

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 27481/2015

DO NOT WRITE HERE IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO	YES/NO
(3) REVISED.	—
24/4/2015	
DATE	SIGNATURE

In the matter between:

BONITAS MEDICAL SCHEME

Applicant

and

THE COUNCIL FOR MEDICAL SCHEMES

First Respondent

THE REGISTRAR OF MEDICAL SCHEMES

Second Respondent

JUDGEMENT

JORDAAN J:

The chronology of the events in this matter are briefly as follows:

On 10 November 2014 the Registrar of Medical Schemes (the Registrar) (the second respondent) appointed an inspector in terms of Section 44(4)(a) of the Medical Schemes Act, Act 131 of 1998 (MSA) and Section 3 of the Inspection of Financial Institutions Act, Act 80 of 1998.

On 24 December 2014 the Applicant (Bonitas) noted an appeal in terms of Section 49 of the MSA to the Council for Medical Schemes (the first respondent) (CMS) which appeal was to be heard on 13 March 2015.

However on 26 February 2015 the CMS resolved, without hearing the appeal, that the decision to order an inspection was not appealable. In this regard they clearly relied on two judgements where other medical schemes attempted to appeal against a similar decision and it was found that such a decision was not appealable. These judgements were not judgements of a High Court but judgements by the Appeal Committee and the Appeal Board of the CMS.

On 2 March 2015 the CMS advised the applicant (Bonitas) that the decision is not appealable and that the inspection would continue. Bonitas then indicated that it would appear on 13 March 2015 to argue the appeal and sought an undertaking that the inspection would in the meantime not proceed.

On 12 March 2015 the CMS acknowledged that there was a dispute with Bonitas on the appealability of the decision but refused to give any undertaking.

Also on 12 March 2015 the CMS issued and served an urgent application to be heard in this court. The subject matter of this application was to apply for urgent relief in which the Registrar and the CMS sought a declarator in the following terms:

"2. *Declaring that the second applicant's ("the Registrar's") decision dated 10 November 2014 ("the inspection decision") to order an inspection into the affairs of the respondent in terms of Sec 44(4)(a) of the Medical Schemes Act 131 of 1998 ("the MS Act") and Sec 2 of the Inspection of Financial Institutions Act, 80 of 1998 ("the Inspections Act") is not a decision that is appealable in terms of the provisions of Sec 49 of the MS Act;"*

On the same date Bonitas wrote to the Registrar on whether the inspection will stand over pending the hearing of the urgent application. Such undertaking was given provided that the application is heard urgently.

On Monday, 13 April 2015 the CMS and the Registrar applied in the Urgent Court under case number 18491/2015 for urgent relief in which the Registrar and the CMS sought the above mentioned declarator.

The application was heard before Baqwa J, who struck the application from the roll with costs for lack of urgency.

The Registrar and the CMS thereafter enrolled the application in which the above declarator is sought for hearing in the Opposed Motion Court on 15 June 2015. The Registrar's counter-application in the matter before me is for exactly the same relief to be argued on 15 June 2015.

In spite of the fact that the matter being enrolled for final determination of the appealability of such a decision the Registrar, on 15 April 2015 advised in a letter that the inspection will continue on 17 April 2015. The Applicant (Bonitas) then lodged this urgent application to stay the inspection pending the finalisation of the main application on 15 June 2015. The Respondents oppose the application and, as indicated above, also lodged a counter application asking for the very same relief it sought before Baqua J, which was struck from the roll for want of urgency.

The applicant argues that due to the fact that it filed an appeal against the inspection decision of 10 November 2014 during December 2014, in terms of Sec 49(2) of the MS Act, any decision of the Registrar appealed against is, upon the noting of an appeal, suspended. The purpose of the declarator to be argued on 15 June 2015 is to obtain clarity on the legal position of an inspection decision, and whether it falls within the ambit of "*any decision*" in Sec 49(2) of the MS Act. The applicant contends that the inspection decision has been suspended as a matter of law.

It is argued on behalf of the Applicant that the Registrar, as the responsible regulator pertaining to inspections of Medical Schemes, seeks clarity on the lawfulness of proceeding with an inspection, notwithstanding the lodging of an appeal in terms of Sec 49 against the inspection decision. It was submitted that a rational regulator would, in such circumstances, await the decision of the Court before proceeding with the inspection. This is particularly so where the Registrar has advanced no factual basis for contending that the inspection is urgent.

It was argued on behalf of the Applicant that however, not content to await the Court's sanctioning of the continuation of the inspection, notwithstanding a Sec 49 appeal having been noted, the Registrar notified the applicant in the afternoon of 15 April 2015 that the inspection would commence at 09:00 on 17 April 2015. The applicant was thereby forced to initiate this urgent application to restore the status quo. The applicant contends that the Registrar, in directing that the inspection proceed on 17 April 2015 on such short notice, notwithstanding the pending declarator aimed at ascertaining the validity of proceeding with the inspection, has acted irrationally. Further, the applicant contends that the Registrar's decision to proceed with the inspection on such short notice was for the ulterior purpose of forcing the applicant to bring this application so that the legal point, which the Registrar was precluded from having decided in the urgent court on 13 April 2015, could be reargued. The counter-application removes all doubt.

The applicant served its urgent application on the respondents just before 17:00 on 16 April 2015, giving notice of a hearing at 18:00 before the Urgent Court. At such hearing, the applicant would seek the relief in terms of Part A of the Notice of Motion. Having served the application, the respondents agreed to an interim arrangement in terms of which the inspection would not proceed before Tuesday, 21 April 2015, provided the application is finalised on Monday, 20 April 2015. Later a further undertaking was given that the inspection would not proceed until judgement in this application is handed down.

The parties agreed time periods for the exchanging of affidavits and the matter was set down before me in the urgent court on 20 April 2015. The undertaking by the Registrar and the arrangement to get the matter ripe for hearing has removed the further need for specific relief in terms of Part A.

In terms of Part B of the notice of motion, the applicant seeks an order interdicting the continuation of the inspection until the validity of such continuation has been decided by the Court in the application set down for 15 June 2015. The relief sought in Part B was argued on 20 April 2015.

The main thrust of the argument of the Respondents before me was that its counter application be granted. In other words that I grant them the very same relief they sought a week before Baqua J which was struck off for want of urgency. I was told that the Registrar and the CMS's application for the urgent declarator on 13 April 2014 was struck off because of dilatory conduct on the part of the Registrar in launching the application. The decision to continue with the inspection had been taken on 10 November 2014, but the application was only brought on 13 April 2014.

Before me the Respondents castigated the Applicants for arguing before Baqua J that the matter was not urgent. I have not been provided with the judgement by Baqua J but I accept that the Respondents (the Applicants before Baqua J) were given the opportunity to fully address him on the question of urgency. They could not convince him. The judgement of Baqua J, that the matter was not urgent, is of course not appealable.

I am in agreement that other than general propositions, no facts had been advanced by the Registrar why the continuation of the inspection is urgent.

The Applicant argues that the question of urgency is rather informed by the question whether the Court will permit the Registrar to take the law into his own hands by proceeding with an inspection, the validity of which the Registrar himself has sought to be confirmed by the Court. Taking the law into his own hands is not only unlawful, but irrational in such circumstances. It was submitted that the primary reason for urgency in this matter is based on the urgency arising from a regulator acting unlawfully and irrationally. The unlawfulness, due to the inspection decision being suspended under Sec 49(2) of the MS Act, is to be decided on 15 June 2015. However, the irrationality of the Registrar, forcing the issue by proceeding with the inspection despite his application for the declarator aimed at establishing the legality of continuing with the inspection, is *per se* urgent. Hence the urgency of this application.

It was argued on behalf of the Applicant that the decision of the Registrar of 15 April 2015 to continue with the inspection in spite of the fact that the Respondents set the matter down for hearing (in the normal course) on 15 June 2015 is irrational and unreasonable. After due consideration I am inclined to agree.

One of the arguments advanced by the Respondents was that the element of surprise is part and parcel of the envisaged inspection. That is of course

correct, but it must be kept in mind that the Applicant has been aware of the inspection to be held since November 2014. There can hardly be any element of surprise in this case.

It was argued on behalf of the Applicant that Sec 33(1) of the Constitution provides that administrative action must be reasonable. In administrative law it is now uncontroversial that the first element promised by reasonable administrative action in Sec 33(1) is rationality. See Barto Star Fishing (Pty) Ltd v Minister of Environment Affairs 2004(4) SA 490 (CC) at par [43]

I agree that no substantial or tenable reasons are provided for the Registrar why an inspection which was already initiated in November 2014, has since the striking of the roll of the main application, become so urgent that it cannot await finalisation of the main application on 15 June 2015.

Having stayed the inspection of its own accord and having launched the main application to seek clarity from the Court of an important, complex statutory interpretation, it is not rational or reasonable to effectively prejudge its own application by ordering the inspection to proceed.

I was referred to *S v Makwanyane* 1995(3) SA 391 (CC) at par 156 where it was stated that: *"We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the*

constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law."

It was argued that no rational basis therefore exists, nor have the Registrar put forward any reasonable grounds why the application is so urgent that it cannot await the outcome of the proceedings for declarator relief.

It was submitted that the only reasonable conclusion is that the respondents' real purpose to irrationally continue with the inspection, is to force the applicant to bring this application in order to allow the respondents to oppose the application, launch a counter-application and thereby seek a second bite at the cherry on the merits of the main application and a disguised appeal against the Order on urgency granted by Bakwa J on Monday, 13 April 2015. I am inclined to agree. A party cannot be allowed to slip in through the back door when its attempt to go through the front door was unsuccessful.

I am satisfied that the Applicant has made out a proper case for an interim interdict that the status quo be preserved, pending the final determination of the rights of the parties.

The applicant has established a *prima facie* right in circumstances where the respondents are ultimately also not sure about the correct interpretation of Sec 49(2), as evidenced by their launching of the main application on 15 June 2015. At the very least, the Applicant's *prima facie* right is one open to some doubt, which nevertheless suffices.

I agree that no rational or reasonable grounds have been provided by the Respondents why the inspection should proceed on such an extremely urgent basis before the main application is disposed of.

I agree with the Applicant's submission that the Respondents have compelled the Applicant to launch this application which would allow the Applicant to abuse the process of court by seeking to reargue the matter which served before the urgent court on Monday, 13 April 2015.

It was submitted that the relief sought by the Applicant should be granted with costs on an attorney and client scale, inclusive of the costs of two counsel.

I agree that the relief sought by the Applicant should be granted but in my view the question of costs should be reserved for the court finally determining the matter on 15 June 2015.

In the result the following order is made:\

1. That pending the finalisation of the main application under case number 18491/2015, enrolled for 15 June 2015, the Respondents are interdicted and restrained from proceeding with the inspection into the affairs of the Applicant in terms of Section 44(4)(a) of the Medical Schemes Act, 131 of 1998;

2. The costs of the application will be costs in the main application under case number 18491/2015.