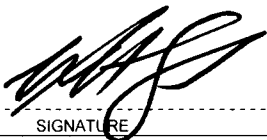


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 69130/14

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	☒ YES / ☐ NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	☒ YES / ☐ NO.
(3) REVISED.	☐ YES / ☐ NO.
7/8/15 DATE	 SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 PRETORIA 0001
2015 -08- 07
JUDGE'S SECRETARY REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

NAKEKELA HEALTHCARE CONSULTANTS (PTY) LTD

1ST APPLICANT

and

MEDSCHEME (PTY) LTD

1ST RESPONDENT

SOUTH AFRICAN POST OFFICE LTD

2ND RESPONDENT

SOUTH AFRICAN POSTAL WORKERS UNION

3RD RESPONDENT

COMMUNICATION WORKERS UNION

4TH RESPONDENT

BONITAS MEDICAL FUND

5TH RESPONDENT

Coram: HUGHES J

JUDGMENT

Delivered on: 7 August 2015

Heard on: 10 and 26 March 2015

HUGHES J

Introduction

1. On 23 September 2014, Raulinga J sitting in the urgent court granted a *rule nisi* in the form briefly set out below with the return date being 24 November 2014. On the return date the first and fifth respondents filed an application for leave to appeal the *rule nisi*. The matter was adjourned to 9 March 2015 with costs reserved and the *rule nisi* was extended.

2. The matter was before me on the opposed roll on 10 March 2015. The first, fourth and fifth respondents filed their heads of argument addressing the merit of the application late, thus the applicant was allowed an opportunity to file its heads of agreement addressing the merits. In the circumstances the *rule nisi* was again extended to 26 March 2015 with costs reserved. I was advised that the leave to appeal the *rule nisi* was no longer being pursued.

Order of urgent court

3. The *rule nisi* called upon the respondents to show cause why a final order should not be made revoking the termination of the applicant's services of 31 July 2014 and placing the applicant in the place of any other broker that was appointed as a result of the applicant's termination. That the appointment of brokerage so appointed be terminated and set aside. The first respondent was to continue paying the monthly brokerage commission to the applicant for its services until the effluxion of the applicant's appointment on 14 May 2016. The order encompassed an interdict restraining the first respondent from paying any other brokerage services other than the applicant and also ordered that the first respondent continue to pay for the service until the finalisation of the application referred to in the *rule nisi* granted. The costs were reserved.

Background

4. A brief background to the current application. The applicant was recommended by the third and fourth respondents to render medical aid brokerage services for a

period of three years from 15 May 2013. The first and fifth respondents administered, calculated and paid over the commission due to the applicant.

5. On 10 May 2013 the third respondent directed correspondence to the second respondent to extend the brokerage services of the applicant. The following day, 11 May 2013, the fourth respondent agreed to the extension. The second respondent duly appointed the applicant as per the third and fourth respondent's recommendation on 15 May 2013 for a three year period.

6. The second respondent advised all the parties concerned that it awaited a service level agreement to be concluded between the applicant and the third and fourth respondents. Though this was not forthcoming the second applicant advised the first respondent of the recommendation and the applicant continued to provide the services it was commissioned to perform. On submission of invoices rendered the applicant was remunerated its commission.

7. In June 2014, some fifteen months after the applicant's appointment, the fourth respondent resolved to appoint another broker to replace the applicant. The fourth respondent communicated this to the second respondent. In turn the applicant was advised of its services being terminated by the first respondent on 9 September 2014.

8. The termination took effect from 31 July 2014 and the other brokerage services were engaged from 1 August 2014. The applicant made enquiries with the third respondent as regards their termination and to their surprise they were shocked to hear of the applicant's termination. They advised the applicant that its termination was not in accordance with their members instructions and that it was only the fourth respondent who had initiated the applicant's termination.

9. In September 2014 the applicant served its urgent application on the respondents and on 23 September 2013 the matter was heard with the *rule nisi* being issued.

10. At present the applicant seeks confirmation of the *rule nisi* as the first and fifth respondents have abandoned their leave to appeal the order of Raulinga J.

Papers before this court

11. The situation with the papers before this court is as follows, no further affidavits have been filed by any of the respondents after the order of Raulinga J. At the hearing before mu brother Raulinga, he was in possession of the answering affidavit from the first and fifth respondent jointly, an answering affidavit from the fourth respondent and on the day of the hearing the second respondent filed a late answering affidavit. It is also noted that the replying affidavit of the applicant is dated 25 September 2014 and had been served via electronic mail after Raulinga J granted this order.

First and Fifth respondent's argument

12. The crux of the first and fifth respondents answering affidavit is that they performed an administrative role and were responsible for the payment of commission to the relevant brokers. They were advised by the employer, the second respondent, of the brokers that had been recommended by the employee or the union that the employee belongs to.

13. The first and fifth respondents contend that they acted within the ambit of the Medical Schemes Act 131 of 1998 ("the Medical Schemes Act") when they were advised by the second respondent that the brokerage services of the applicant were to be terminated and replaced by newly recommended brokerage selected by the forth respondent. According to the first and fifth respondent in terms of section 65 of the Medical Schemes Act read with regulation 28, they were legally obliged to follow the instructions from the employer and/ or the employee member or their union.

14. Lastly, the first and fifth respondents had concluded agreements with both the applicant and the new broker. In the circumstances they will pay whichever broker they are instructed to pay by the member employee or the employer. It would be incompetent for them to be ordered by the court to pay a specific broker who had not been recommended by the employee/ employee's union or as instructed by the employer. This would lead to them acting contrary to their mandate as set out in the Medical Schemes Act and the Regulations mentioned *supra*.

Fourth respondent's argument

15. The forth respondent's answering affidavit deals in the main with the fact that the letter of 14 May 2013, wherein it agrees to the appointment of the applicant, is not signed and is thus not authentic. Further, they state that they became aware of such correspondence on 14 May 2013. On or about 12 August 2013 they advised the applicant that this letter had been sent erroneously and the appointment of the applicant was an error.

16. The fourth respondent states that as a result of a meeting of their National Executive Committee held on 24 and 25 May 2014, a decision was taken to terminate the services of the applicant. Having considered this, they communicate their preferred broker to the second respondent. The appointment of the recommended broker was taken into account by the second respondent.

17. The fourth respondent contends further, that the applicant has not produced a contract or letter of appointment confirming its allegations that it had a contract with the fourth respondent.

Third respondent's argument

18. The position of the third respondent is evident from correspondence between the second respondent and the third respondent date 16 September 2014 and 18 September 2014. The third respondent sought that the *status quo* remained with the applicant being the relevant broker. The third respondent did not agree with the forth respondent's recommendation for the termination of the applicant's service and the replacement thereof with another brokerage service.

Second respondent's argument

19. The second respondent distanced itself from having anything connected with the selection of the relevant brokerage services for its employees. It denied that it was in anyway involved in contracting the applicant as a broker for any of its employees.

20. The second respondent persisted that on the recommendation of the fourth respondent the applicant was appointed on 15 March 2013. On 5 June 2014 a recommendation of the fourth respondent was attained for the second respondent to appoint Classique Medical Aid Consultants CC ("Classique") as the new brokerage service provider.

21. The second respondent contends that on 2 September 2014 it wrote to the first respondent advising of the fourth respondent's instruction to appoint Classique and as at that specific time it was not aware of the contract that the applicant relied upon. It was adamant that it played no role in the appointment of brokers as alleged by the applicant in paragraph 4.2 of its founding affidavit.

Applicant's argument

22. The applicant argued that the relief it seeks is akin to specific performance of a prior existing agreement. The applicant disputes the allegations that the letter which it realises on, regarding its appointment, is not valid because it was not signed and erroneously sent to the applicant. It rubbished this as false, a recent fabrication and spurious. The second respondent's attitude was that in these circumstances the applicant had not raise a real or substantive dispute of the fact.

23. The applicant contends that the employment of brokers, like itself, is the duty of the second respondent as *"these services constitute an integral part of the employees' employee benefits, the appointment are done on recommendation of the relevant union."*

24. The applicant goes on further to state that it is not the third or fourth respondents who have the authority to appoint the broker but rather that this lies with the second respondent. In addition, it is not the one union alone who can recommend the broker to be appointed, but both unions, that is the third and fourth respondents and/or either one of them can make a recommendation with the other supporting such recommendation.

25. Section 65 of the Medical Schemes Act provides:

“A medical scheme may compensate any person, in cash or otherwise, in accordance with its rules, for the introduction or admission of a member to that medical scheme.”

Regulation 28(7) and (8) of the Medical Aid Schemes Act states:

“(7) A medical scheme shall immediately discontinue payment to a broker in respect of services rendered to a particular member if the medical scheme receives notice from that member (or the relevant employer, in case of an employer group) that the member or employer no longer requires the services of that broker”

(8) A medical scheme may not compensate more than one broker at any time for broker services provided to a particular member”

Analysis

26. It is clear that the respondents take issue with whether an agreement had been concluded for the applicant to render the services of medical aid broker on behalf of the fourth respondent. What also comes to light is that the first and fifth respondents maintain that it was their statutory obligation to appoint who had been recommended. If the court made an order as to whom should be appointed, this would result in them acting contrary to their mandate in terms of the Medical Schemes Act.

27. One should not lose sight of the fact that the fourth respondent vehemently disputes that it recommended the applicant on 15 March 2013 and it calls on the applicant to submit such contract or proof of such an appointment that it places reliance upon.

28. At all material times the first and fifth respondent's maintained that *“the brokers represent the members whom they represent, however, the broker may be appointed by either the member or the employer under certain circumstances.”*

29. When a member or the employer group informs the Scheme of a change in broker, the Scheme is obliged to follow the instructions of that member or employer

group. In this instance the Scheme was instructed by the employer group (the second respondent) that the fourth respondent had recommended a change of their broker. In light of this notification the services of the applicant were terminated to ensure that the Scheme performed in accordance with its statutory duties in terms of section 65 and Regulation 28.

30. What is noted of the appointment of the applicant in March 2013, the second respondent had requested that *“all service level agreements must be concluded with both unions. It is specifically recorded that SA Post Office is not in any way obligated to contractually perform in terms of this appointment”*.

31. It would seem that even though the recommendation must be made by the member or union/unions, the second respondent is the party who informs the Scheme of the recommendation. Even so, the second respondent still requires the union and broker to conclude a service level agreement.

32. The second respondent in no uncertain terms advised the parties concerned that it was not contractually obliged to perform in terms of such appointment when they dealt with the recommendations of the relevant union.

33. The way I see it, the agreement for brokerage service is between the union and the broker. The first and fifth respondents are agents that administer the payments to the broker on behalf of the member or employer group. The second respondent is the agent between the employee or union and the broker. In these circumstances I cannot see how the second respondent could be contracting with the applicant.

34. No service level agreement was concluded between the fourth respondent and the applicant. Both would have been contractually bound to perform in terms of the said service level agreement which was not concluded. In this instance there could not have been a contract concluded by the applicant and the third and fourth respondent if the appointment of the applicant took place on 15 March 2013, when the recommendations were made by both these unions only on 10 and 14 May 2013.

35. It is evident to me that there are clearly issues that need to be dealt with by way of evidence. There is no service level agreement only the recommendations and the letter from the second respondent advising the applicant of the recommendation

made. The applicant places reliance upon these documents however this does not tie in with the applicant's version of what transpired on 15 March 2013.

36. In view of the disputes of fact between the parties I am convinced that this is a matter that cannot be decided on the papers before me but should proceed to trial.

37. I also find that it is irresponsible of the applicant to just wish away the issue of the non-joinder of Classique. In light of my findings above the entire appointment of the applicant, in my view, needs to be revisited. I say so because the fourth respondent on 14 May 2013 confirmed the recommendation of the third respondent of 10 May 2013, however the applicant had already been appointed by the second respondent on 15 March 2013.

38. There are too many issues to consider, to mention but a few:

- Was the applicant appointed by the recommendations of the unions or not? The applicant on its own version will fall short in this regard taking into account what I have said in the preceding paragraph;
- Then there is the second respondents adamant stance that it does not contract with brokers and is not obliged to contractually perform in terms of the appointment of the applicant;
- Are the first and fifth respondent's acting in terms of their statutory duties having regard to the revelation of the appointment of the applicant?
- Is the first respondent still bound to pay the commission of the applicants with regards to the third respondent in light of the facts above?

Costs

39. The applicant at its own peril proceeded with this matter by way of motion court proceedings and as such knew of the risk it was embarking upon. In the circumstance, my view is that, the applicant should be liable for costs of bring the parties along this risky path. No better court would be in a position to deal with the issue of costs than this court.

40. Therefore the successful respondents, the first, second, fourth and fifth, are entitled to costs of the opposed application which would include the costs reserved of 23 September 2014, 24 November 2014 and 10 March 2015, such costs to include the employment of senior counsel where so employed.

Conclusion

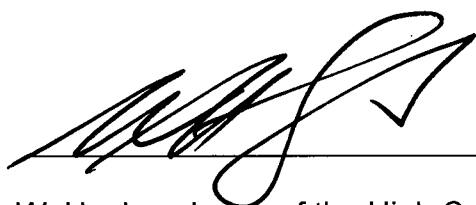
41. In the circumstances as set out above it is abundantly clear to me that the *rule nisi* be discharged with costs and the matter is referred to trial.

Order

41.1 The application is dismissed.

41.2 The rule is duly discharged and the matter is referred to trial.

41.3 The applicant is ordered to pay the costs of the first, second, fourth and fifth respondents opposing the application. Such cost to include the employment of senior counsel where so employed.


W. Hughes Judge of the High Court

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