



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case number: 47707/11
Date: ~~12 August 2012~~

1/8/2012

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED	
1/8/2012	<i>Pretorius</i>
DATE	SIGNATURE

In the matter between:

BARLOWORLD MEDICAL SCHEME
ALEXANDRA AITKEN SMITH
FREEWORLD COATINGS GLOBAL (PTY) LTD

Applicant
Applicant
Applicant

and

THE REGISTRAR OF MEDICAL SCHEMES
GOLDBLATT, LEWIS N.O.
BAQWA, SELBY N.O.
TERBLANCHE, DIANE N.O.

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

JUDGMENT

Pretorius J

This is an application for a review and setting aside of the approval by the first respondent on 1 March 2010 of the revised definition of "employer" in the rules of the applicant and reviewing and setting aside the decision of the second to the fourth respondents dated 1 October 2010 dismissing the appeal of the applicant's in respect of the proposed amendment of the definition of "employer" in the rules of the first applicant.

The respondents indicated in court that the respondents did not oppose the application for an order in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000 extending the time period for the filing of the application to the date on which it was actually filed.

The applicants further seek an order directing the first respondent to approve and register the amended definition of the term “employer” in rule 4 of the first applicant’s rules.

The second part of the relief sought in part 2 of prayer 5 falls away as rules 12.6 and 30A of the first applicant’s rules were registered on 30 December 2011.

The applicants and the respondents were *ad idem* that the crisp issue the court has to decide is whether or not the proposed amendment to Rule 4 of its Rules by the first respondent will render the Rules of the medical scheme inconsistent with Act 131 of 1998 as is provided in section 31 (3) of the Act.

The court has first to decide what the correct interpretation of the definition of “a *restricted membership scheme*” in section 1, read with section 29 (3) of the Act is.

The second issue the court has to decide is what the effect and potential consequences of the proposed amendment will have on the interpretation of “a restricted membership scheme”. The definition of a restricted membership scheme is:

“restricted membership scheme’ means a medical scheme, the rules of which restrict the eligibility for membership by reference to-

- (a) employment or former employment or both employment or former employment in a profession, trade, industry or calling;*
- (b) employment or former employment or both employment or former employment by a particular employer, or by an employer included in a particular class of employers;*
- (c) membership or former membership or both membership or former membership of a particular profession, professional association or union; or*
- (d) any other prescribed matter;”*

This definition must be interpreted with reference to section 29 (3) (a) and (b) of Act 131 of 1998 which reads:

“(3) A medical scheme shall not provide in its rules-

- (a) for the exclusion of any applicant or a dependant of an applicant, subject to the conditions as may be prescribed, from membership except for a restricted membership scheme as provided for in this Act;*
- (b) for the exclusion of any applicant or a dependant of an applicant who would otherwise be eligible for membership to a restricted membership scheme;”*

There is no definition of an open medical scheme. The provisions in section 29 (3) are peremptory. According to these provisions an open medical scheme may not in its rules provide for the exclusion of any applicant, whilst a restricted scheme may not in its rules provide for the exclusion of any eligible applicant.

The proposed amendment to Rule 4 of the first applicant's Rules will amend the definition of "employer" in the Rules of the Scheme to read:

*"the Company [Bartoworld] or any subsidiary, associated or affiliated company, organization or division which has been admitted to participating in the Scheme, including any such employer which the Board permits to continue to participate in the Scheme after it ceases to be so related to the Company for any reason (whether such relationship ceases, without limiting the generality of the following, from a change in shareholding or a disposal of assets or of the whole or part of a division or business) **provided that the discretion of the Board to allow continued participation must be exercised at or about the time of and in respect of the relevant event.**"*

(Court emphasis)

This amendment must be tested having regard to section 31 (3) (a) of the Act which provides:

"(3) On receipt of a written notice from a medical scheme setting out the particulars of any amendment or rescission of its rules, certified by the principal officer, the chairperson and one other member of the board of trustees as having been adopted in accordance with the provisions of the rules of the medical scheme, the Registrar shall-

- (a) *if he or she is satisfied that the amendment or rescission of the rules will not be unfair to members or **will not render the rules of the medical scheme inconsistent with this Act**, register the amendment or the rescission of the rules and return it to the medical scheme with the date of registration endorsed thereon;*
(court's emphasis)

The factual background is that the third applicant had previously been an unincorporated division of Barloworld Limited that is the principal employer participating in the Barloworld Medical Scheme.

The third applicant was unbundled from the first applicant in November 2007. The third applicant is therefore no longer a subsidiary or associated company of the first applicant. There is no relationship at all between Barloworld and the third applicants.

The third applicant informed the board of the first applicant that it would wish to remain a participating employer in the Barloworld Medical Scheme after the unbundling in the interests of the third applicants and of its present and former employees who were members of the Scheme. The current Rules of the Scheme are limited to include only "*the Company (Barloworld) and any **associated or affiliated company or organization.***" (Court's emphasis). This caused the first applicant to have to amend the Rules to facilitate the ongoing participation in the Scheme by the third applicant.

The board considered the amendment and concluded that the continued participation of such employers may be advantageous to the Scheme and its members.

These proposed amendments to the Rules were submitted to the Registrar of Medical Schemes on 25 October 2007 for approval in terms of section 31 of the Act to enable the Board to decide whether to keep the third applicant's employees as members of the first applicant.

In August 2008 the Registrar rejected the proposed amendments. During September 2008 the Scheme appealed this rejection to the Council of Medical Schemes. The Council dismissed the appeal regarding the proposed "employer" definition on 4 June 2009.

An appeal was lodged to the Appeal Board on 3 August 2009 against the Council's ruling in terms of section 50 of the Act. The appeal against the "employer" definition was dismissed. Thus the current application. The court has to decide whether the proposed definition of "employer" accords with the provisions of the Act as is envisaged by section 31 (3) of the Act.

It is clear from the wording of the proposed Rule 4 that the Scheme's board will have a discretion to allow or disallow a previous employer, who is neither an associated nor an affiliated company to Barloworld, to participate in the Scheme or to exclude it from participation in the Scheme.

The question arises what is meant by “a particular employer” or “a particular class of employers.”

In **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 [2] AllSA 262 (SCA)** at para 18 Wallis JA held:

*“The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. **The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.**” (Court’s emphasis)*

The Board will have the discretion whether to include or exclude an employer after it has ceased to be an associated or affiliated company of Barloworld. There will thus be no fixed criteria. Should the Board be allowed to exercise such discretion then it may become an open scheme and would be in conflict with section 29(3) of the Act

where it is prohibited for a Medical Scheme to provide in its rules for the exclusion of any applicant if it is not a restricted membership scheme.

The third applicant will no longer be an employer as envisaged by the definition of "a restricted membership scheme" in the Act, being neither a particular employer nor a particular class of employers as there is no link at all between first and third applicants.

Rule 6.1 of the Scheme's rule provide:

"6.1 Eligibility

6.1.1 Subject to rule 8, membership of the Scheme shall be compulsory for all employees for whom membership is a condition of employment and shall be restricted to –

6.1.1.1 persons in the employment of the employer;

6.1.1.2 persons who have retired from the employment of the employer or its predecessor in title as defined in these rules;

6.1.1.3 persons in the former employment of the employer and who comply with rule 6.1.2 provided that membership shall not be compulsory for an employee who by virtue of previous employment is a continuation member of his previous medical scheme;

provided further the Board may at any time exempt any employee from membership on sufficient evidence being submitted to the satisfaction of the Board that such employee has been or shall be registered as a dependant on such other scheme.

6.1.2 An employee who resigns from the service of the employer or who is retrenched by the employer may remain as a member of the Scheme provided that –

6.1.2.1 he resigns or is retrenched after the age of 53 years; and

6.1.2.2 he has been a member of the Scheme for at least 10 years at the time of resignation or retrenchment.”

6.1.3 A former employee who remains as a member of the Scheme in terms of rule 6.1.2 shall be deemed to become a continuation member on attaining the age of 63 years.”

If Rule 6.1 is read with the proposed amendment of the definition of “employer” it will be possible for the Board to exclude employees eligible under rule 6.1 should the Board in its discretion decide not to admit continual participation of the employer.

This will be in direct contradiction of the provisions of section 29 (3) (b) which prohibits the exclusion of any applicant otherwise eligible.

Objective criteria should be used to determine which employers and employees will be eligible to participate in the first applicant's scheme. This will result in clarity and will not be determined by a decision by the Board in its discretion to include or exclude certain employers as it deems fit. It will enable employers and employees to know whether they are entitled to participate in the restricted Scheme, without first referring to a decision by the Board.

The first applicant set out the intention of the Board as:

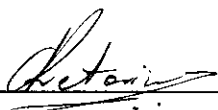
"The purpose of this proposed amendment was to facilitate the continued participation in the Scheme, at the discretion of the Board, by subsidiaries, associated and affiliated companies, and organisations and divisions of Barloworld (such as Freeworld), whose employees already participated in the Scheme, but which ceased to be so related to Barloworld as a result of an unbundling or otherwise. The Board sought thereby to protect and preserve the interests of the Scheme, whose active membership and risk-pool might otherwise be negatively affected by one or more such restructuring events." (Court's emphasis)

It is thus clear that the interests of the Scheme, and not the members will be of paramount importance. The court agrees with the argument of Mr. Maritz, for the respondent, that the Board will be inclined to exercise its discretion in favour of a group which would be the most financially advantageous to the Scheme. A scenario can develop where two divisions are unbundled simultaneously, with the first division having a much better risk profile than the second and therefore a board will obviously, in the interests of the Scheme, choose the more favourable division.

It is thus made very clear that it will be a decision by the Board at the discretion of the Board who will be included or excluded. This is directly in conflict with section 29 (3) (a) of the Act. I am therefore satisfied that the decision by the second to fourth respondents are correct and that the proposed amendment to the definition "employer" in Rule 4 of the registered Rules of the first applicant should not be allowed as it will be in direct conflict with the provisions of section 31(3) of the Act. The Appeal Board was correct to uphold the Registrar's decision.

The following order is made:

1. The time period for the filing of this application is extended until the date of the filing of the application;
2. It is declared that the decision of the definition of "employer" in Rule 4 of the first applicant's rules which was erroneously granted on 1 March 2010 is null and void;
3. The decision of the second to fourth respondents, dated 1 October 2010 dismissing the applicants' appeal against the ruling of the Council for Medical Schemes dated 4 July 2009 in respect of the first respondent's refusal to register the proposed amendment to the definition of "employer" in Rule 4 of the registered rules of the first applicant, is hereby reviewed and confirmed;
4. The applicants' appeal against the ruling of the Council for Medical Schemes dated 4 June 2009 is dismissed.
5. The applicants are ordered to pay the costs jointly and severally, the one paying the other to be absolved, including the cost consequent upon the employment of 2 counsel.


C PRETORIUS
JUDGE OF THE HIGH COURT

Case number	: 47707/2011
Heard on	: 24 July 2012
For the Applicant / Plaintiff	: Adv M van der Nest SC
Instructed by	: Bowman Gilfillan
For the Respondent	: Adv MC Maritz SC
Instructed by	: Maponya
Date of Judgment	: 1 August 2012