

IN THE HIGH COURT OF SOUTH AFRICA (SOUTH GAUTENG)**JOHANNESBURG****CASE NO: 33735/10****DATE: 2011-05-27****REPORTABLE****(In the electronic reports)**

10 In the matter between

BONITAS MEDICAL FUND & OTHERS

Applicant

and

REGISTRAR OF MEDICAL SCHEMES & OTHERS

Respondent

J U D G M E N T

WILLIS, J:

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[1] This is an application for the appointment of a curator of the Bonitas Medical Fund in terms of section 56 of the Medical Schemes Act, 131 of 1998.

[2] The matter has had a protracted history. The Deputy Judge President of the South Gauteng High Court appointed me to case

manage the matter, and apart from the formal orders that have been made in Court, I have had innumerable consultations in my chambers with a galaxy of legal luminaries representing different parties. I have also had telephone calls at my home of an evening, seeking that I make interventions on an urgent basis, which, I may record, I have declined to do.

[3] Finally, after much haggling, and negotiation, interim orders, reports that were filed by certain experts, all the parties save for the Union, the National Union of Metalworkers of South Africa, (NUMSA), have
10 reached an agreement that a curator should be appointed, and that this curator should be Mr Molokome Joseph Maluleke.

[4] It needs to be emphasised that this application for curatorship has not been brought about because the Bonitas Medical Fund is in any financial difficulties. This is a very important point that needs to be emphasised, so that there is no panic or alarm in the larger community in South Africa. The Bonitas Medical Fund is, I understand, the second largest medical aid scheme in the country.

[5] The dispute has been about the management and control of the Fund, and I regret to say, one has begun to get suspicious, although I
20 cannot make any final conclusion in the matter thatt it is about an all too depressingly familiar South African story: it is a fight about spoils. It is tragic that this hectic, tense, contest has gone on, because clearly, it seems to me, there are strong personal interests that are frustrating the interests of the members of the scheme.

[6] Be that as it may, I have attempted on a number of occasions to

suggest to parties that they should try to resolve their difficulties regarding the management and avoid a curatorship order. I have publicly appealed for commercial statesmanship. I have requested that the parties please transcend personal interests and look after the greater interests of this very important scheme. Sadly, I have not succeeded, but mercifully, in the end, agreement has been reached that curatorship, unfortunately, is a necessary route to follow. I hope that it will be a very interim form of curatorship, in order to set things back on track so that a properly convened meeting of members can determine
10 the management and control of this Fund.

[7] This is, in the end, I sincerely believe the only way to go, and if I understand NUMSA correctly, they too, who applied to intervene at a very late stage, namely only this morning, agreed that a curator should be appointed. I may mention that I made an order authorising the intervention of the Union, NUMSA, and I also wish to place on record the fact that I am pleased that this application met with no serious opposition from other parties. It is right that the voice of the Union should be heard.

[8] The only issue in contention now is whether instead of Mr Maluleke
20 being appointed as a curator, the appointment of a curator should go to one Mr Thabane Frances Zulu. It is true that Mr Zulu has an impressive track record, and a distinguished *Curriculum Vitae*. There can be no inherent objection to his being appointed. Certain allegations were made against Mr Maluleke, but these have been untested and Mr Maluleke was represented in Court by Mr Labuschagne, who was ready,

vigorously, to contest any unfortunate allegations being made against Mr Maluleke. Therefore I wish to emphasise these allegations against Mr Maluleke are untested, unproven and not accepted by the Court.

[9] Mr Maluleke has acquaintance with the affairs of the Fund, and that, obviously, is an advantage in taking care of the Fund until such time as new management has been properly vested in the Fund, in terms of proper elections, where proper procedures have been followed.

[10] This morning I mooted with counsel the possibility of appointing a triumvirate, which would include both Mr Maluleke and Mr Zulu, and perhaps a third person as a tie-breaker, or a vote giver in the event that Mr Maluleke and Mr Zulu could not agree. The representatives of the parties were unable to agree on this formula, and I may say that I have got sympathy with the protestations of Mr Bava, that it would be cumbersome and unworkable. The history, for what it is worth, throughout the world from the Roman era to the present, is that triumvirates are very seldom successful instruments to resolve problems, except on a strictly short-term basis.

[11] Counsel for the different parties prevailed on me to act like Solomon of Old Testament fame. I certainly do not have Solomon's qualities, and in the end, ultimately, I am faced with this fact: NUMSA, at a late stage, has come to "the party". It is the only interested party to protest against the appointment of Mr Maluleke. Mr Maluleke has the support of all the others, who have been at loggerheads, and I am aware at how extraordinarily difficult it has been for the parties to reach agreement on (a) the going into curatorship of the Fund, and (b) the appointment of Mr

Maluleke. Balancing all this out, it seems to me that the most sensible course is to go with the appointment of Mr Maluleke.

[12] A draft order has been prepared, which has been signed by all the parties. An order will be made in terms of that draft marked X, and an order is also made in terms of Prayers 1, 4, 7, 8, 9 10, 11 and 12 of the notice of motion dated 24 May 2011.

[13] I wish to place on record that I have invited Mr *Brett*, counsel for the Registrar of Medical Schemes, and also for the Council for Medical Schemes, to draft a consolidated order which will include the draft
10 marked X today and these various Prayers in the notice of motion. It suddenly occurred to me that I should indicate today that an order is made in terms of the draft marked X, and in terms of the Prayers, but that the order that will ensue from this Court on Monday 30 May will be a draft marked Z, that reflects the consolidated orders made today. The reason for the consolidation is that clearly this is an important order that is going to be made. There are a lot of different parties that will be interested in reading it and seeing it. Who knows, the newspapers may even be interested in it? It is important that there should be no confusion at all as from Monday morning what the order of the Court is.

20 [14] Therefore, in summary, an order is made in terms of the draft marked X and in terms of prayers 1, 4, 7, 8, 9, 10, 11 and 12 of the notice of motion dated 24 May 2011.

POSTEA:

[15] The order, marked "Z" which was signed by me in chambers in

Johannesburg on the 7th day of June 2011, reads as follows:-

1) The National Union of Metal Workers of South Africa, Siphon Mjwara, France Mabelebele, Lucky Mbageni and William Modisha are granted leave to intervene in the application under case number 2010/33573.

2) Bonitas Medical Fund ("the Scheme") is placed under curatorship in terms of section 56 of the Medical Schemes Act 131 of 1998 ("the Act").

3) Molokomme Joseph Maluleke is hereby appointed as the
10 Scheme's curator ("the curator").

4) The curator shall have the following powers ~

- 3.1) generally to take control of and in the place of the board of trustees and principal officer manage the business of the Scheme in accordance with the provisions of the Act and the Scheme's rules;
- 3.2) to exercise all executive powers which would ordinarily vest in and be exercisable by the board of trustees or principal officer of the Scheme in terms of the Act or the Scheme's rules;
- 3.3) to incur such expenses and costs on the Scheme's account as may be reasonably necessary or expedient for the purposes of the curatorship and control of the business and operations of the Scheme;
- 3.4) to engage the services of any professional advisors reasonably required to assist for the purposes of the curatorship and the control of the business and operations of the Scheme;
- 3.5) to institute, defend, settle or compromise any legal proceedings on behalf of the Scheme and in its name and for those purposes to appoint and instruct attorneys and counsel;
- 3.6) to operate the Scheme's existing bank accounts and to open and operate any new banking accounts in the name of the Scheme as might reasonably be required for the purposes of the curatorship;
- and

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3.7) to dispose of shares held by the Scheme in any company whose main object and business is not directly related or connected to the business of a medical scheme.

5) The curator is directed to report on his curatorship to the first applicant and the Scheme's members within two (2) months from the date of this order which report shall include a statement of his findings and recommendations concerning the Scheme's affairs and the continuation, if necessary, of the curatorship.

6) The curator is directed to report on the Scheme's affairs to the first applicant every two weeks during the aforesaid period of two (2) months.

7) The curator is directed to take all steps which are necessary to convene a special general meeting of the Scheme at which a new board of trustees shall be elected and which meeting shall take place no later than ninety (90) calendar days from the date on which the order is granted.

8) The applicants are empowered temporarily to vary the respondent's rules to the extent which may be necessary to convene and hold a special general meeting of the respondent's members to elect a new board of trustees within a period not exceeding ninety (90) calendar days from the date on which this order is granted.

9) The curator shall be entitled to reasonable remuneration and disbursements, as might be allowed by agreement with the first applicant, alternatively, failing such agreement as may be determined later by this Court and that such remuneration shall be paid by the Scheme and shall be a first charge upon the Scheme's assets.

10) The terms of office of Mpungose Bongani Phumlani; Mncube Michael Sibusiso; Willem Frederik Van Heerden; Zulu Mdumuseni Petros; Seobi Mokone Nicodemus; Koch Lugene; Schoombie Sonja and Dolamo Mokgoatji Josiah as members of the Scheme's board of trustees shall come to an end on 27 May 2011.

11) The proceedings instituted by the Council for Medical Schemes against Mpungose Bongani Phumlani, Mncube Michael Sibusiso, Willem Frederik Van Heerden, Zulu Mdumuseni Petros and Seobi Mokone Nicodemus in terms of section 46 of the Act are hereby withdrawn and the Council for Medical Schemes reserves the right to reinstate such proceedings against any of the aforesaid individuals in the event that any of them is elected or appointed as a member of a board of trustees of a medical scheme which falls under the Council for Medical Schemes' regulatory authority.

20 12) Gerhard Van Emmenis is divested of the powers and functions of the Scheme's board of trustees with effect from 27 May 2011.

13) Gerhard Van Emmenis' term of office as the Scheme's acting principal officer shall come to an end with effect from 27 May 2011.

14) It is noted that the application under case number 2011/4206 has been withdrawn.

15) The costs of the Registrar, Council for Medical Schemes and Gerhard Van Emmenis in the application under case number 2011/4206 shall be paid by the Scheme including all the reserved costs and such costs shall include the costs occasioned by the employment of two counsel and shall be paid on an attorney and client scale.

16) The term of office of Mpungose Bongani Phumlani; Mncube Michael Sibusiso; Willem Frederik Van Heerden; Zulu Mdumuseni Petros; Gerhard Van Emmenis and Seobi Mokone Nicodemus as directors of Bonitas Marketing (Pty) Ltd and Pegma 36 (Pty) Ltd, as the case may be, shall come to an end on 27 May 2011.

17) It is noted that the application under case number 2010/02947 has been withdrawn and it is directed that the Registrar and the Council for Medical Schemes' costs of that application shall be paid by the Scheme including all the reserved costs and such costs shall include the costs occasioned by the employment of two counsel and shall be paid on an attorney and client scale.

18) It is noted that the application under case number 2010/48594 has been withdrawn and is directed that the Registrar and the Council for Medical Schemes' costs of that application shall be paid by the Scheme including all the reserved costs and such costs shall include the costs

occasioned by the employment of two counsel and shall be paid on an attorney and client scale.

19) The appeal in terms of section 49 of the Act against the inspection (that includes the resultant report) into the affairs of Bonitas Marketing Company is hereby withdrawn.

20) The investigation report will only be used by the Registrar in the performance of its regulatory duties after Willem Van Heerden and Gerhard Van Emmenis having made representation against all allegations pertaining to them contained in the report.

10 21) The relief sought by the aforesaid intervening parties in the counter-application is refused and no order as to costs is made in relation to that relief.

22) The costs of the Registrar, Council for Medical Schemes, Mpungose Bongani Phumlani, Mncube Michael Sibusiso, Willem Frederik Van Heerden, Zulu Mdumuseni Petros and Seobi Mokone Nicodemus in the application under case number 2010/33573 shall be paid by the Scheme including all the reserved costs and such costs shall include the costs occasioned by the employment of two counsel and shall be paid on an attorney and client scale.

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N.P.WILLIS

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Registrar of Medical Schemes and for the Council of Medical Schemes	Adv JJ Brett SC (with him Adv KN Tsatsawane
Attorneys for the Registrar of Medical Schemes and for the Council for Medical Schemes	Eversheds
Counsel for NUMSA Attorneys for NUMSA Counsel for Bonitas Medical Fund	Adv D Wood Xulu Liversage Inc Adv A Bava SC (with him Adv R Moultrie and Adv A Stein
Attorneys for Bonitas Medical Fund	Gildenhuis Lessing Maltji Inc
Counsel for the trustees of the Bonitas Medical Fund	Adv JH Dreyer SC
Attorneys for the trustees of the Bonitas Medical Fund	Couzyn Hertzog & Horak
Counsel for Mr Maluleke (the curator)	Adv EC
Attorneys for Mr Maluleke (the curator)	Labuschagne SC Rooth & Wessels Attorneys

DATES OF HEARING:

21 December 2010

4 February 2011

3 March 2011

11 March 2011

27 May 2011

30 March 2011

33735/10/jc

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JUDGMENT

DATE OF JUDGMENT:

27 May 2011