

1 SEPTEMBER 2009
NOT REPORTABLE

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG DIVISION, PRETORIA

Case number 37155/09

In the matter between:

RESOLUTION HEALTH (PTY) LTD

RESOLUTION ADMINISTRATORS (PTY) LTD

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

And

THE COUNCIL FOR MEDICAL SCHEMES

1st Respondent

THE REGISTRAR OF MEDICAL SCHEMES

2nd Respondent

RESOLUTION HEALTH MEDICAL SCHEME

3rd Respondent

THE MINISTER OF HEALTH N.O.

4th Respondent

JUDGMENT

INTRODUCTION

1. The applicants applied to the first respondent for accreditation as a managed healthcare organization and as an administrator of the third respondent. In fact, the two applications were made in the name of the first applicant, even though the first respondent may not have appreciated this at the time.

2. The third respondent is a medical scheme that must be registered in terms of section 24 of the Medical Schemes Act 131 of 1998 ("the Act").
3. Section 58 of the Act provides that a person providing administration services to a medical scheme must be duly accredited by the first respondent, while a person rendering managed healthcare services must similarly be registered as such under Regulation 15 of the regulations promulgated under the Act.
4. Prior to 2006, the first applicant had been accredited as a managed healthcare association and the second applicant as the third respondent's administrator.
5. After a dispute arose between the applicants and the third respondent, the latter contended that these accreditations had lapsed.
6. The applicants were granted temporary accreditation during October 2008, subject to the resolute conditions that substantive applications for accreditation were lodged within thirty days from the 31st October 2008 and that such applications were granted.
7. The substantive applications were refused on the 29th May 2009.
8. The applicants have lodged an internal appeal against the refusal of the applications in terms of section 50 of the Medical Schemes Act 131 of 1998 ("the Act"). The appeal is pending. Should it be unsuccessful, the applicants have already indicated that they intend to launch a review application to this Court.
9. The resolute conditions not having been fulfilled, the applicants' temporary accreditation has lapsed.
10. The applicants approach the Court on a basis of urgency for an interim order, pending the finalization of the appeal and potential review proceedings, declaring that the temporary accreditation has not lapsed; alternatively relief in terms of which the first respondent is ordered to grant the desired accreditation to the applicants until all the envisaged processes have been finalized.

11. These orders were sought subject to the internal appeal being launched and prosecuted timeously in terms of section 50(3) of the Act.
12. In the alternative, an order is sought that the provisions of Regulations 15A, 15B and 15C of the General Regulations promulgated in terms of section 67 of the Act are invalid, but it was conceded during argument that this relief is not urgent. Nothing further need be said about this cause of action in this judgment.
13. The application is opposed by the first and second respondents.

THE PARTIES

14. The first applicant is Resolution Health (Pty) Ltd, formerly known as Resolution Managed Healthcare (Pty) Ltd, a company duly registered and incorporated as envisaged by the Company Act 61 of 1973, with principal place of business and registered office at Resolution Office Park, Boskruin Office Park, President Fouché Avenue, Boskruin.
15. The second applicant is Resolution Administrators (Pty) Ltd, formerly known as Medical Aid Administration Experts (Pty) Ltd, a company duly incorporated and registered in accordance with the Company Act 61 of 1973, with principal place of business and registered office at the same address as the first applicant.
16. The first respondent is The Council for Medical Schemes, a juristic person duly established in terms of the Act, with principal place of business at Hadevelds Office Park, Block E, 1267 Pretorius Street, Hadeveld, Pretoria.
17. The second respondent is the Registrar of Medical Schemes, the executive officer of the first respondent, appointed in terms of section 18 of the Act, of the same address as the first respondent.
18. The third respondent is Resolution Health Medical Scheme, a medical scheme duly registered in terms of section 26 the Act, a corporate

body with legal personality and principal place of business at the same address as the applicants. The third respondent is joined in this application because of its interest in the outcome thereof, but no relief is claimed against it.

19. The fourth respondent is the Minister of Health cited in his official capacity as such as the political head of the Department of Health, of c/o the State Attorney, 8th Floor, Bothongo Heights, 167 Andries Street, Pretoria, joined in this application as an interested party without any relief being claimed against him.

THE FACTUAL BACKGROUND

20. The second applicant, then known by its previous name, concluded an administration agreement with the third respondent on the 3rd January 2005.
21. It changed its name to its present appellation during November 2005.
22. The business activities of the second applicant were either merged or consolidated with those of the first applicant with effect from the 1st January 2007.
23. Although there appears to be some dispute about the precise sequence of the so-called consolidation or merger, it is clear that according to the financial statements of the first, second and third applicants that all their business activities were conducted through and provided by the first applicant from a date before the end of the financial year 2007.
24. In spite of the merger, the second applicant and the third respondent concluded another administration agreement on the 7th November 2007, recording that a merger of the first and second applicants was envisaged and that the administration agreement would be “transferred” to the new entity thus created.

25. The administration agreement is alleged to have been “ceded” to the first applicant with effect from the 1st January 2008.
26. It is common cause that no notice of the alleged cession was given to the 1st respondent.
27. From the applicants’ and the third respondent’s financial statements it appears, however, that the transfer of the second applicant’s business to the first applicant was effected as from the 1st January 2007.
28. It is common cause that the “transfer” or “merger” was effected without having given the first respondent prior notice thereof and without having obtained the first respondent’s consent thereto.
29. The first respondent engaged upon an inspection of the applicants and the third respondent and their related enterprises during or about March 2006 already.
30. After a report and a lengthy reply the first respondent raised various charges against the applicants and indicated its intention to cancel the applicants’ accreditation as a managed health care organization and an administrator respectively.
31. During the course of the investigation and subsequent interactions between the applicants and the first respondent, the applicants’ existing accreditations expired, as accreditations have to be renewed every 24 months in terms of Regulation 17 (4) (a) of the Regulations promulgated in terms of the Act. No application for a renewal had been made while the investigation and its consequent interactions between the parties had taken place.
32. The granting of the temporary accreditations has been adverted to above, as has the refusal of the substantive applications for a renewal of the existing accreditation or, more accurately, the granting of both applications to the first applicant.
33. Following upon the “merger” or “transfer” of the business of the second applicant to the first applicant, the applications for a renewal of the accreditation as manager and as managed health care provider were

made in the name of the first applicant, according to the applicants' founding affidavit, and the interim relief the applicants seek aims to obtain such interim accreditation in the first applicant's name.

THE ENTITLEMENT TO INTERIM RELIEF

34. It is common cause that the fact that an appeal against the refusal of the accreditation of renewal thereof is pending in terms of section 50 of the Act to a statutory appeal board does not suspend the refusal of the accreditation (if such were possible in law), nor does it provide for an interim authorization to render the services accreditation for the delivery of which has been refused by the first respondent.
35. The applicants contend that they find themselves in the same position as an applicant for a liquor licence or a road transport certificate whose application has been refused by the regulatory authority and rely on decisions such as *Patterson v Umvoti Liquor Licensing Board* 1932 NPD 766; *Pietermaritzburg City Council v Local Road Transportation Board* 1959 (1) SA 586 (A) and *Airoadexpress v Local Road Transportation Board, Durban and Others* 1986 (2) SA 663 (A). They argue that the *status quo ante* should be maintained pending the administrative appeal and potential review to prevent injustice, hardship or irreparable harm being caused to them.
36. The first and second respondents ("the respondents") dispute the applicability of this rule and point to the fact that the first applicant conducted the business of an administrator without permission or accreditation and thus operated unlawfully. To grant interim relief under such circumstances would countenance the continuation of an unlawful practice that is visited by a criminal sanction in section 66 of the Act.
37. As the question whether the applicants have a right to the relief sought appeared to the court to be possibly decisive of the matter, an order

was made on the first day of argument that this question should be determined separately and *in initio* in terms of Rule 33(4).

38. During argument on this issue reference was made to the fact that the first respondent had been under a misapprehension when deciding the application for accreditation as administrator that the first applicant was in fact the second applicant under a new name.
39. The court enquired whether this misapprehension could not be said to have led to the administrative process not having been fairly conducted when the applications for accreditation were considered.
40. The court is indebted to counsel for the further research that was conducted to clarify this issue.
41. The end result will not be affected by the fact that the first respondent laboured under a misapprehension when the applications for accreditation were placed before it. The critical question to be decided is whether the applicants could be described as *bona fide* service providers whose accreditation ought to have been granted and the refusal of which will in all probability be overturned on review or by the internal appeal tribunal. The applicants suggest that the following citation from the judgment of Kotze, JA in the *Airoadexpress* matter applies to them: “

“In the instance case the order of the local board has not yet been set aside and it may be argued that confirmation of the rule will run counter to the local board's order. Setting aside the order could, at the earliest, take place when the NTC decides the appeal. That may involve a long delay. I cannot accept that, if it can be shown in a case of this kind that the appellant must inevitably succeed in the appeal, interim relief pending the determination thereof can lawfully be withheld solely by reason of an order which cannot conceivably be sustained. I am of the view further that in principle the same approach should prevail where a strong prima facie case is established that the permits applied for were wrongly refused. In my view the principle applied in the De Fraetas type of case should be extended to a case like the present. The decision in that case is based on the existence of a "general power" or, put differently, an inherent jurisdiction to grant pendente lite relief to avoid injustice and hardship. An inherent power of this kind is a salutary power which should be

jealously preserved and even extended where exceptional circumstances are present and where, but for the exercise of such power, a litigant would be remediless, as is the case here.” (per Kotze JA at 676 A-D)

42. The principles enunciated in this judgment are not applicable to the present dispute. It is clear that the Kotze JA proceeded from the premise that the applicant in *Airoadexpress* was lawfully entitled to hold the permit applied for and that it had made out a strong case for the granting thereof, resulting in injustice and hardship if no interim relief were granted. In addition, the applicant had rendered the service applied for in virtually identical form prior to the application for the permits in issue being launched.
43. The present matter stands on a significantly different footing. The first applicant was at no stage entitled in law to render the services of an administrator, but proceeded to do so in spite of the fact that its directors knew that it was unlawful to render the service without accreditation. They knowingly allowed the first applicant to commit a criminal offence for financial gain. In addition, the role of administrator was assumed by the first applicant at a time when its fitness to render another service, that of managed health care, was under earnest debate with the first respondent after the latter’s expression of the view that the existing accreditation should not be renewed – and neither should second respondent continue as administrator.
44. Against this background the failure to pertinently advise the first respondent of the true state of affairs, and the failure to seek its prior approval of the proposed transfer of the administrator’s functions assume a sinister hue. If the failure to pertinently advise the first respondent was deliberate, the first applicant’s directing minds might well be regarded as lacking in probity and frankness; if it arose from negligence, the fitness of the directors to conduct its business with the necessary acumen might well be questioned.

45. Of particular concern in this regard is the fact that the first applicant received contributions from the third respondent's members in an account kept under the former's name. The moneys were transferred daily to an account opened in the third respondent's name. This practice was – or still is - in flagrant contravention of the imperative contained in Regulation 23 that these funds – which clearly are in the nature of trust funds – should be held in an account in the medical scheme's name. The moneys paid by the third respondent's members were received - albeit only for a day at a time – in an account that would reflect these funds as the applicant's turnover to the bank. The size of such turnover may have influenced the first applicant's bankers in its favour.
46. The transgression of this provision cannot but be viewed in a very serious light. The unlawfulness of the entire operation admits of no doubt: *Watson NO and Another v Shaw NO and Others* 2008 (1) SA 350 (C) and on appeal: *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA).
47. In the light of the foregoing the respondents' submission that the first applicant never had the right to act as administrator is correct. Its actions in providing such service against the background of an already existing dispute with the respondents about its ability to provide managed healthcare services and the second applicant's fitness to be the third respondent's administrator (as the respondents believed the entity administering the medical scheme to be), cast a shadow over the management's fitness to be entrusted with services the nature of which differ little from those of trustees or curators.
48. Far from finding themselves in the position of applicants whose appeal is virtually certain to succeed, the applicants are requesting the court to allow them to continue to act as administrator under circumstances that render the first respondent's performance of this function a criminal offence not only from the date of the dismissal of the

accreditation application, but from the moment the first applicant commenced its role as such.

49. A court cannot be party to such practice.
50. The applicants have therefore not made out a case for an interim order that would entitle the first applicant to continue to act as administrator pending the appeal and a potential review, quite apart from which it is not at all certain that the proposed appeal will succeed – on the contrary.
51. It was argued strenuously on the applicants' behalf that the rendering of the managed healthcare services stood on a different footing as the first applicant had rendered these for about nine years to the third respondent without any serious complaints or difficulties.
52. The respondents allege that the applicants have been proven to be unreliable, at the very least, and that the first applicant has not made out a case that its review or appeal will succeed in respect of the managed healthcare services, let alone that there is a strong prospect thereof.
53. Bearing in mind that there is, if not an identity of management providing both the services, then at least a strong affinity of management while the directors and shareholders controlling the first applicant are obviously the same in respect of both services, this argument is compelling. If there is serious doubt about the administrator there can be little sanguinity about the same entity providing another service to a medical scheme.
54. The application must therefore be dismissed in its entirety.
55. This finding renders it unnecessary to analyze the detailed complaints raised by the respondents against the applicants' management, bookkeeping, banking practices and administrative lapses. Suffice to say that there has been an ongoing debate between the parties about complaints raised by the respondents for several years, leading to the accommodation of the granting of the temporary accreditation referred

to above, until the substantive applications were eventually refused. The mere existence of these complaints is enough to create a sense of unease regarding the applicants' business practices – but no final finding need be in respect of these points individually.

56. The applicants also argued that the respondents had created the impression by granting the temporary accreditation that full accreditation would follow as a matter of course and that the respondents were therefore estopped from relying on the existing complaints and unlawful actions once the temporary accreditation was conferred upon the applicants.
57. The respondents cannot waive compliance with the demands of the statute and the regulations promulgated thereunder and can therefore not be estopped from applying the full measure of the law to the applicants' failure to comply with the required standard and practices.
58. The parties were agreed that, should the application fail, the applicants and the third respondent should be granted a period of three months to transfer the functions of administrator and managed health care provider to another entity or to the third respondent itself.
59. The following order is made:
 1. The application is dismissed with costs, including the costs of two counsel;
 2. The applicants and the third respondent are granted a period of three months from date of judgment to transfer the functions of an administrator and a managed health care provider to another provider or providers of these services, or to the third respondent itself.

Signed at Pretoria on this 1st day of September 2009.



E Bertelsmann.

Judge of the High Court

For Applicants: Adv R. Stockwell SC
Adv A.C. Botha
Adv C.J. Bresler

For Resp: Adv J.J. Brett SC
Adv N.H. Maenetje