

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

COURT A QUO CASE NO.: 60445/21

APPEAL CASE NO.: A288/2023

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

DATE

SIGNATURE

In the matter between:-

**SOUTH AFRICAN POLICE SERVICE MEDICAL SCHEME
("POLMED")**

First Appellant

MEDSCHEME HOLDINGS (PTY) LTD

Second Appellant

V

METROPOLITAN HEALTH CORPORATE (PTY) LTD

First Respondent

MOMENTUM HEALTH SOLUTIONS (PTY) LTD

Second Respondent

MOMENTUM CONSULTANTS AND ACTURIES (PTY LTD

Third Respondent

In the interlocutory application between:

METROPOLITAN HEALTH CORPORATE (PTY) LTD

First Applicant

MOMENTUM HEALTH SOLUTIONS (PTY) LTD

Second Applicant

MOMENTUM CONSULTANTS AND ACTURIES (PTY LTD

Third Applicant

v

SOUTH AFRICAN POLICE SERVICE MEDICAL SCHEME

First Respondent

MEDSCHEME HOLDINGS (PTY) LTD

Second Respondent

In re:

METROPOLITAN HEALTH CORPORATE (PTY) LTD

First Applicant

MOMENTUM HEALTH SOLUTIONS (PTY) LTD

Second Applicant

MOMENTUM CONSULTANTS AND ACTURIES (PTY LTD

Third Applicant

v

SOUTH AFRICAN POLICE SERVICE MEDICAL SCHEME

First Respondent

MEDSCHEME HOLDINGS (PTY) LTD

Second Respondent

Heard on: 22 January 2025

Delivered: 6 February 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 5 February 2025.

Summary: 1. The High Court has jurisdiction in the review application in terms of PAJA in terms of Section 169 of the Constitution.

2. The issue as to whether the impugned decision constituted an administrative action, is an enquiry into the merits of the matter, which

proposition was confirmed in ***Murray and Others v Ntombela 2024 (4) SA 95 SCA***.

3. It is settled law that when a proper jurisdiction dispute is raised, it has to be disposed of before a party is called upon to file a Rule 53 record as enunciated in the ***Standard Bank*** and ***Computicket*** decisions.

ORDER

It is ordered:-

1. The appeal is dismissed.
2. The appellants are ordered to pay the costs jointly and severally, including the costs of two counsel.

JUDGMENT

KOOVERJIE J (MOSHOANA J et LEDWABA AJ concurring)

- [1] In this appeal the appellant's challenge court *a quo*'s decision whereby Polmed was directed to file the Rule 53 record.
- [2] For the purposes of this judgment the appellants will be referred to as the South African Police Services Medical Scheme ("Polmed") and Medscheme Holdings (Pty) Ltd ("Medscheme") and the respondents will be referred to as the "Momentum group".

ISSUE FOR DETERMINATION

- [3] This appeal deals with a crisp point in law. The main issue for determination is whether it was competent for the court *a quo* to have compelled the filing of the Rule 53 before determining whether the impugned decision of Polmed was reviewable in terms of the Promotion of administration of justice Act 3 of 2000 (PAJA). Polmed contended that the issue of the reviewability of the impugned decision affects the jurisdiction of the High Court to hear the PAJA review.

CORE DISPUTE

- [4] This matter was premised on an interlocutory application instituted in terms of Rule 30A whereby the Momentum sought the Rule 53 record from the appellants. They instituted a review application seeking, *inter alia*, the setting aside of Polmed's decision in its bidding process where they were not successful. Polmed persisted with an argument that the decision is not reviewable as it does constitute an administrative action, neither is it a decision of an organ of state nor involves an exercise a public function. Polmed not only opposed the application but launched a counter application where it sought, *inter alia*, a declarator that it is not an organ of state, as such its impugned decision is not reviewable under PAJA.
- [5] The appellants argued that it is not competent for the court to have ordered the filing of the record at this stage of the proceedings. The court was required to make enquiries as to whether Polmed's decision was reviewable in terms of PAJA. It follows that if there is no reviewable decision, the provisions of Rule 53 do not find application, so went the argument. They persisted with the argument that the High Court does not enjoy review jurisdiction over the impugned decision. Such implicated the jurisdictional powers of the High Court to hear the review launched, so went the argument.

- [6] Momentum group's core argument is that Polmed is not permitted to short-circuit the main review application and refuse to provide the record in terms of Rule 53. The aforesaid arguments of Polmed pertains to the merits of the matter and should properly be adjudicated before the review court. Consequently, it would be premature to adjudicate thereon at this stage of the proceedings. As a matter of law, the Momentum group argue that they are entitled to the production of the record. They relied squarely on the provisions of PAJA, contending that the impugned decision constituted an administrative action.

ANALYSIS

- [7] Upon having heard the submissions made by counsel for the parties it became evident that Polmed's substantive point was that their defence turns on a jurisdiction issue. Momentum group on the other hand, argued that it is an enquiry that goes to the merits of the matter.
- [8] It becomes necessary in law to highlight the distinction between a jurisdiction proper and a merits argument. . The Constitutional Court in the ***Standard Bank*** matter¹ expressed that a distinction must be made between the jurisdiction of the forum to hear the review application and the merits in the review application.
- [9] Our courts have through a long line of cases established the proposition in law that – when there is a dispute regarding the jurisdiction of the court, such court may only order the production of the record once the jurisdiction issue is settled. The appellants squarely rely on the aforesaid principle and maintain that since their defence is premised on the jurisdiction issue, it has to be adjudicated first.

¹ Competition Commission of South Africa versus Standard Bank of South Africa Limited; Competition Commission of South Africa versus Standard Bank of South Africa Limited; Competition Mission of South Africa versus Waco Africa (Pty) Ltd and Others [2020] (4) BCLR 429

[10] In this regard, the seminal decisions of the **Standard Bank** and the **Computicket** matters² are relevant. The Constitutional Court in **Standard Bank** emphasized that a court must have the necessary authority to make an order or else such order would constitute a nullity. At paragraphs 201 to 203 the court expressed:

“... Where the jurisdiction of the court before which a review application is brought is contested, a ruling on this issue must precede all other orders. This is because a court must be competent to make whatever orders it issues. If a court lacks authority to make an order it grants, that order constitutes a nullity...”

By its very nature, rule 53 of the uniform rules application and review proceedings are instituted before a competent court...

Therefore, the rule enables the applicant to raise relevant grounds of review, and the court adjudicating the matter to probably perform its review function. However for a court to perform this function, it must have the necessary authority. It is not prudent for a court whose authority to adjudicate a review application is challenged to proceed to enforce Rule 53 and order that disclosure should be made before the issue of jurisdiction is settled. The object of rule 53 may not be achieved in a court that lacks jurisdiction.”

[11] The Constitutional Court further in **Standard Bank** cited with approval the principles set out in the **Computicket** matter. At paragraph 120 the said court highlighted the importance of the Rule 53 record and its availability to litigants. It echoed the proposition in law that:

“A distinction must be made on the jurisdiction of the forum to hear the review application and the merits of the review application. If a review application is launched in a forum that enjoys jurisdiction that a party is entitled to the record

² Competition Commission versus Computicket (Pty) Ltd [2014] ZASCA 185

*even if the grounds of the review are meritless. As the Supreme Court of Appeal put it “the obligation to produce the record automatically” follows upon the launch of the application however ill-founded and application may later turn out to be.³ This is because, as recognised by the majority decision in **Helen Suzman**, Rule 53 envisages the grounds of review changing after the record has been furnished. The record is essential to a party’s ability to make out a case for review. It is the reason that a prima facie case on the merits it not be made out prior to the filing of the record.”*

[12] It is not in dispute that the review application was premised in terms of PAJA. In their founding affidavit to the review application Momentum group alleged that the impugned decisions constituted an administrative action contemplated in terms of PAJA *alternatively* such impugned decision amount to an exercise of public power.⁴ Thus, the impugned decision is reviewable under PAJA alternatively the principle of legality, so the allegations went.

[13] It is apposite, at this juncture to refer to **Murray**⁵ where the Supreme Court of Appeal was seized with a similar issue for determination, namely whether the decision constituted an administrative action and whether it was susceptible to review.

[14] In **Murray** the liquidators similarly contended that the right to the production of the record as provided for in rule 53(1)(b) would arise only upon the determination of the High Court, on the issue whether the election not to

³ My underlining

⁴ “55 I am advised that Polmed intake in the impugned decisions, exercise public power and perform the public function in accordance with an enabling provision including the constitution, the SAPS and its regulations.

56 I am advised that the impugned decisions constitute administrative action as contemplated in the promotion of Administration Justice Act 3 of 2000 (PAJA). I am advised, in the alternative, the impugned decisions constitute an exercise of public power.

57 In the circumstances, I am advised that the impugned decisions are reviewable under PAJA, alternatively the principle of legality.”

⁵ The decision of the majority court in **Murray and Others NNO v Ntombela and Others** 2024 (4) SA 95 SCA

render performance in terms of the contract concluded with the party prior to its liquidation, constituted administrative action.

- [15] **Murray** upheld the principles set out in the **Standard Bank** and **Computicket** decisions, namely that when a jurisdiction issue is raised in review proceedings, the court has to dispose of such issue first before proceeding to direct the parties to file a record.
- [16] It however went a step further by succinctly proceeding to distinguish why the substantive defence raised, which is similar *in casu*, did not constitute a jurisdiction issue.
- [17] The court further noted that the parties never raised the point of jurisdiction. Instead the contention centered on whether the conduct of the liquidators constituted an administrative action and confirmed that the High Court has jurisdiction to adjudicate on reviews. At paragraph 41 the court expressed:
- “In this case there is not even the slightest suggestion that the high court lacks jurisdiction to entertain the review application. On the contrary the jurisdiction has been accepted without question. On the score it bears mentioning that ordinarily the high court may decide any constitutional matter except matters that reside within the exclusive domain of the Constitutional Court or are assigned by national legislation to another court of equivalent status to that of the High Court. In addition the High Court may hear any other matter not assigned to another court by national legislation.*⁶ That the appellants themselves desire that the high court itself deal with an adjudicate the liquidators point of law set forth in their rule 6(5)(d)(iii) notice attests the fact that its jurisdiction is not contested. In reality, the crux of the liquidator’s case is that the relief sought by the respondent in the review proceedings are not only ill-conceived but also legally untenable. That may well be so. The

⁶ My underlining

question must – for reasons already stated – be determined only once review application is ripe for hearing and not before.”

At paragraph 42 court continued:

“42 As indicated, rule 53, which is designed specifically to regulate review proceedings, forms an integral part of the uniform rules regulating the way proceedings in the high court generally ought to be conducted. And, as I have demonstrated above the high court has the jurisdiction to hear any dispute that can be resolved by the application of the law and decided on a fair public hearing, save only in relation to matters assigned to other courts by the Constitution or national legislation. The respondents review application currently pending before the high court to which this appeal pertains to is not one of the exclusions. Accordingly, in the context of the facts of this case, the jurisdiction of the high court can hardly be contested on any tenable grounds and any order it may make ultimately – whether right or wrong – will not, as a result, constitute a nullity.”

[18] Similarly, in this matter, the court *a quo* also noted that no jurisdictional challenge was raised on the papers before it. At paragraph 26 the court *a quo* expressed:

“In my Rule 53 judgment and order I adopted the view that because the Competition Commission matters related to a challenge of jurisdiction proper, it was not applicable to the issues that serve before me. There was no jurisdictional challenge at all on the papers before me. It was submitted by counsel acting for the applicants that in reaching these conclusions the court did not err. It was submitted that nowhere in the answering affidavit to the Rule 30A application, or in its counter application, does the respondents contend that this court has no jurisdiction to entertain the review application. On the contrary the applicants founding affidavit demonstrates the opposite.”

[19] **Murray** further clarified the position that the substantive dispute raised was a merits determination. This clarification is significant since the issue of jurisdiction is one that relates to the authority to hear a case. Jurisdiction can be established in two instances, firstly, it may emanate from the statutory provisions (statutory jurisdiction) the parties are bound to, and secondly, it depends on presence of jurisdictional facts which must exist before jurisdiction is exercised (objective jurisdictional facts jurisdiction). In this instance, jurisdiction is determined by virtue of the relevant statute.

[20] At paragraph 28 the Court held that Section 169 of the Constitution⁷ enjoins the High court to have jurisdiction in review proceedings:

“28 Lest I be misunderstood, the judgement does not say in circumstances where a court patently lacks jurisdiction to even entertain the matter. It should nevertheless go through the motions, in a manner of speaking, and order a respondent to provide a record to the applicant as contemplated in Rule 53(3). Far from it. Where the very jurisdiction of the court is contested which is not the case here, the court must naturally determine the issue up front. This, of course, is precisely what the Constitutional Court decided in Standard Bank. The present case is starkly different – here the High Court is indubitably empowered in terms of section 169 of the Constitution to deal with all manner of causes of action except those explicitly (or by necessary implication) excluded from its jurisdiction...”⁸

[21] At paragraph 14 the court expressed:

⁷ Section 169 reads:

“The High Court of South Africa may decide-

(a) any constitutional matter except a matter that-

(i) the Constitutional Court has agreed to hear directly in terms of Section 167(6)(a); or

(ii) is assigned by an Act of Parliament to another court of a status similar to the High Court

....

(b) any other matter not assigned by another court y an Act of Parliament.”

⁸ My underlining

“14 In view I take of the matter, this court – as was the high court – is not at this stage called upon to enter into the substantive merits of the review proceedings. Rather what this court is seized with is the interlocutory application brought by the respondents (as applicants) an order directing the liquidators (as respondent) to provide them with a record of the decision not to implement the executory contract concluded between Phehla Umsebenzi and the respondents in relation to certain immovable property prior to the winding up of the former...”

At paragraph 18 the court continued:

“18 I agree with some of the contentions advanced by the liquidators to a point. However, on balance, I consider that the overall thrust in seeking to have the grounds of opposition to the relief sought in the review application determined before Rule 53 record is provided, cannot, in the context of the facts of this case and indeed what is at the core of this appeal, be upheld. ...”

[22] Notably *Murray* echoed that the right to a fair hearing would be compromised if there is a premature adjudication on the merits in the review. At paragraph 36 the court stated that:

“Accordingly, if at this stage even before the record is provided to the respondents (as applicants), the court enters into the substantive merits of the review itself...

This would have the potential to disarm the applicant in the review proceedings and, most likely put paid to the quest to review the impugned decision. The inevitable consequence of such an approach would not only be subversive of the respondent’s rights (qua applicants) under Rule 53(3) but also deny them their right to have the real dispute resolved by the application of law decided in a fair public hearing before, in this instance, the court, in breach of the right of access to courts entrenched in section 34 of the Constitution. In truth, what the liquidators seek to do is, borrowing the expression used in **Computicket**, to “effectively place the cart before the

horse” by requiring issues that must rightly be decided in the review application itself determined in the respondents’ interlocutory application. In my judgement no court should countenance such a radical departure from a well entrenched practice and procedure.”⁹

[23] **Murray** illustrated that the facts in the **Standard Bank** matter are clearly distinguishable. The proposition that the issue of jurisdiction has to be ventilated first- did not find application in **Murray**.

[24] The complaint in **Standard Bank** was that a single judge of the Competition Appeal Court could not order the disclosure of the record without first determining whether the Competition Appeal Court had jurisdiction as a court of first instance. It was pointed out that the Competition Appeal Court is a creature of statute and can only exercise those powers conferred upon it by the Competition Act. The reviews in the Competition Appeal Court are unique in that its review jurisdiction is connected with the grounds of review. This is not the position at all in respect of the reviews in terms of PAJA or the legality principle.

[25] At paragraph 37 the court expressed:

“... The decision of the Constitutional Court in Standard Bank which they pin their faith in the heads of argument does not avail them. As I have demonstrated above in Standard Bank the Constitutional Court dealt with an entirely different question. Pertinently, at issue, in that case was whether it was competent for the CAC to entertain an application at the instance of a party who sought an order for the production of the record in circumstances where the jurisdiction of the CAC to entertain the very application was contested by the adversary. The answer to the question with which the CAC was seized was entirely dependent on the antecedent question namely,

⁹ My underlining

whether the CAC had the requisite jurisdiction to entertain the main application in the first place.”

- [26] The court *a quo*, *in casu*, also forewarned that the inclination to entertain challenges to produce a Rule 53 record at this stage of the proceedings would undermine the expeditious adjudication of the review proceedings. In addition, sanctioning such a procedure may create a precedent that can open the doors for potential abuse by respondents and review proceedings already at this stage, before the rendering of the Rule 53 record would raise defences to the merits in the review application, whether meritless or not.¹⁰
- [27] **Murray** is therefore authority for the proposition that the nature of a specific defence raised constituted an enquiry into the merits and that the High Court has jurisdiction in the said circumstances.
- [28] Sections 6 and 7 PAJA regulate the review procedure. Section 6 (1) requires that a review be instituted in a court or tribunal. Section 1 defines a court as: “... the High Court ... within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the parties’ rights have been affected, is domiciled ordinarily resident or the adverse effect of the administrative action was, is or will be experienced...”
- [29] The respondents correctly pointed out that there is nothing in PAJA that requires a party to – connect the grounds of review to the jurisdiction of the court.
- [30] This was the very reason why the Constitutional Court echoed in **Standard Bank** that if a review application is launched in a forum that enjoys jurisdiction then a party is entitled to the record even if the grounds of review are

¹⁰ Paragraph 30 of the judgment of the court *a quo* in these proceedings

meritless. The production of the record automatically follows upon the launch of the application however ill-founded that application may later turn out to be.

- [31] Reference to the ***Richards Bay Coal Terminal*** matter¹¹ does not assist the appellants. Therein the court was seized with determining whether Section 47(9)(e) of the Customs and Excise Act, which made provision for the lodgment of an internal appeal excluded the right to review before High Court. The court therein was seized to determine whether the High Court had jurisdiction in terms of the said statute.
- [32] During argument, counsel for Medscheme pointed out that this court should take heed of the analysis and findings of the Supreme Court of Appeal in the ***GEMS*** matter.¹² Therein the said Court established that the business of a medical scheme does not appear to encompass the performance of a public or government function or the exercise of public powers, with particular reference to the Government Employees Medical Scheme (GEMS).
- [33] Counsel for Medscheme particularly implored this Court to follow the decision of this Court per Ranchod J in the matter of ***Famous Idea Trading 4 (Pty) Ltd t/a Dely Road Courier Pharmacy v Government Employees Medical Scheme and Others (“Famous Idea”)***. Therein, a conclusion was reached that the impugned decision was not reviewable in terms of the common law because it does not fall in the category of administrative action.
- [34] Similar to this matter, a jurisdictional point of law was raised. The basis of the jurisdictional point in ***Famous Idea***, was that the nature of the power exercised by GEMS was contractual power, as such not reviewable. In our view, as fortified by ***Murray***, the issue of reviewability of an impugned decision is not a

¹¹ Commission for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd [2023] ZASCA 39

¹² Government Employees Medical Scheme and Others v Pulic Protector of the Republic of South Africa and Others 202 (2) SA 114 (SCA)

jurisdiction issue. It is a question that agitates the merits of a review. In my considered view, the Court in ***Famous Idea*** erred when it dismissed the review application on the basis of a merit issue disguised as a jurisdictional issue, particularly in the absence of a Rule 53 record. For this reason alone, ***Famous Idea*** was wrongly decided and at odds with the principles enshrined in ***Murray***.

[35] There is no doubt that the court sitting as the review court would have to consider the ***GEMS*** judgment. However as outlined above, as per the settled principle in ***Murray***, an enquiry into whether Polmed inter alia is an organ of state, would be premature at this stage of the Rule 53 process. The review application has been instituted in the High Court that has jurisdiction. It automatically follows that the filing of the record is imminent.

[36] A determination as to whether a decision constituted an administrative action is not a simple exercise. Our courts have appreciated that to determine a power or function is of a public nature is a difficult exercise. The Constitutional Court in ***Association of Regional Magistrates of Southern Africa***¹³ highlighted that in determining whether a decision is reviewable in terms of power is context specific. It is not a mechanical exercise where in a court would merely ask itself whether public powers being exercised at a public function is being performed. The courts further expressed that in determining whether particular conduct constitutes administrative action the focus must be on the nature of the power exercised rather than upon the functionary.

[37] In conclusion, ***Murray*** has settled the proposition in law, namely that the High Court has jurisdiction to hear reviews of this nature. Whether or not an impugned decision constitutes an administrative action is one that goes to the merits of the matter. This issue will be ripe for determination when the

¹³ Association of Regional Magistrates of Southern Africa vs President of the Republic of South Africa [2013] ZACC 13

substantive merits are adjudicated by the review court. This would include the ventilation of the counter application as well. Consequently there is no merit in the appeal.

[38] Insofar as the costs are concerned, the general principle that costs should follow the result finds application.

[39] In the premises, this appeal is dismissed with costs, which are to be paid by the appellants jointly and severally, including the costs of two counsel.

H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,

MOSHOANA J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,

LEDWABA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Counsel for the second appellant: Adv MA Chohan SC

Adv M Lengane

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Counsel for the respondents: Adv. JG Wasserman SC

Adv A Govender

Adv S Tshikila

Instructed by: Gering Attorneys

Date heard: 22 January 2025

Date of Judgment: 6 February 2025