. Mohapi
Instructed by	WERKMANS ATTORNEYS
For the first & second respondents:	Adv. J.J. Brett SC
With:	Adv. L. Makua
Instructed by:	LAWTONS INC.
For the third respondent:	Adv. A. Louw SC
With:	Adv. M.S. Manganye
Instructed by:	THE STATE ATTORNEY
Date of the hearing:	8 August 2023
Date of judgment:	10 August 2023