



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case No: 201/11

In the matter between:

REGISTRAR OF MEDICAL SCHEMES

First Appellant

THEBEMED MEDICAL SCHEME

Second Appellant

and

SUREMED MEDICAL SCHEME

Respondent

Neutral citation: *Registrar of Medical Schemes v Suremed Medical Scheme*
(201/11) [2011] ZASCA 173 (29 September 2011)

Coram: HARMS DP, LEWIS, MALAN, BOSIELO and THERON JJA

Heard: 23 August 2011

Delivered: 29 September 2011

Summary: Medical Schemes - Amalgamation of medical schemes - Medical Schemes Act 131 of 1998, s 63 - Purpose of s 63 is to regulate transactions relating to amalgamations or transfer of business of medical schemes - No amalgamation or transfer without agreement between parties concerned - Registrar of Medical Schemes has no power to confirm an exposition not underpinned by agreement to merge.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Prinsloo J sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel.

JUDGMENT

THERON JA (HARMS DP, LEWIS, MALAN and BOSIELO JJA concurring)

[1] The first appellant is the Registrar of Medical Schemes (the Registrar). The second appellant, Thebemed Medical Scheme (Thebemed) and the respondent, Suremed Health Medical Scheme (Suremed), are medical schemes registered in terms of the Medical Schemes Act 131 of 1998. Thebemed and Suremed entered into a Memorandum of Understanding (MOU) on 19 April 2010 in terms of which they agreed in principle to merge, subject to the approval of their members. They lodged an exposition of their proposed merger with the Registrar in terms of s 63 of the Act. This appeal revolves around the interpretation of s 63 and in particular, whether the Registrar has the power to confirm an exposition that is not submitted pursuant to an agreement to merge.

[2] The background to this matter is the following: Suremed is a small medical scheme with only 1576 members. This number falls short of the minimum of 6000 members required by sections 24(2)(d) and 27(1)(d) of the Act read with Regulation 2(3) of the Medical Schemes Regulations, GN R1262, Regulation Gazette 6652, 20 October 1999. The Registrar has, since 2007, requested that Suremed address this problem. He eventually threatened that if Suremed did not comply with the requirement of a minimum of 6000 members by the end of April 2010, he would 'direct the scheme into an amalgamation'. Suremed identified Thebemed as a suitable merger partner and as has already been mentioned, they

entered into a MOU in terms of which they agreed to merge. Clause 1 of the MOU records the following:

'Thebe and Suremed are registered medical schemes whose Boards of Trustees have agreed to a merger of the two schemes *subject to approval by*:

- a. The respective members of each scheme
- b. The Council for Medical Schemes

This document seeks to capture the key principles and procedures already agreed to which will form the basis of a formal agreement to be entered into by the parties.' (Emphasis added.)

[3] Suremed and Thebemed jointly prepared an 'exposition' setting out the proposed amalgamation for submission to the Registrar in terms of s 63(2) of the Act. Thebemed and Suremed's boards approved the exposition on 26 and 28 June 2010, respectively. The exposition was lodged with the Registrar on 1 July 2010. The Registrar gave notice on 3 August 2010 that the exposition would be open for public inspection at the office of the Registrar and the registered offices of both schemes from 4 August 2010. The Registrar gave interested parties until 14 September 2010 to comment on the exposition. Suremed and Thebemed caused similar notices to be published in the media on 8 August 2010 and in the Government Gazette on 27 August 2010.

[4] In accordance with the terms of the MOU, the two funds conducted a poll of their respective members regarding the merger. Thebemed's members voted in favour of the merger while the majority of Suremed's members voted against it. On 22 September 2010, Suremed advised the Registrar that its members had not approved the merger and asked the Registrar to withdraw the exposition. The Registrar nevertheless confirmed the exposition on 29 September 2010. Suremed appealed against the Registrar's decision to the Medical Schemes Appeal Board, which dismissed the appeal. Suremed took the decisions of the Registrar and the Appeal Board on review to the North Gauteng High Court, Pretoria (Prinsloo J) which upheld the review and set aside the decisions of the Registrar and the

Appeal Board. This is an appeal against the judgment of the high court, with the leave of that court.

[5] The high court held that it was not competent for the Registrar to confirm the exposition because the parties' merger agreement was rendered void when Suremed's members voted against the merger. The high court further held that the Registrar did not have the power to confirm an exposition which was not underpinned by a valid and binding agreement. On appeal, the appellants contended that the purpose of s 63 was to create a mechanism to give statutory force to an exposition – a mechanism not dependent upon an agreement to merge or transfer of a business to or from a medical scheme. It was argued that the lodging of an exposition triggers a process conducted under the control of the Registrar and in terms of the Act. The procedure initiated by the submission of an exposition, so the argument went, takes the process out of the realm of contract between the parties and locates it in the statutory and regulatory arena, and the Registrar must consider whether the proposed amalgamation or transfer of business meets the requirements of the section. On the interpretation of s 63 contended for by the appellants, the Registrar does have the power to confirm an exposition even if it is not underpinned by a binding agreement to merge. According to this interpretation, the exposition becomes binding on the parties independently of any underlying agreement and immediately after confirmation by the Registrar.

[6] The determination of the issue in this matter lies in the interpretation of s 63. This section provides the statutory framework for amalgamations and transfer of businesses to or from medical schemes and gives the Registrar regulatory powers in respect of such transactions. In terms of s 63(1) such transactions shall not be of any force and effect unless carried out in accordance with the provisions of s 63. Section 63(1) provides that:

'No transaction involving the amalgamation of the business of a medical scheme with any business of any other person (irrespective of whether that other person is or is not a

medical scheme) or the transfer of any business from a medical scheme to any other medical scheme or the transfer of any business from any other person to a medical scheme, shall be of any force, unless such amalgamation or transfer is carried out in accordance with the provisions of this section. (Emphasis added.)

[7] In terms of s 63(2) the medical schemes concerned are required to submit 'a copy of the exposition of the proposed transaction' to the Registrar. The meaning of the words 'exposition' and 'transaction' have not been defined in the Act. The dictionary meaning of 'exposition', according to the *Collins Dictionary* (10 ed) is,

'a systematic, usually written statement about, commentary on, or explanation of a specific subject. The act of expounding or setting forth information or a view point.'

In the *Oxford English Dictionary* (2 ed) 'exposition' is explained, as, inter alia,

'The action or process of setting forth, declaring, or describing, either in speech or writing. A statement in which any matter is set forth in detail. The action of expounding or explaining; interpretation, explanation.'

According to *Black's Law Dictionary* (9 ed), the meaning of 'transaction' is recorded as:

'The act or an instance of conducting business or other dealings; esp. the formation, performance, or discharge of a contract. Something performed or carried out; a business agreement or exchange. Any activity involving two or more persons. An agreement that is intended by the parties to prevent or end a dispute and in which they make reciprocal concessions.'

[8] The inclusion of the word *transaction* in the section clearly indicates that there must be agreement between the parties concerned, before the process created by s 63 can be set in motion. Section 63(3) contains references to the 'proposed transaction'. The further subsections, namely, 63(5), (6), (7), (13) and (14) also refer to the 'proposed transaction'. The proposed transaction is, in my view, the underlying agreement between the parties and governs the terms of the amalgamation or transfer contemplated in the section. The submission that there

can be an amalgamation or transfer without an underlying transaction is without merit. Further support for this view is to be found in s 63(16) which provides that:

'A *transaction* in terms of this section shall not deprive any creditor of a party thereto, other than in his or her capacity as a member or a shareholder of such party of any right or remedy which he or she had immediately prior to the date of the *transaction* against any party to the transaction or against any member or shareholder or officer of such party.' (Emphasis added.)

The scheme created by s 63 clearly envisages a 'transaction' between the parties concerned relating to their amalgamation.

[9] Having regard to its ordinary dictionary meaning, an exposition, as used in the section, is intended to explain and comment on the underlying transaction. Without an underlying transaction there would be nothing to explain or deliver comment on. The parties must, in the exposition, explain the terms upon which they have agreed. The exposition may contain more detail than the transaction itself. This becomes clear when regard is had to the further requirement in s 63(2) that the exposition must be accompanied by every actuarial or other statement taken into account for the purpose of the transaction and particulars of 'the voting at any meeting of its members at which the proposed transaction was considered'.¹ If the voting of members of the medical scheme(s) is a precondition for the validity of the proposed transaction, then details of such voting should ideally be submitted with the exposition. At the very latest, details of the voting should be provided to the Registrar before the latter considers the exposition and makes a decision in respect thereof.

[10] By letter dated 22 September 2010, the Registrar was advised that the members of Suremed had voted overwhelmingly against the merger. Suremed

¹Section 63(2) reads:

'The medical scheme contemplated in subsection (1) shall deposit with the Registrar a copy of the exposition of the proposed transaction, including a copy of every actuarial or other statement taken into account for the purpose of the proposed transaction, and shall furnish the Registrar with particulars of the voting at any meeting of its members at which the proposed transaction was considered and with such additional information as the Registrar may require.'

requested the withdrawal of the exposition, alternatively that 'the Registrar declines to confirm the exposition on the basis that there is no agreement between Thebemed and Suremed to merge as the Suremed members failed to approve such proposed merger'. The Registrar declined to withdraw the exposition and in a letter to Suremed dated 28 September 2010 wrote that,

'1. Rule 31.3 requires that 50% of [Suremed's] members return their ballots voting in favour of the amalgamation before it can be concluded in terms of Section 63 of the Act. Furthermore, [Suremed's] rules do not provide for the Registrar to ratify a lesser percentage of votes received where the scheme could not attain the required percentage. As the number that voted on the proposed merger is less than 50% of the number of members of the scheme hence the requirements of rule 31.3 have not been met.

....

Notwithstanding the above issues, the position of this office is that an amalgamation is a legal process which is guided by section 63 of the Act. The Suremed board has signed the exposition document and resolved to merge with Thebemed Medical Scheme and is therefore not in the position to withdraw from the process.'

[11] The Registrar confirmed the exposition on 29 September 2010. The Registrar was thus aware, prior to confirming the exposition that the proposed transaction was in conflict with Suremed's rules and that the members had voted against it. It was also clear that the trustees of Suremed had no authority to conclude the merger agreement. It was argued, on behalf of the appellants, that the Registrar could, in terms of s 63(11), confirm an exposition even if the proposed transaction was in conflict with the rules of the scheme concerned. There is no merit in this submission and this will be dealt with later in this judgment.

[12] The Registrar may also request that a medical scheme provide him with a report on the proposed transaction by an expert nominated by the Registrar.² The exposition and the expert's report, if any, must lie open for inspection at the registered offices of the parties involved in the transaction and at the Registrar's

² Section 63(3)(a).

office for at least 21 days.³ It was contended, on behalf of the appellants, that once a party has knowledge of the exposition and willingly participates in the process provided for in s 63, and in particular allows the exposition to lie open for inspection, it was not possible for such party to contend that it has not consented to the proposed transaction, as the process was then under the control of the Registrar. There is also no merit in this submission. It is absurd to suggest that a transaction can be foisted upon a party in circumstances where such party has not agreed to a merger or transfer of business, but merely because such party has, in some way, participated in the process created by s 63. As has already been pointed out, a transaction is an agreement based on consensus between the parties. It must also be borne in mind that medical schemes are voluntary associations and s 63 must be interpreted in the context of freedom of association and the right of members to control the destiny of their association.

[13] The Registrar may also require a medical scheme to forward the exposition and the expert's report, if any, to its members and creditors⁴ and to give notice of the proposed transaction by publication in the Government Gazette and in any such newspaper(s) as the Registrar may direct.⁵ After the exposition and the expert's report has lain open for inspection, interested parties have 21 days to make representations to the Registrar on the proposed transaction.⁶

[14] Subsections 63(6) to (10) sets out the powers of the Registrar in relation to confirmation of the exposition. The Registrar may confirm the exposition.⁷ He may suggest that the parties modify the exposition before he confirms it.⁸ He may decline to confirm the exposition.⁹ The Registrar may only confirm the exposition if he is satisfied that the transaction would not be detrimental to the interests of the majority of the beneficiaries of the medical scheme(s) concerned and that the

³ Section 63(4).

⁴ Section 63(3)(b).

⁵ Section 63(3)(c).

⁶ Section 63(5).

⁷ Section 63(6)(a).

⁸ Section 63(6)(b).

⁹ Section 63(6)(c).

medical scheme(s) remaining after the transaction, will remain in or attain a sound financial condition.¹⁰

[15] The consequences that flow from confirmation of the exposition are dealt with in subsections 63(11) and (13) to (17). Section 63(11) reads as follows:

‘Any exposition confirmed by the Registrar or the Council in accordance with this section shall be binding on all parties concerned, and shall have effect notwithstanding any conflicting provision contained in the rules of any medical scheme concerned, in the memorandum or other document under which any other party to the transaction is constituted or in the articles of association or other rules of such party.’

Confirmation gives immediate legal effect to the exposition and makes it binding on the parties to the transaction, despite any provision to the contrary in the rules of the medical scheme(s) or other instruments of any of the parties. Confirmation of the exposition immediately brings about the transfer of the assets and liabilities envisaged in the exposition in terms of subsections 63(14), (15) and (17).

[16] Relying on the provisions of s 63(11), it was argued, on behalf of the appellants, that once the exposition has been confirmed by the Registrar, it was not open to a party to contend that the transaction underpinning the exposition was not valid. It was further argued that the exposition becomes the primary instrument in accordance with which the transaction takes effect and is implemented. To find otherwise, so the argument went, would defeat the object of the section because then the Registrar would be called upon to regulate a transaction that may not have been disclosed to him.

[17] This argument is misplaced. Section 63(11) does not authorise a medical scheme to enter into a transaction that is in conflict with its rules. This subsection does not deal with the requirements of an exposition but rather with the situation between the parties post amalgamation or transfer and after the exposition has been confirmed by the Registrar. The process itself, however, begins with and is

¹⁰ Section 63(7).

dependant on a binding transaction. There cannot be an amalgamation or transfer without a valid transaction. The transaction is not valid if, for example, it is in conflict with the rules of the scheme concerned or with legislation. The transaction between the parties is explained in the exposition. Section 63(11) says no more than that the *confirmed* exposition shall be binding despite any conflict there may be between the exposition and the rules of the scheme or its memorandum. Section 63(11) does not, as I have said, authorise the medical scheme or its board, to enter into a transaction that is in conflict with or not sanctioned by its rules.

[18] The purpose of s 63 is to regulate transactions between parties relating to amalgamations or transfer of businesses to or from medical schemes. This section gives the Registrar a supervisory role and as has already been mentioned above, he has to be satisfied that such transactions will not be detrimental to the interests of the majority of the beneficiaries of the medical scheme(s) concerned and that the medical scheme(s) remaining after the transaction, will remain in or attain a sound financial condition. The first step in the process is a valid transaction between the parties of the kind envisaged in s 63. In order for such a transaction to be performed or be of any force or effect, the provisions of s 63 have to be complied with. Compliance with the section, entails, inter alia, the filing of a document, referred to as an exposition, explaining in detail the terms of the transaction. The contention by the appellants that there can be an exposition without a valid underlying agreement between the parties, cannot be sustained. The section does not obviate the necessity of an agreement between the parties.

[19] The appeal is dismissed with costs, including those of two counsel.

L V THERON
JUDGE OF APPEAL

Appearances:

1ST Appellant:

W Trengove SC (with F Ismail)

Instructed by: Eversheds, Sandton

Symington & De Kok, Bloemfontein

2ND Appellant:

L J Morison SC (with P Strathern)

Instructed by: Brian Khan Inc, Johannesburg

Claude Reid Inc Bloemfontein

Respondent:

M S M Brassey SC (with K Hopkins and
D Van Zyl)

Instructed by: Webber Wentzel Attorneys,
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McIntyre & Van Der Post, Bloemfontein