THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 901/2010

In the matter between:

JOHANNES ZACHARIAS HUMAN MULLER N.O.	**First Appellant**
RALPH FARREL LUTCHMAN N.O.	**Second Appellant**
and	
COMMUNITY MEDICAL AID SCHEME	**Respondent**

Neutral citation: ***Muller NO & another v Community Medical Aid Scheme*** **(901/2010) [2011] ZASCA 228 (30 November 2011)**

Coram: Heher, Malan and Wallis JJA

Heard: **22 November 2011**

Delivered: **30 November 2011**

Summary: Medical Schemes Act 131 of 1998 – s 63 – liquidation of medical scheme – transfer of members to other medical scheme – confirmation of by Council for Medical Schemes – whether contributions falling into liquidated scheme's estate and if so whether s 63(14) applicable.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Blieden J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

MALAN JA (Heher and Wallis JJA concurring):

[1] This is an appeal against the judgment and order of Blieden J dismissing with costs the application of the appellants for the repayment of monies paid to the respondent from the current account of Humanity Medical Scheme (Humanity). The appeal is with his leave.

[2] The appellants are the joint liquidators of Humanity which was finally wound-up on 26 September 2008, with effect from 23 September 2008, the date of the application for its winding-up. They were appointed on 26 September 2008. On 26 September 2008

two payments of R1 850 000 and R5 272 566,80 were made on the instructions of the administrators of Humanity, Allcare Administrators (Pty) Ltd (Allcare), to the respondent, the Community Medical Aid Scheme (Commed). On 29 September 2008 Allcare caused a further payment of R1 150 000 to be made to Commed. All the payments were made from the account of Humanity after its winding-up. The amount claimed consisted of the amount of contributions made by members of Humanity in respect of their medical aid benefits for September 2008. The question in this case is whether the entitlement to the September contributions paid into its account formed part of Humanity's insolvent estate and, if so, whether it thereafter vested in Commed by operation of law on confirmation, on 3 September 2008, by the Council for Medical Schemes (the Council) of the transfer of the members of Humanity to Commed in terms of s 63 of the Medical Schemes Act 131 of 1998 (the Act).

[3] During August 2008, when it was apparent that Humanity was in dire financial circumstances and insolvent, a meeting was arranged between representatives of Humanity and Commed to discuss the 'migration' of the former's members to the latter. At a subsequent meeting on 25 August it was agreed that the effective date of the cover to be extended by Commed to the former members of Humanity would be 1 September 2008. Since Humanity's members paid their contributions in advance Humanity agreed to pay all contributions it received from its members for cover in the month of September 2008 to Commed. The word 'migration' is not defined in the Act but was referred to by the parties to describe the transfer by members of Humanity of their membership to Commed.

[4] On 22 August 2008 the Council approved Humanity's proposal for the transfer of its members but required that an application for exemption from the provisions of s 63 of the Act be made. Section 63, briefly, deals with the amalgamation of the business of a medical scheme with the business of another person and with the transfer of the

business of a medical scheme to another person. Its provisions must be complied with for the amalgamation or transfer to be of any force (s 63(1)).

[5] On 25 August 2008 Humanity sought exemption from the provisions of s 63 from the Council. On 3 September 2008 the Council approved the application and authorised Humanity to proceed with the transfer of its members. The approval was backdated to 1 September 2008. The members were transferred onto the books of Commed on 5 September 2008 and full coverage was extended to them by Commed with effect from 1 September 2008. Members of Humanity were informed by circular on 3 September 2008 of the transfer but they were requested to notify it if they wished not to have their membership transferred.

[6] Allcare had administered Humanity prior to its winding-up, and was again appointed on 7 November 2011 to assist the liquidators. Commed was concerned that it would not receive the transferred members' contributions for the month of September timously but was assured on 8 September 2008 'that the contributions to Commed will be paid'. Commed was again told on 23 September 2008 'that the matter is being taken care of.' Commed's concern, as expressed in an email message on the previous day, was 'whether once the liquidator is confirmed, will we be able to receive those contributions and not wait for the winding down process?' Allcare, as counsel for the appellant remarked, did not take care and the winding-up application was presented on 23 September 2008 without any payment having been made.

[7] Chapter XIV of the Companies Act 61 of 1973 and, in particular, ss 337 to 426, apply to the winding-up of a medical scheme (s 53(1) of the Act). Humanity is a 'medical scheme' as defined by s 1 of the Act. The effect of a winding-up order is to establish a

concursus creditorum. In *Walker v Syfret NO* 1911 AD 141 at 166 Innes JA explained what is meant by this expression:[1]

'The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtor's rights are vested in the Master or the trustee from the moment insolvency commences. The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.'

Section 361(1) of the Companies Act provides accordingly that in the event of a winding-up by the court 'all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office.' On winding-up the directors of the company cease to function and are deprived of their control of its property.[2] Any authority Allcare had also terminated on the liquidation of Humanity.[3] Section 391 requires a liquidator to 'proceed forthwith to recover and reduce into possession all the assets and property of the company …, [and to] apply same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto.'

[8] The court below accepted that the September contributions were received by Humanity as 'custodian' for Commed and held that they never formed part of Humanity's estate. It did so on two grounds. The first is that the contributions were earmarked funds and that Humanity was merely acting as a conduit for their transmission to Commed. The second basis arises from the judgment of this court in *Nissan South Africa (Pty) Ltd v Marnitz NO & others (Stand 186 Aeroport (Pty) Ltd*

[1] *Walker v Syfret NO* 1911 AD 141 at 166.

[2] *Secretary for Customs and Excise v Millman NO* 1975 (3) SA 544 (A) at 552H.

[3] *Goodricke & Son v Auto Protection Insurance Co Ltd (in liquidation)* 1968 (1) SA 717 (A) at 722H-723C.

intervening)[4] that an account holder is not entitled to claim from his bank money that had mistakenly been transferred into his account.

[9] Humanity, the court below said, had never made any claim to the contributions. The members who paid their September contributions to Humanity did so in the belief that they were obliged to do so and to retain their rights to medical aid. The contributions were paid to Humanity when, unknown to the members, it was unable to render any services to them and that Commed had undertaken to do so. The contributions paid into Humanity's current account could accordingly not be classified as its property and could not have become so by way of *commixtio*, which would have been an 'oversimplification' of the matter.

[10] As to the second ground, the court below took the view that, although it was not concerned with the theft of money, 'one is dealing with credits reflected in [Humanity's] bank account which the recipient was aware were not its property and which it had every intention to pay to the party to whom such money was due. Had [Humanity] utilised the funds received from its members for September 2008 for its own purposes, there is little question that this would have constituted theft on its part, if one applies the reasoning in the Nissan case …'. The principles relating to insolvency and impeachable transactions thus, the court held, found no application because the funds at no stage belonged to Humanity which had accepted the contributions 'with full knowledge that it was not its money'.

[11] In this court it was argued on behalf of Commed that the rules of a medical scheme constituted a reciprocal agreement between the scheme and its members: the scheme undertakes liability for the member's medical expenses in return for the

[4] *Nissan South Africa (Pty) Ltd v Marnitz NO & others (Stand 186 Aeroport (Pty) Ltd intervening)* 2005 (1) SA 441 (SCA).

member's obligation to pay a contribution. Payment, so the argument went, is a form of performance of contractual obligations discharging the obligations of the payor. It is a bilateral act requiring a meeting of minds in respect of the debt to be discharged,[5] as well as the obtaining of control over the funds paid by the payee. To be effective the payee must have the 'unfettered or unrestricted right to the immediate use of the funds in question'.[6] It was submitted that the September contributions were paid by its members to Humanity without agreement as to the debt to be discharged and without Humanity's obtaining control over the funds. The contributions therefore never became part of its property. Humanity, it was contended, never intended to provide cover to its members for September 2008 nor did it receive those contributions for the purposes of extending such cover. As it was obliged to pay over their amount to Commed, Humanity never acquired an unfettered or unrestricted right to the September contributions.

[12] I do not fault the submissions made by counsel for Commed on the legal nature of payment. However, the conclusions sought to be drawn from them are not supported by the facts. The Council granted Humanity exemption from the provisions of s 63 of the Act on 3 September 2008 and the members were transferred to Commed on 5 September 2008. The September contributions were due and payable to Humanity in terms of its rules on or before 3 September. Rule 13.2 provides that '[c]ontributions shall be due monthly in advance and be payable by not later than the 3rd day of each month.'[7] The September contributions were paid and received as such on or before that date: the notice circulated by Humanity on 3 September 2008 referred specifically to the fact that the 'September contributions, levied as per the Humanity Medical Scheme contributions' would be reconciled at the same time as their debit orders would be adjusted – the debt discharged was clearly identified. The fact that Humanity intended to pay the amount of the September contributions over to Commed does not detract from this finding. Nor

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[5] Relying on *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 993A-C. See also *B & H Engineering v First National Bank of South Africa Ltd* 1995 (2) SA 279 (A) at 293C-G.

[6] Relying on *Vereins- und Westbank AG v Veren Investments & others* 2002 (4) SA 421 (SCA) para 11.

[7] See also s 26(7) of the Medical Schemes Act.

does it matter that Humanity was unable to provide any services to its members: it had arranged for Commed to do so and had agreed to pay over the amount of the September contributions to the latter. The minutes of the meeting of 25 August 2008 between the two medical schemes record that it was agreed that '[a]ll contribution[s] received will be paid into Commed's account …'. The two medical schemes involved thus contemplated that the September contributions would be paid to Humanity and thereafter by Humanity to Commed. This is also apparent from the answering affidavit where it was stated that the transfer of the members to Commed also embraced the transfer of the September contributions and that Humanity had undertaken to transfer them to Commed. No doubt this was agreed to because it was not possible, as also appears from the answering papers, to make the necessary adjustment to the debit orders of members in time. It follows that the September contributions were received by Humanity as contributions due and payable to it and that Humanity undertook to pay them over to Commed. This is confirmed by the undertakings referred to above. It follows that the September contributions were not paid in error, nor were they undue. There was, moreover, agreement as to the debt to be discharged by their payment.

[13] No question of 'ownership' of the contributions arises or can arise (this matter is concerned, not with *res corporales*, but with personal rights). In so far as monies *in specie* may have been involved they belonged to Humanity's bank. The relationship between bank and customer is one of debtor and creditor. In *S v Kearney*[8] it was stated that –

'it has long been judicially recognised in this country that the relationship between bank and customer is one of debtor and creditor. When a customer deposits money it becomes that of the bank, subject to the bank's obligation to honour cheques validly drawn by the customer …'

Humanity never became owner of the September contributions but acquired a personal right or claim against its bank, an entitlement, arising from the bank and customer

[8] *S v Kearney* 1964 (2) SA 495 (A) at 502H-503A cited with approval in *ABSA Bank Limited v Intensive Air* [2010] ZASCA 171 (1 December 2010) para 20.

relationship between them. Its bank became owner of the funds credited to the account subject to an obligation to honour payment instructions by Humanity. The September contributions were not kept separately in an earmarked account, with the agreement of the bank, for payment to Commed or repayment to Humanity's members. They were 'mixed' with other funds in the account resulting in an amount standing to the credit of Humanity. To call Humanity a 'custodian' of the September contributions deposited into its bank account, as the court below did, adds nothing to the issue. The contributions paid were not trust funds.[9] Nor was Humanity's bank party to any agreement between Humanity and Commed. There is no evidence to suggest that Humanity's bank had agreed to hold the September contributions as agent or custodian for Commed, whether disclosed or undisclosed, or that it had knowledge of such arrangement.[10] Nor is there any evidence to suggest that Commed had acquired any personal rights against Humanity's bank in respect of the contributions. Moreover, there is no evidence to the effect that Humanity's rights to operate upon its bank account had in any way been limited by reason of the payment of the September contributions into it.[11] The fact that Humanity undertook to pay the amount of the September contributions to Commed had no effect on its powers as account holder and did not fetter or restrict them.

[14] The court below relied on the decision of this court in *Nissan*.[12] In view of my finding that the September contributions were due to Humanity, were not paid in error

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[9] *Ex Parte Estate Kelly* 1942 OPD 265 at 271-2.

[10] Cf *Dantex Investment Holdings (Pty) Ltd v National Explosives (Pty) Ltd (in liquidation)* 1990 (1) SA 736 (A) at 749D-I; *ABSA Bank Limited v Intensive Air* [2010] ZASCA 171 (1 December 2010) paras 21-2, 24 and 26.

[11] Cf *Joint Stock Company Varvarinskoye v Absa Bank Ltd & others* 2008 (4) SA 287 (SCA) and see *ABSA Bank v Intensive Air* [2010] ZASCA 171 (1 December 2010) para 22.

[12] *Nissan South Africa (Pty) Ltd v Marnitz NO & others (Stand 186 Aeroport (Pty) Ltd intervening)* 2005 (1) SA 441 (SCA).

and that Humanity undertook to pay them over to Commed it is not necessary to deal with the *Nissan* case. It is clearly distinguishable.[13]

[15] It follows that when the September contributions were paid into Humanity's account it had a personal right *vis à vis* its bank to the corresponding credit in its account. Neither Commed nor anyone else had a better or stronger claim or, for that matter, any claim to it.[14] This entitlement was an asset in Humanity's estate and would on liquidation have been available for the satisfaction of the claims of the general body of creditors. But this would have been the position only if s 63 of the Act had not been applicable.

[16] Section 63 of the Act regulates the amalgamation and the transfer of the business of a medical scheme. The section provides the statutory framework for amalgamations and transfers and gives the Registrar regulatory powers in respect of these transactions. In terms of s 63(1) these transactions shall not have any force and effect unless carried out in accordance with the provisions of the section.[15] Section 63(1) provides:

'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.'

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[13] See the discussion in *ABSA Bank v Intensive Air* [2010] ZASCA 171 (1 December 2010) para 22.

[14] *Dantex Investment Holdings (Pty) Ltd v National Explosives (Pty) Ltd (in liquidation)* 1990 (1) SA 736 (A) at 749E-J.

[15] *Registrar of Medical Schemes v Suremed Medical Scheme* (201/11) [2011] ZASCA 173 (29 September 2011) para 6.

[17] The only manner in which an amalgamation or transfer envisaged by the section may be achieved is in terms of this section. Its requirements are peremptory but the Council is entitled under s 8(*h*) of the Act to –

‘exempt, in exceptional cases and subject to such terms and conditions and for such period as the Council may determine, a medical scheme or other person upon written application from complying with any provision of this Act’.

It is not necessary to determine the precise ambit of s 8(*h*). The Council was informed of the proposed transfer of Humanity’s members and confirmed its approval of Humanity’s proposal but requested it on 22 August 2008 to make an urgent application in terms of s 8(*h*) for exemption from the provisions of s 63 setting out inter alia –

‘1.The circumstances resulting in the transfer i.e. the financial status of the scheme;

2. The urgency in needing to speedily effect the transfer of the members and the consequences for the members if this is not done;

3. The reasons why the time periods as well as the requirements prescribed in section 63 of the Act would result in prejudice to the scheme and its members; and finally

4. Why the circumstances described are exceptional.’

[18] Humanity made application for exemption on 25 August 2008 and referred to its insolvent state and the need for continued medical cover of its members. It also addressed the urgency of the matter and the need to have the members covered by Commed from 1 September. It emphasised that following the ordinary procedure involving the compilation of an exposition of the transaction and the actuarial statements required by s 63(2) and observing of the time periods provided for by s 63 would lead to an inevitable delay and an extension of the date of transfer to November or December. On this basis the Council approved of the transfer of Humanity’s members. I do not understand the Council’s approval to involve an exemption from all the provisions of s 63 (it does not, in any event, appear to have such power under s 8(*h*)). Both the Council

and Humanity purported to and acted in terms of s 63. The Council in exempting Humanity under the provisions of s 8(*h*) exempted it from 'complying with any provision of this Act'. The exemption therefore related to provisions of the Act, particularly s 63, that Humanity had to comply with, such as the filing of a formal exposition and observation of the time limits set by the section. The exemption did not and does not affect the need for the Council's approval or the consequences flowing from it. One of the consequences is set out in s 63(11) providing for the binding force of the exposition (an explanation of the facts and circumstances of the proposed transaction)[16] on all the concerned parties. No exposition was filed in this case. The Council had exempted Humanity from doing so. But the facts and circumstances of the proposed transfer were known to the Council. When it confirmed the transfer the consequences resulting from the confirmation of an exposition provided for in s 63 followed.

[19] One consequence is of particular importance and decisive of this matter. Section 63(14) provides:

'Upon the confirmation of the exposition of a proposed transaction in accordance with the provisions of this section, the relevant assets and liabilities of the parties to the amalgamation shall vest in and become binding upon the amalgamated body or, as the case may be, the relevant assets and liabilities of the party effecting the transfer shall vest in and become binding upon the party to which transfer is effected.'

I have found that the entitlement to the amount of the September contributions when paid into its bank account vested in Humanity. It follows that, on confirmation by the Council of the transfer of the members to Commed, this entitlement, being one of the 'relevant assets' of Humanity, became vested in Commed by operation of law and no longer formed part of Humanity's estate.[17] The appellants, the liquidators of Humanity,

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[16] See *Registrar of Medical Schemes v Suremed Medical Scheme* (201/11) [2011] ZASCA 173 (29 September 2011) para 7.

[17] Cf s 54(3) of the Banks Act 94 of 1990 (and *ABSA Bank Ltd v Van Biljon & another* 2000 (1) SA 1163 (W) para 33; *Nedcor Investment Bank Ltd v Visser NO & others* 2002 (4) SA 588 (T) at 594F-595A) and

could therefore lay no claim to it. It follows that their claim was correctly dismissed by the court below, albeit for the wrong reasons. In the result the appeal should be dismissed.

[20] The following order is made:

The appeal is dismissed with costs.

F R MALAN

JUDGE OF APPEAL

also s 14(2) of the Pension Funds Act 34 of 1956.

APPEARANCES:

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