IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

24/8/15

Case number: 61312/2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

24/8/15
DATE SIGNATURE

In the matter between:

SPECTRAMED MEDICAL SCHEME	**Applicant**
and	
THE REGISTRAR OF MEDICAL SCHEMES	**First Respondent**
JAN SWANEPOEL	**Second Respondent**
RESOLUTION HEALTH	**Third Respondent**

Heard: 19 August 2015

Delivered: 24 August 2015

JUDGMENT

A.A.LOUW J

Introduction

[1] The issue to be determined is whether the first respondent (the "**Registrar**") is compelled to consider a proposed amalgamation (which has yet to be lodged) between the applicant ("**Spectramed**") and the third respondent ("**Resolution Health**") in circumstances where Spectramed is under investigation for alleged irregularities and mismanagement of trust funds and where Resolution Health is in the process of being liquidated.

The Medical Schemes Act 131, of 1998

[2] In the long title of this Act ("the Act") it is stated that one of the purposes of the Act is protect the interests of members of medical schemes. If one has regard to section 7(a) of the Act it is the first listed function of the council for medical schemes (the Council) to protect the interests of the beneficiaries at all times.

[3] It is thus the Council as represented by its main executive official, the registrar, to at all times act in the interests of members of medical schemes and to do so scrupulously. This duty is of significance as billions of rands are controlled by medical schemes in South Africa. Medical aid schemes are non-profit organisations. All assets of these schemes, whether fixed assets, reserves or working capital have been derived from contributions by members. Thus, in this sense, a medical scheme is the custodian of public money.

[4] It is in the light of this background (briefly sketched as I heard this case in the urgent court on 19 August and deliver judgment by 24 August) that I have to consider whether I should order the registrar to consider the proposed amalgamation (in respect whereof the exposition of the transaction as required by section 63 of the Act, still has to be drafted) and furthermore compel him to take such a decision on or before 10 November 2015.

The urgency

[5] The urgency is alleged to be that the process of amalgamation has to go through its various steps, outlined hereunder, and finalized by the lastmentioned date so that the new membership contributions and benefits can become operative from 1 January 2016.

[6] The process of amalgamation is regulated by section 63 of the Act. It is necessary to set out the applicant's envisaged timetable for complying with the various requirements of section 63 as this forms the basis of the alleged urgency. I therefore quote par 49 of the founding affidavit:

> *"49. The timetable for hearing this application has been designed to ensure that the regulatory processes relating to amalgamations of medical schemes as set out above can be completed in time for the amalgamation to proceed with effect from 1 January 2016. In this regard:*
>
> *49.1. Under the Rules of the amalgamated scheme, members will have one month's notice to select their benefit options for the 2016 calendar and benefit year.*

49.2. A final decision by the Registrar on the amalgamation will accordingly be required by 10 November 2015 for members to be notified of the decision in time to exercise their election in respect of benefit options in 2016.

49.3. In terms of subsections (4) and (5) of section 63, the minimum period allowed between lodgement of the exposition document and scheme voting results with the Registrar and the Registrar's final decision on the amalgamation is 42 days.

49.4. So the exposition document and scheme election results will have to be lodged with the Registrar by the end of September 2015.

49.5. The process of appointing an independent external party to conduct the election on the amalgamation, printing copies of the abridged exposition document, distributing these copies to members with 21 days' notice of an election on the proposed amalgamation, counting the ballots and preparing a report on the election for the Registrar takes at least five weeks.

49.6. So if the election is not going to be an exercise in futility and result in the wasted expenditure of millions of rands across both schemes, an order of this Court will be required by Monday 24 August at the latest."

[7] On 18 February 2013, an inspection was ordered into the affairs of Spectramed including any associated institutions, its board of trustees, principal officer and other officers, in terms of section 44 of the Act and section 2 of the Inspection of Financial Institutions Act, 80 of 1998 ("the Inspection Act"). The inspection covered the period from January 2009 to February 2013.

[8] The inspection was ordered after Spectramed's audit and risk committee was summarily dissolved and its erstwhile chairman advised the Regisrar's office of alleged irregularities and mismanagement of trust funds at Spectramed.

[9] The report relating to this inspection (the first report) was received by the registrar during May 2015. In the meantime a second inspection was ordered in November 2014 and January 2015. This related to the procurement of administration and managed care services. The second report was submitted to the registrar's office on 21 April 2015.

[10] After receipt of these two reports the registrar sought the advice of senior and junior counsel as to the most appropriate regulatory intervention to be pursued based on those reports. The advice received was to conduct a third inspection into the corporate governance of Spectramed since the first inspection report was dated as it related to the period from 2009 to February 2013. This was also considered important given the new developments that had occurred on or before October 2014, namely, the establishment of a new audit committee, the appointed of a new principal officer, a new chairman and two additional trustees.

[11] Spectramed opposes this third inspection. It asks in part B of the application (which is not before me now) that the third inspection decision be reviewed and set aside save in so far as it relates to item 3.9 of the appointment letter. This para refers to the change of administrators of the scheme.

[12] It seems entirely reasonable to me that the registrar is entitled to an up to date report in ordered to take informed decisions as to its further conduct vis-à-vis Spectramed. I cannot see how I can find on the papers that the decision to asks for this further report is *mala fide* or that the registrar deliberately wants to sabotage the amalgamation. As the regulator of the industry the registrar is entitled to have a further investigation done.

[13] On this finding I cannot grant a declarator that the registrar is to consider the envisaged application and so much less can I order it to come to a final decision by 10 November 2015. As the exposition does not yet exists, and it is not known what further information the registrar may call for, one cannot now speculate as to the amount of time that will be needed by the registrar to take a responsible decision. The orders asked for seem to me to be an unjustified interference with the duties of the registrar and a trespassing onto his terrain as regulator. Of course, I do not mean by this statement that a court can never interfere in such an administrative law process, but it is simply not warranted to do so in the present circumstances.

[14] There is therefore no *prima facie* right or urgency to issue the declarator as asked for in prayer 1.2. Consequently the relief in prayer 1.3 falls away. That leaves the relief in prayer 1.4 to be considered.

Prima facie right

[15] The latter prayer is for an interim interdict pending review namely that pending decision on part B of the application the second respondent be prohibited from proceeding with the inspection under the certificate issued to him on 17 July 2015. Such an interim interdict is provided for in section 8(1)(e) of PAJA.

[16] In regard to a *prima facie* right the applicant argues as follows in para 69 of its written argument:

> *"The third inspection decision constitutes an administrative action in terms of PAJA. The Registrar took the third inspection decision as a decision related to the first and second reports. The purpose was ostensibly to merely update the information available to the Registrar. The decision of the Registrar to direct the third inspection on the overbroad terms in the appointment certificate and to take refuge behind such inspection as a reason not to consider the amalgamation is an unlawful exercise of public power. It is irrational and unlawful. The third inspection has no ostensible relevance to the questions the Registrar is called upon to consider when assessing an amalgamation of schemes. The Applicant has established a prima facie right to review and set aside the Registrar's decision to again appoint an inspector. This decision impacts on the rights of the Applicant in the sense explained by the SCA in Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others (supra)."*

[17] I do not see how it can be argued that the registrar takes "refuge" behind the third inspection as a reason not to consider the amalgamation. In effect the applicant asks me to find that the decision to direct a third inspection is not *bona fide*, irrational and unlawful. On the papers I cannot find that. On the contrary, the decision to me seems reasonable. I can also not find that the items to be investigated are not relevant to assessing an amalgamation of Spectramed with another scheme. The applicant has failed to establish a *prima facie* right. Thus the relief in prayer 1.4 can also not be granted

[18] Belatedly the applicant, in argument, relied on a right to privacy in this regard. Whilst I accept in principle that a corporation has a right to privacy, it is so attenuated – put differently, limited in terms of section 36 of the Constitution – that I doubt it exists at all in the present circumstances. Surely the registrar has the right to investigate the use of public money in the terms as set out in the mandate to the second respondent. Were such a right not to be recognised in circumstances like the present, any attorney, or chartered accountant for that matter, can block or frustrate an investigation into their affairs by the Law Society or whatever other regulatory authority.

[19] In any event no reliance on such a right was alleged in the founding papers.

Order

The application is dismissed with costs, including the costs of two counsel.

A.A. LOUW

Judge of the High Court