THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 814/2015

In the matter between:

BONITAS MEDICAL FUND **APPELLANT**

and

THE COUNCIL FOR MEDICAL SCHEMES **FIRST RESPONDENT**

THE REGISTRAR OF MEDICAL SCHEMES **SECOND RESPONDENT**

Neutral citation: *Bonitas Medical Fund v The Council for Medical Schemes* (814/2015) [2016] ZASCA 154 (3 October 2016)

Coram: Mpati AP, Bosielo, Petse, Swain and Van der Merwe JJA

Heard: 5 September 2016

Delivered: 3 October 2016

Summary: Interpretation of statute ─ a decision to order an inspection in terms of s 44(4)*(a)* of the Medical Schemes Act 131 of 1998 is not appealable under s 49(1) ─ Costs ─ no genuine and substantive constitutional issue raised ─ Cross-appeal in respect of costs allowed.

ORDER

On appeal from Gauteng Division of the High Court, Pretoria (Tuchten J sitting as court of first instance):

1 The appeal is dismissed with costs.

2 The cross-appeal is upheld with costs and paragraph 2 of the order of the court a quo is set aside and replaced with the following:

'The respondent is directed to pay the costs of the application.'

JUDGMENT

Van der Merwe JA (Mpati AP, Bosielo, Petse and Swain JJA concurring):

[1] The appellant in this appeal, Bonitas Medical Fund (the scheme), is a medical scheme registered under Chapter 4 of the Medical Schemes Act 131 of 1998 (the MSA). The first respondent is the Council for Medical Schemes (the council), a juristic person established in terms of s 3 of the MSA. The second respondent is the Registrar of Medical Schemes (the registrar), appointed in terms of s 18(1) of the MSA. The registrar is the executive officer of the council and manages its affairs.

[2] Section 44 of the MSA deals with inspections and reports. Subsection 44(4) provides as follows:

'(4) The Registrar may order an inspection in terms of this section–

(a) if he or she is of the opinion that such an inspection will provide evidence of any irregularity or of non-compliance with this Act by any person; or

(b) for purposes of routine monitoring of compliance with this Act by a medical scheme or any other person.'

Section 49(1) of the MSA states:

'Any person who is aggrieved by any decision of the Registrar under a power conferred or a duty imposed upon him or her by or under this Act, excluding a decision that has been made with the concurrence of the Council, may within 30 days

after the date on which such decision was given, appeal against such decision to the Council and the Council may make such order on the appeal as it may deem just.'
The central issue in the appeal is whether a decision of the registrar to order an inspection in terms of s 44(4)*(a)*, is appealable in terms of s 49(1).

[3] The issue arose in the following manner. On 10 November 2014 the registrar appointed Mr Cornelius Jacobus Potgieter as an inspector, and ordered him to inspect the affairs of the scheme as well as of specified institutions associated with the scheme. The certificate of appointment stated that the inspector was appointed in terms of s 44(4)*(a)* of the MSA and s 2 of the Inspection of Financial Institutions Act 80 of 1998 (the FIA). The inspector was principally directed to investigate whether or not irregularities occurred or existed in respect of: (a) the election of the board of trustees of the scheme; (b) the commercial relationship between officers of the scheme and service providers contracted to the scheme; and (c) increases in the non-healthcare expenditure, marketing expenditure and managed care expenditure of the scheme.

[4] On 24 December 2014 the scheme delivered a notice of appeal to the registrar. In terms of the notice, the scheme lodged an appeal to the council against the decision to order the inspection. However, on 26 February 2015, the council resolved that the registrar's decision to order the inspection was not appealable in terms of s 49(1).

[5] As the scheme insisted that the decision to order the inspection was appealable, a dispute arose between the parties. The council and the registrar approached the Gauteng Division, Pretoria for declaratory relief aimed at resolving the dispute. They sought an order declaring that the registrar's decision of 10 November 2014, to order an inspection into the affairs of the scheme in terms of s 44(4)*(a)* of the MSA, is not a decision that is appealable in terms of the provisions of s 49(1) of the MSA. The scheme opposed the application but did not file answering affidavits. The court a quo (Tuchten J) granted the declarator but made no order as to costs. It granted leave to the scheme to appeal to this court against the declaratory order. The court a quo

also granted leave to the council and the registrar to cross-appeal in respect of costs.

[6] It is necessary, therefore, to determine the meaning of the word 'decision' in s 49(1) of the MSA. As is the case with almost any word, the word 'decision' is capable of more than one meaning. In the present matter the word may mean a decision of a dispute or issue in the sense of the determination thereof or simply a decision to do something, ie the making up of one's mind. It is not necessary to quote authority for the principle that the meaning of the word must be determined in the context in which it is used. The context includes the apparent scope and purpose of the MSA.

[7] Medical schemes are of great public importance. They receive and control vast amounts in members' contributions. The scheme, for instance, has approximately 297 000 members and more than 650 000 beneficiaries. It receives contributions from members in excess of R10,2 billion per year.

[8] The MSA provides for the regulation of medical schemes in the public interest. Its long title indicates that its objects include the control of certain activities of medical schemes and the protection of members' interests. Section 7 of the MSA deals with the functions of the council. Section 7*(a)* states that it is a function of the council to protect the interests of the beneficiaries of medical schemes 'at all times'.

[9] The power in terms of s 44(4)*(a)* is intended to promote these objects. The power is no doubt intended to be an effective regulatory mechanism. For it to be effective, the registrar ought to be able to act in terms of s 44(4)*(a)* with expedition and without notice. A medical scheme or person suspected of irregularities or non-compliance with the Act, should, in the public interest, not be provided with the opportunity to hide or destroy evidence. Without the element of surprise, the effectiveness of the power will in many instances be lost or severely undermined. I agree with counsel for the respondents that the right of medical schemes to privacy should, in the light of these considerations, be attenuated.

[10] In terms of s 49(2) of the MSA, the operation of a decision which is the subject of an appeal under s 49(1), is suspended pending the decision of the council on the appeal. And in terms of s 50(3), a person aggrieved by a decision of the registrar acting with the concurrence of the council or by a decision of the council, may within 60 days after the date on which such decision was given, appeal to the appeal board established by s 50(1). Thus, if a decision to order an inspection in terms of s 44(4)*(a)* were to be subject to an appeal, the inspection could be effectively stymied by simply noting an appeal. This would be subversive of the intended effective intervention and militates strongly against the interpretation contended for by the scheme.

[11] Before us, counsel for the scheme recognised the need for urgent investigation and the element of surprise. He argued, however, that that could be achieved by expedition of an appeal to the council or by taking the decision to order an inspection with the concurrence of the council. There is no provision in the MSA for the suspension of the operation of a decision of the council pending an appeal to the appeal board. But both of these proposals require that a meeting of the council be convened. This is hardly practical. In terms of s 4(1) of the MSA, the council shall consist of up to 15 members appointed by the Minister of Health. In making the appointments, the Minister is enjoined to inter alia take into account expertise in law, accounting, medicine, actuarial sciences, economics and consumer affairs. It can therefore safely be accepted that the members of the council are mostly not available on a fulltime basis. This is underscored by the provisions of s 10 of the MSA. In terms of s 10(1), the council shall hold at least four ordinary meetings per year. Section 10(2) provides:

‘Special meetings of the Council may be convened by the chairperson or at the written request of the majority of the members setting forth clearly the purpose for which the meeting is to be held.’

[12] As I have pointed out (para 2 above), the registrar may also order routine inspections in terms of s 44(4)*(b)*. On the argument of the scheme, a decision to order such routine inspection would also be appealable in terms of

s 49(1). This is an absurd result that could not have been intended by the Legislature.

[13] In addition, ss 44(2) and (3) provide:

'(2) The Registrar, or such other person authorised by him or her, shall in addition to the powers and duties conferred or imposed upon him or her by this Act, have all the powers and duties conferred or imposed upon an inspector appointed under section 2 of the Inspection of Financial Institutions Act, 1984 (Act 38 of 1984), as if he or she has been appointed an inspector under that Act.

(3) Any reference in this Act to an inspection made under this section shall also be construed as a reference to an inspection made under the Inspection of Financial Institutions Act, 1984.'

The Inspection of Financial Institutions Act 38 of 1984 was repealed by the FIA with effect from 28 October 1998. The parties accepted that the reference to Act 38 of 1984 should be read as a reference to the FIA. Section 2 of the FIA provides for the appointment of an inspector to carry out an inspection of the affairs of a financial institution. In terms of ss 4 and 5 of the FIA, such inspector is clothed with very wide powers. The FIA does not provide for an appeal against the appointment of an inspector. The argument of the scheme would thus lead to the anomalous result that a decision to order an inspection in terms of s 44(4) would be appealable, but not a decision to appoint an inspector in terms of s 2 of the FIA.

[14] An inspection in terms of s 44(4)*(a)* is purely investigative. The inspector merely gathers evidence. The inspection does not determine or affect any rights. It follows that there is no need to provide for the protection of substantive rights by way of an appeal against a decision to order an inspection in terms of s 44(4)*(a)*. This may, for instance, be contrasted with the powers of the registrar under s 33(4) (withdrawal of approval of a benefit option of a medical scheme), s 33(5) and s 44(11) (amendment of the rules of a medical scheme) or s 38 (rejecting of the annual financial statements of a medical scheme).

[15] There is no material difference between the nature of an inspection in terms of s 44(4)*(a)* of the MSA and that of the investigation of a complaint by the Competition Commission in terms of the Competition Act 89 of 1998. Such investigation may culminate in a referral of the matter to the Competition Tribunal. In *Competition Commission of SA v Telkom SA Ltd & another* [2010] 2 All SA 433 (SCA) para 11, this court held that a decision to refer a matter to the Competition Tribunal and the referral itself, are of an investigative and not an administrative nature and are not subject to review under the Promotion of Administrative Justice Act 3 of 2000. In my judgment the same applies to s 44(4)*(a)* of the MSA. Nevertheless, a decision to order an inspection in terms of the MSA, would be subject to review under the rule of law, on the ground that it was arbitrary or irrational (*Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 85) or offended against the principle of legality (*Telkom* (above) para 12 and *Competition Commission v Computicket (Pty) Ltd* [2014] ZASCA 185 paras 18 and 22).

[16] The English text of the MSA was signed by the President. Our courts have over many years referred to the unsigned text of a statute to elucidate an ambiguity in the signed text. (See, for instance, *Commissioner for Inland Revenue v Witwatersrand Association of Racing Clubs* 1960 (3) SA 291 (A) at 302A-B.) The rule remains applicable in the constitutional era. In *Du Plessis & others v De Klerk & another* 1996 (3) SA 850 (CC) para 44, Kentridge AJ dealt with the words 'all law in force' in s 7(2) of the Constitution of the Republic of South Africa Act 200 of 1993. He said that these words may have some ambiguity, but that any ambiguity was removed by the Afrikaans version of the section that read 'alle reg wat van krag is'. He added that the English version would prevail in case of a conflict between the two versions but proceeded to say:

'But where there is no conflict between them, there is another well-established rule of interpretation: if one text is ambiguous, and if the ambiguity can be resolved by the reference to unambiguous words in the other text, the latter unambiguous meaning should be adopted. There is no reason why this common-sense rule should not be

applied to the interpretation of the Constitution. Both texts must be taken to represent the intention of Parliament.'

[17] In the Afrikaans text of s 49(1) of the MSA, the word 'beslissing' is used for 'decision'. The word 'beslissing', as opposed to the word 'besluit', generally denotes the determination of a dispute or issue. The Afrikaans text therefore provides a further indication that the word 'decision' in s 49(1) should bear the meaning of the decision of a dispute or issue.

[18] To summarise, the purpose of the MSA, the context of s 44(4) read with s 49(1), the nature of an inspection in terms of s 44(4)*(a)* and the Afrikaans version of s 49(1) lead me to the firm conclusion that the interpretation favoured by the court a quo is correct.

[19] A decision to order an inspection in terms of s 44(4)*(a)* is clearly not a decision envisaged in s 49(1). It follows that the appeal must fail.

[20] I now turn to the cross-appeal. The court a quo declined to make an order as to costs, primarily upon application of the principles set out in *Biowatch Trust v Registrar, Genetic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC). It was submitted on behalf of the respondents that these principles did not find application in this matter. Counsel submitted that the application of the principles in *Biowatch* constituted a misdirection that entitled this court to interfere with the exercise of the discretion of the court a quo in respect of costs.

[21] Counsel for the scheme referred to what was said in *Justice Alliance of South Africa v Minister for Safety and Security & others* [2013] ZACC 12; 2013 (7) BCLR 785 (CC) para 10, namely:

'The Minister contends that because there was no challenge to the constitutional validity of any of the provisions of the Act, no constitutional issue in the *Biowatch* sense was raised. That is not, without more, a proper basis for finding that no constitutional issue was raised. The attack on the validity of the guidelines as being *ultra vires* s 137 of the Act is based on the principle of legality. Legality is decidedly a

constitutional issue. The interpretation of the provisions of the Act in order to decide whether the guidelines fell within their ambit is also a constitutional issue because statutory interpretation must be done in accordance with the dictates of the Constitution. In addition it is clear that the original order forcing the Minister for Police to promulgate guidelines was founded on his failure to comply with the provisions of the Constitution.' (Footnotes omitted.)

[22] As I understood it, the argument was that the mere fact that the interpretation of a statutory provision is at stake, means that a constitutional issue is raised. I am unable to agree. The principles in respect of costs set out in *Biowatch* apply 'where matters of genuine constitutional import arise' (para 24). In para 25 of *Biowatch* it was stated:

'Merely labelling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule as referred to in *Affordable Medicines* [2006 (3) SA 247 (CC); {2005] ZACC 3]. The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication.'

[23] Paragraph 10 of *Justice Alliance* must of course be read in context. There the applicant sought leave to appeal against an adverse costs order. The court stated that the central issue was whether a genuine and substantive constitutional issue was at stake. In paras 12 and 13, the court pointed out that in order to ascertain whether the interpretation of a statute raised a genuine constitutional issue, it has to be considered whether it was alleged that any specifically articulated right under the Bill of Rights would be adversely affected by the interpretation of the statute. What has to be weighed is whether the interpretation of the statute held an adverse effect on an underlying fundamental right. In the final analysis, the court refused leave to appeal on the ground that the applicant did not seek to vindicate any fundamental right in the litigation.

[24] The case of the scheme was about the avoidance of the inspection of its affairs by relying on an interpretation of the statute per se. It did not assert a right under the Constitution nor did it seek to vindicate any fundamental

right. In the result, I am persuaded that the costs in the court a quo should have followed the result.

[25] Accordingly, the following order is made:

1 The appeal is dismissed with costs.

2 The cross-appeal is upheld with costs and paragraph 2 of the order of the court a quo is set aside and replaced with the following:

‘The respondent is directed to pay the costs of the application.’

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C H G van der Merwe
Judge of Appeal

APPEARANCES:

For Appellant:	E Labuschagne SC (with him J W Schabort) Instructed by: Gildenhuys Malatji Inc, Pretoria Honey Attorneys Inc, Bloemfontein
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