REPORTABLE
Case No: 651/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

NATIONAL POLICE SERVICE UNION **1st Appellant**
O Y ZAMA
2nd Appellant
S G MDLULI
3rd Appellant

and

THE MINISTER OF SAFETY AND SECURITY
1st Respondent

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE
2nd

Respondent
THE PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE FOR KWAZULU-NATAL
3rd Respondent

BONITAS MEDICAL FUND
4th Respondent

CORAM: **SMALBERGER, MARAIS, OLIVIER JJA, MELUNSKY and FARLAM AJJA**

DATE OF HEARING: **28 FEBRUARY 2000**

<u>DELIVERY DATE</u>: 29 MARCH 2000
Police Service - Rationalisation scheme providing for transfer of members to fixed establishment - promulgation not required - whether membership of Police Medical Scheme compulsory.

JUDGMENT

. . . SMALBERGER JA

SMALBERGER JA:

[1] Immediately prior to the coming into operation of the Constitution of the Republic of South Africa Act 200 of 1993 ("the Interim Constitution") the second and third appellants were members of the KwaZulu Police Force. Their conditions of service allowed them to be members of the fourth respondent ("Bonitas"), a registered medical scheme. In terms of KwaZulu Cabinet Resolution 138/93 they were entitled to a 100% subsidisation of their monthly medical aid contributions to Bonitas. This appeal primarily concerns their right (and the rights of others similarly placed, who are members of the first appellant) to continue to be members of Bonitas and to have their contributions paid in full by the State. I shall refer to those whose rights are in issue collectively as "the appellants", save where

the context indicates otherwise.

[2] Section 214 of the Interim Constitution provided for the establishment of a South African Police Service ("the Service"). In terms of section 236(7)(a) the South African Police and "all other police forces established by law" were deemed, at the commencement of the Interim Constitution, to constitute the Service. Such "other police forces" included those of KwaZulu and the other formerly independent or self-governing territories. The various police forces were to continue to function as such in accordance with the laws applicable to them until rationalised (section 236(1)). Such rationalisation was to take place as soon as possible after the commencement of the Interim Constitution (section 237(1)(a)). Section 237(3)(a) provided that:

> "The President may . . . by proclamation in the *Gazette* take such steps as he or she considers necessary in order to achieve the aim mentioned in subsection (1)."

[3] Pending rationalisation of the various police forces, the terms and conditions of employment applicable to any person employed by them were to "continue to apply to him or her until amended by or under any law, including any law enacted in order to establish uniformity of the terms and conditions of employment in accordance with those generally prevailing at such commencement" (section 236(4)). "Any law" would include a proclamation by the President in terms of section 237(3)(a).

[4] The South African Police Service Rationalisation Proclamation, 1995 published in Government Gazette 16239 of 27 January 1995 ("the Proclamation"), was issued by the President under the powers vested in him by section 237(3)(a). It provided for the rationalisation of the Service. The provisions of section 236(4) of the Interim Constitution were mirrored in those of section 12(2)(b) of the Proclamation which provides, to the extent relevant, that:

> "any person employed immediately before the commencement of this Proclamation by a force . . . shall, . . . continue in such employment (which is referred to hereinafter as employment in a pre-rationalised post) until he or she is dealt with in terms of this Proclamation, and— (i) the terms and conditions of service and accrued benefits;

(ii) . . .
(iii) . . .
applicable to him or her immediately before such commencement shall continue to apply to him or her subject to any alteration thereof in terms of this Proclamation;"

[5] Section 12(2)(e) goes on to prescribe what the consequences are to be of the appointment of someone to the "fixed establishment" which by definition (section 1) means "the posts which have been created for the normal and regular requirements of the Service but does not include pre-rationalised posts". The relevant portion reads:

"[A]ny appointment in the fixed establishment of the Service shall be effected in terms of the provisions of the Police Act [7 of 1958] and regulations thereunder as applicable on the day before the commencement of this Proclamation . . . with respect to -
(i) . . .
(ii) . . .
(iii) terms and conditions of service;
(iv) . . .
(v) . . .
subject to any alteration, replacement or amendment of such provisions in terms of or by virtue of the provisions of this Proclamation."

[6] Section 12(2)(g) of the Proclamation preserves certain rights of persons employed in a pre-rationalised post in the Service on the day before his or her appointment in a post in the fixed establishment.

The list of preserved rights makes it clear that the obligatory preservation of such rights is not all-encompassing but is limited to those specifically mentioned. It is common cause that they do not include or relate to medical benefits.

[7] The Minister of Safety and Security was given the task of implementing the rationalisation process. In this respect section 14(1) and (6) of the Proclamation provides:

> "(1) The Minister shall determine a scheme for the rationalisation, reorganisation and consolidation of the Service at national and provincial level as contemplated in section 237 of the Constitution.
>
> . . . .
>
> (6) Prior to the implementation of such a scheme the Minister shall inform the members, who may be affected by such rationalisation scheme, of the contents thereof."

[8] The South African Police Service Act 68 of 1995 came into effect on 15 October 1995. It repealed the Proclamation save for certain sections. Included amongst the latter were sections 12(2)(a) to (j) and 14 which continued to remain operative. The provisions of that Act do not have a bearing on the issues in the appeal.

[9] The Minister, acting in terms of section 14(1) of the Proclamation, determined a number of schemes relating to the rationalisation process. Of these the Fifth Rationalisation Scheme

("the Fifth Scheme"), which came into effect on 10 February 1997, provided (in paragraph 4) for the *en masse* transfer of members serving in pre-rationalised posts (including the appellants) to the fixed establishment. By this route the appellants were finally assimilated into the Service.

[10] Once the appellants were appointed in the fixed establishment they became subject to the provisions of section 12(2)(e) of the Proclamation. This resulted in their appointments being effected in terms of the Police Act and the regulations thereunder in respect of, *inter alia*, their terms and conditions of service. These included their medical benefits. Whereas up to then they had retained their conditions of service, including their medical benefits, that were applicable immediately before the commencement of the Interim Constitution, the situation now changed. Their medical benefits were in future to be governed by the relevant regulations under the Police Act. The effect of their appointment was that, by operation of law, there was substituted for the medical benefits they (and others) had previously received, those to which members of the erstwhile South African Police Force ("the Force") were entitled in terms of the Police Act and regulations, to the extent that the latter excluded the former.

[11] This result harmonises with section 236(4) of the Interim Constitution which envisages the establishment of "uniformity of the terms and conditions of employment in accordance with those generally prevailing" at the commencement of the Interim Constitution. At that time the members of the Force substantially outnumbered those of the other Police forces, and the medical benefits

"generally prevailing" were those to which they (the members of the Force) were entitled in terms of the applicable regulations.

[12] Under Government Notice R203 of 14 February 1964 Regulations for the Force were promulgated in terms of the Police Act. Regulation 30 provided for medical treatment of members at public expense. Government Notice R685 of 31 March 1981 caused a new regulation 30 (which is still current) to be substituted for the original one. It established the South African Police Medical Scheme ("Polmed") which was to provide medical benefits for members and their dependants at public expense. Members were not required to contribute to Polmed but had to pay one-tenth of the cost of medical services provided in accordance with a prescribed tariff. I shall deal with the effect of this regulation later.

[13] After the Fifth Scheme became operative a dispute arose between the appellants, on the one hand, and the first, second and third respondents on the other, with regard to the appellants' continued membership of Bonitas at public expense (the State having up to then continued to subsidise their contributions in full in view of the provisions of section 12(2)(b) of the Proclamation). The three respondents took up the attitude that the appellants were no longer entitled to subsidised membership of Bonitas; to qualify for medical benefits at State expense they would have to become members of Polmed. This was evidenced in letters from the State Attorney, Kwa-Zulu-Natal, to the appellants' attorneys in August 1997, and letters from the second respondent to Medscheme (the administrators of Polmed) and to all Deputy National Commissioners, Provincial Commissioners and other persons in command dated 9 and 15 September 1997 respectively. These letters made it clear that in order to enjoy medical benefits at State expense the appellants would be obliged to become members of Polmed as from 1 November 1997 (certain concessions having been made to them up to then pending resolution of the existing dispute.)

[14] On 31 October 1997 the appellants brought an urgent application against the respondents and Polmed in the Natal Provincial Division in which they sought the following relief:

(a) That the Fifth Scheme "be and is declared to be null and

void and of no force and effect";

(b) That the decision of the first, second and third respondents "that those members of the first applicant [now first appellant] who are members of [Bonitas] shall with effect from 1 November 1997 become members of Polmed, be and is hereby set aside";

(c), (d) and (e) Orders interdicting and restraining the first, second and third respondents from withholding payment to Bonitas of amounts due in respect of subscriptions of the appellants who belonged to Bonitas; directing them to continue to make payment to Bonitas in respect of such membership on the basis set forth in KwaZulu Cabinet Resolution 138/1993; and costs.

[15] The matter came before P C Combrinck J. In essence the respondents contended (as they had done in their answering affidavits):

(a) That the appointment of former members of the KwaZulu Police (including the appellants) in the fixed establishment in terms of the Fifth Scheme automatically and by operation of law rendered them subject to the Police Act and regulations in respect of their conditions

of service.

(b) That this resulted in compulsory Polmed membership, as the relevant regulations under the Police Act provided for compulsory Polmed membership to the exclusion of any other medical scheme.

[16] At the hearing of the application it was common cause between all concerned that compulsory Polmed membership followed upon the appointment of the appellants in the fixed establishment. (Whether this correctly reflects the legal position is a matter which falls to be dealt with later.) The respondents' contentions in para [15](a) above were not specifically dealt with by the learned judge. They were, however, clearly correct - see para [10] above. In the result the only point argued in the application was whether, as stated in the judgment, "the Fifth Rationalisation Scheme was obliged to be implemented by promulgation in the Government Gazette", it being common cause that no such promulgation had taken place. The learned judge held that promulgation was not required for the Fifth Scheme to be of force and effect, and duly dismissed the application with costs. He subsequently granted leave to appeal to this Court. The grounds of appeal relate solely to the issue of promulgation.

[17] Although, as will appear later, this was not the only issue raised

on appeal before us, it will be convenient to deal with it first. It is a requirement of both the common law and statute that subordinate legislation, even if it has been validly enacted, is not of binding force and effect in law until it has been promulgated. The requirement is subject to qualification, as will appear later. The purpose of promulgation is to notify those who will be, or may be, affected by the legislative enactment in question of its import and effect. As stated in *Byers v Chinn and Another* 1928 AD 322 at 330:

> "Published notices in matters affecting the public at large, a considerable portion of it, or a large class of persons, is the only practical way of informing the individuals concerned of their rights and duties."

[18] The statutory requirement for promulgation is to be found in section 16 of the Interpretation Act 33 of 1957 which provides:

> "When any by-law, regulation, rule or order is authorized by any law to be made by the President or a Minister or by the Premier of a province or a member of the Executive Council of a province or by any local authority, public body or person, with the approval of the President or a Minister, or of the Premier of a province or a member of the Executive Council of a province, such by-law, regulation, rule or order shall, *subject to the provisions relative to the force and effect thereof in any law*, be published in the *Gazette*." (My emphasis.)

[19] The common law position appears from the following passage in *Byers v Chinn and Another* (*supra*) at 327 - 8:

> "The learned JUDGE-PRESIDENT laid down the general proposition that: 'Before a law or any regulation or by-law having the force of law can become operative, it must be duly promulgated.' The rule is supported by numerous decisions of the Courts of South Africa besides those quoted by the Local Division and is founded on the common law. See remarks of INNES, C.J., in *Ismail Amod v Pietersburg Municipality* (1904, T.S. at p. 323), and KOTZE, J., in *Rex v Koenig* (1917, C.P.D. 235), said: 'It is not enough that an individual may have knowledge in some other way of the alleged law, regulations or order (*Voet* 1.3.10); there must be promulgation'; but then he adds: '*But this rule may admit of exceptions. Thus, a statute may possibly be so framed as to indicate that, under particular circumstances, or from the very nature of the case, an order, or regulation issued under its authority, need not comply with the necessity of promulgation.' And in addition to this there are nearly always to be found in the enactments giving power to subordinate bodies to make rules, regulations, or by-laws, which are to have the force of law, directions as to procedure, ...*" (My emphasis.)

[20] The rationalisation process was carried out step by step in strict conformity with the requirements of the Interim Constitution and the Proclamation. It is common cause that the latter constituted original legislation. It was the empowering provision in terms of which the Fifth Scheme, the final step in the process, was determined. In terms

of the Scheme pre-rationalised posts became posts in the fixed establishment with the attendant legal consequences foreshadowed in, and envisaged by, the Proclamation. It was an anticipated as well as a logical step in an administrative process which had its origin in a legislative command. The determination and putting into effect of the Scheme constituted, in my view, an administrative directive. The character of the Scheme was not of the kind that would normally call for promulgation. It did not amount to a "by-law, regulation, rule or order" within the purview of section 16 of the Interpretation Act. Section 14(6) of the Proclamation provided for the form of notification the administrative decision underlying the directive was to take - the members who might be affected thereby were to be informed. This was done.

[21] In the result promulgation, in my view, was not called for. The validity of the Fifth Scheme (as opposed to whether it had force and effect) has never been in issue, and the legislative consequences that flow from it are not open to challenge. Questions of non-compliance with the rules of natural justice simply do not arise.

[22] Even if the Fifth Scheme amounted to a legal enactment which would normally require promulgation, there are sufficient indications in the Proclamation to infer an intention that promulgation was

impliedly dispensed with (c*f* section 16 of the Interpretation Act and *Byers v Chinn* (*supra*)). The Scheme related to a limited class of persons (pre-rationalised members of the Service) and did not affect the public in general, or a large percentage or class of the public, requiring that they be given notice. The Scheme primarily conferred a benefit - that of incorporation in the fixed establishment - rather than imposing an obligation. Furthermore, the requirement in section 14(6) of the Proclamation, in express terms, that members who may be affected by a rationalisation scheme were to be informed of its contents, served the very purpose for which promulgation was intended. Being so informed through the available command structures of the Service would also amount to the most effective form of notification to its members. Promulgation would therefore not serve a purpose not already specifically catered for by the Proclamation.

[23] At the hearing of the appeal Mr Maritz, for the appellants, (who had not appeared in the court below) distanced himself from the concession made in that court that regulation 30 rendered membership

of Polmed compulsory for all members of the Service. The concession being one relating to a matter of law or legal interpretation, the appellants were not bound by it. Mr Maritz contended that on a proper construction of regulation 30 membership of Polmed was not obligatory. Consequently the appellants were not precluded from continuing to be members of Bonitas at State expense, in other words, from continuing to enjoy their pre-rationalisation medical benefits.

[24] Section 33(1)(b) *bis* of the Police Act authorised the President (whose powers were later transferred to the Minister) to make regulations in respect of the establishment of a scheme to provide for medical benefits and "the class of members of the Force or other persons who shall be or may become members of such a scheme . . ." The Act therefore envisaged the possibility that not all members of the Force might be required or obliged to become members of the scheme, although it lay within the Minister's power to so require or oblige them. Their position would be governed and determined by the relevant regulations.

[25] Regulation 30 does not, in my view, either expressly or by necessary implication, make membership of Polmed obligatory. Polmed was initially established, *inter alia*, for all serving members of

the Force. They automatically qualified for membership of Polmed. The same holds true for current members of the Service. But while regulation 30 entitles all members of the Service to be members of Polmed, it does not compel such membership or preclude them from joining a medical scheme of their choice. What they cannot do is be a member of both. Section 38 of the Medical Schemes Act 72 of 1967 (since repealed and replaced by section 28 of the Medical Schemes Act 131 of 1998) prevents the simultaneous membership of more than one medical scheme.

[26] While membership of Polmed is not obligatory, it remains the only scheme providing medical benefits to members of the Service at public expense. Although the appellants are entitled to belong to Bonitas, forsaking the Polmed benefits, they cannot do so at State expense. This is because regulation 30, by providing, at State expense, for a specific, non-contributory medical scheme (Polmed), must in my view be construed (in the absence of any contrary regulatory provision) as having excluded, by necessary implication, not the option of membership of another medical scheme, but the option of membership of such scheme at State expense. The choice in terms of regulation 30 therefore lies between membership of Polmed at no cost to a member, or membership of a medical scheme at his or her own expense.

[27] It is unnecessary to consider whether the appellants, as members of the Service, are, by virtue of para 5.2 of Chapter D.(ix), Part 1,of the Public Service Staff Code published in terms of the

Public Service Act, 1994 (Proclamation 103 of 1994), entitled to a two-thirds subsidized membership of a medical scheme of their choice (including Bonitas), subject to the prescribed maximum amount. They never sought to make out such a case in the court below. Nor have they sought to do so subsequently. In fact, reliance thereon was specifically disavowed in the appellants' supplementary submissions where it was stated that it is "not the appellants' case that they are entitled to the medical aid membership contribution by the employer as provided for in terms of the Public Service Staff Code".

[28] The relief sought by the appellants referred to in para [14](b) above was partly premised on the respondents' attitude that they were obliged to become members of Polmed. But, as this judgment holds, they are entitled but not obliged to become members. However, the true issue underlying such relief was whether they were entitled to a 100% State subsidised membership of Bonitas. In this they have failed. Within that context they are not entitled to the relief sought by them in the above, or any other respects.

[29] In the result the appeal is dismissed with costs.

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J W SMALBERGER

JUDGE OF APPEAL

MARAIS JA)concur
OLIVIER JA)
MELUNSKY AJA)
FARLAM AJA)