

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 023855/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
12 May 2025	
DATE	SIGNATURE

In the matter between:

**THE SOUTH AFRICAN POLICE SERVICE MEDICAL
AID SCHEME (POLMED)**

Applicant

and

SIKHALA ATTORNEYS INC

First Respondent

MR KHATHU SIKHALA

Second Respondent

KNK HEALTHCARE SOLUTIONS (PTY) LTD

Third Respondent

JUDGMENT

DOMINGO, AJ

Introduction

- [1] This is an opposed motion application brought by the applicant against the respondents. The applicant seeks firstly, a declarator that the first respondent's conduct is unlawful, and an interdict prohibiting them from undertaking recoveries of money on behalf of the applicant, and an order directing the first respondent to account to the applicant for all recoveries undertaken since 09 December 2020.
- [2] On the day of the court hearing the respondents made no appearance and they have not provided the court with their heads of arguments. The first and second respondents have filed on record an answering affidavit.

Background

- [3] The applicant is a closed Medical Aid Scheme that services members of the South African Police Service and their nominated dependants. The applicant has about 180 000 principal members and about 500 000 beneficiaries.
- [4] This application concerns, in the main, the conduct of the first respondent, a former sub-contractor of one of applicant's service providers, which is the third respondent.
- [5] It is common cause that the applicant appointed the third respondent to conduct recoveries from the applicant's members who had successfully claimed payment from the Road Accident Fund ("RAF") for past medical expenses under circumstances where the applicant had paid for those past medical expenses. In order to effectively execute its duties, the third respondent appointed the first respondent as its sub-contractor. The applicant terminated its agreement with the third respondent on 09 December 2020.
- [6] It is submitted by the applicant that the termination of its agreement with the third respondent, naturally, ought to have been the end of the first respondent's involvement with the third party recoveries for past medical expenses on behalf of the applicant. However, the applicant has submitted that the first respondent continues to date to represent itself as a service provider of the applicant and continues to collect and receive money belonging to the applicant into its trust account.

[7] It is submitted by the applicant that on average the applicant, pays R10 million a month in medical related claims to healthcare professionals for injuries sustained by its members in motor vehicle accidents alone, where a third party was involved or at least partially liable.

[8] Rule 14 of the applicant's rules provide that:

"[T]he member is under a duty to disclose all and any health information or matters relating to any incidents (resulting from actions of third parties) which give rise to any third party claims to the scheme...

14.5 ...in the event of claims reimbursed on behalf of members which arose from actions of omissions of any other party, the member shall:

14.5.1 be liable to repay to the scheme all amounts paid by the scheme and recovered by or on behalf of the member from the party responsible to compensate such member."

[9] The applicant has submitted that despite members being obliged to disclose this information, members do not. To that end, the applicant, procured the services of the third respondent to conduct these recoveries in terms of an agreement signed between the parties on or about 11 May 2020.

[10] It is submitted by the applicant that in terms of this agreement, the third respondent had to provide the following services:

10.1 Investigating and identifying members who have submitted RAF claims;

10.2 Procuring from members who submitted RAF claims an undertaking and delivering such undertaking to the applicant;

10.3 Monitoring all RAF claims submitted by members and/or by their attorneys;

10.4 Ensuring that members who have successfully claimed from the RAF refund to the applicant all amounts which the applicant is entitled to in terms of an undertaking;

10.5 Maintaining comprehensive records relating to all RAF claims; and

10.6 Complying with reporting obligations set out in clause 7.3 of the agreement.

[11] Under the assignment and sub-contracting clause, the applicant stated that the agreement further contemplated:

“[T]hat the service provider will appoint attorneys to conduct the legal work in so far as the recovery is concerned hereof, the service provider shall not be entitled to (i) assign the agreement or any part thereof or any benefit or interest therein or (ii) sub-contract any part of the services to any third party without prior written consent of POLMED.”

[12] It is common cause that the first respondent was appointed as the sub-contractor to assist the third respondent with these recoveries.

[13] It is also common cause that the agreement between the applicant and the third respondent terminated on 09 December 2020 pursuant to an audit report that found that the appointment of the third respondent was irregular.

[14] It is submitted by the applicant that since the termination of the agreement, the third respondent has refused to return the files that belong to the applicant and refuses to fully account for the recoveries undertaken during the subsistence of the contract. The applicant has subsequently instituted a claim for the debatement and abatement of the account, which claim is in arbitration.

[15] The applicant has informed the court that the arbitration had concluded at the time of the deposing of its affidavit in this matter, and judgment had been handed down in favour of the applicant, however, the defendants in the arbitration matter had noted an appeal.

Relief

[16] The relief sought by the applicant is as follows:

16.1 The applicant seeks an order declaring the conduct of the first respondent, as unlawful and an interdict that prohibits the first respondent from representing themselves to the public at large as the applicant's service provider and from collecting money due to the applicant;

- 16.2 Consequent thereto, the applicant further seeks ancillary relief in terms whereof the first respondent is directed to repay the money so collected and to provide the applicant with a list of all collections it has undertaken on behalf of the applicant since 9 December 2020.

Issues

[17] The issues for determination in this matter are as follows:

- 17.1 Whether or not the first respondent is entitled to present itself as a service provider of the applicant;
- 17.2 Whether or not the conduct of the first respondent is unlawful.

Points in limine

[18] The first and second respondent raised three points *in limine*, namely; the defence of *lis pendens*, non-joinder and dispute of facts.

a) First point in limine: lis pendens

[19] The first and second respondent in its answering affidavit has averred that the applicant is abusing the court process as there is currently a pending case on arbitration instituted by the applicant, arising from the same cause of action and on the same set of facts, which matter remains not finalised. The first and second respondent submitted that to institute these proceedings against the respondents offends the *lis pendens* principle and amounts to double jeopardy, and as such this application stands to be dismissed with punitive costs or stopped pending finalisation of the arbitration.

[20] The first and second respondent further averred that this application is disguised to create an impression that the applicant has recently, after it has instituted arbitration proceedings against the respondents, become aware that the first respondent is receiving payments in respects of its files. It is contended by the first and second respondent that it cannot be true as the applicant had raised this application before even instituting arbitration proceedings, raised and argued it during arbitration.

[21] Alternatively, the first and second respondent relied on section 6(1) of the Arbitration Act 42 of 1965 (“Arbitration Act”) and submitted that the applicant is prohibited in terms of section 6(1) of the Arbitration Act from instituting these proceedings, wherefore the respondents pray for the stay of these proceedings pending the finalisation of the arbitration hearing.

[22] It is trite in our law, that there are three requirements for a successful reliance on the defence of *lis pendens*; i) the litigation is between the same parties, ii) the cause of action is the same, and iii) the same relief is sought in both sets of proceedings.

[23] In other words, as stated in *Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd*¹:

“A plea of *lis alibi pendens* is based on the proposition that the dispute between the parties is being litigated elsewhere and, therefore, it is inappropriate for the dispute to be litigated in the court in which the plea is raised. The policy consideration underpinning the *lis alibi pendens* doctrine is that there should be a limit to the extent to which the same issue is litigated between the parties as it is desirable that there be finality in litigation. Also, a situation should be avoided where different courts pronounce on the same issue with the risk that they may reach different conclusions.”

[24] It is submitted by the applicant that the arbitration proceedings are instituted in terms of a contract the applicant had with the third respondent. The relief sought and the cause of action in the arbitration proceedings are different to this application. The cause of action in that application is on a contractual clause that obliges the third respondent to return files to the applicant and to account to the applicant. While the cause of action in this matter, pertains to the unlawful conduct of the first respondent and to interdict the first respondent from purporting to act on behalf of the applicant and from collecting money on behalf of the applicant without instructions from the applicant.

[25] I am in agreement with the applicant that the pleaded case in this matter differs from the pleaded case in the arbitration proceedings instituted by the applicant

¹ *Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd* 2023 (6) SA 452 (WCC) at para 11.

primarily against the third respondent. I am also in agreement with applicant that there is no contract between the applicant and the first respondent, thus there is no arbitration clause they are subject to in terms of the Arbitration Act. In other words, there can be no arbitration clause in terms of the Arbitration Act absent an arbitration agreement. Furthermore, as stated by the applicant, the arbitration proceedings have concluded, and the arbitration award was in favour of the applicant and the defendants in that matter have appealed the arbitration award.

[26] In the premises, I find that the first and second respondents first point *in limine* is without success.

b) Second point in limine: non-joinder

[27] It is submitted by the first and second respondents that before the third respondent was contracted by the applicant, there was another service provider named Batsumi Claims Management Solutions Pty Ltd (“Batsumi”) with whom the applicant had a contract to provide similar services as the third respondent. The first respondent was sub-contracted by the said service provider to render services, by virtue of which they are in possession of the applicant’s claim files. The first and second respondents contend that Batsumi has a direct and substantial interest in this matter and ought to be joined but have not, and this constitutes an irregularity warranting the dismissal of the applicant’s application.

[28] The applicant contended that this point *in limine* raised by the first and second respondents lack legal foundation as no relief was sought against Batsumi and there are no legal rights of Batsumi that will be offended by the relief sought in this application.

[29] The applicant submitted that it has now become “settled law that joinder of a party is only required as a matter of necessity, as opposed to a matter of convenience, if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned.”² The rule is that a person is a necessary party and should be joined if such a person has a direct and substantial interest in any order that the court

² See *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) at para 12.

might make, or if such order cannot be sustained or carried out into effect without prejudicing that party, unless the court is satisfied that he or she has waived his or her right to be joined.³

[30] In *Absa Bank Ltd v Naude NO and Others*⁴ the court set out the terms for non-joinder as follows:

“The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined.”

[31] I am in agreement with the applicant that a “direct and substantial interest” means an interest in the right which is the subject matter of the litigation and not merely an indirect financial interest in the litigation.⁵ As stated in *Pheko and Others v Ekurhuleni City*⁶:

“The test for joinder requires that a litigant have a direct and substantial interest in the subject matter of the litigation, that is, a a legal interest in the subject matter of the litigation which may be affected by the decision of the court. This view of what constitutes a direct and substantial interest has been explained and endorsed in a number of decisions by our courts.”

[32] In the premises, I am of the view that in this matter, the cause of action arises, and the focus of the applicant's relief sought is against the first respondent who as a sub-contractor to the third respondent has continued recoveries for RAF claims for the applicant, despite the applicant terminating its contract with the third respondent on 09 December 2020. It is common cause that the third respondent had appointed the first respondent as its sub-contractor to assist in undertaking recoveries. The relief sought by the applicant in this matter, is not a consequence of the the sub-contract agreement between Batsumi and the first

³ *Economic Freedom Fighters Student Command v Minister of Higher Education, Science and Technology and Others* (7641/2) [2021] ZAGPPHC 205 (11 March 2021) at para 84; see also Erasmus *Superior Court Practice* 2nd ed Volume 2 at p D1-125.

⁴ 2016 (6) SA 540 (SCA) at para 10.

⁵ See *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) 169; *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415G-H.

⁶ 2015 (5) SA 600 (CC) at para 56.

respondent. Thus, Batsumi has no direct and substantial interest in the subject matter of this litigation.

[33] I find that the second point *in limine* raised by the first and second respondents is without success.

c) Third point in limine: dispute of facts

[34] The first and second respondents submitted that motion proceedings are not to be utilised where a genuine dispute of fact exists or is even anticipated. It is contended by the respondents that a litigant with a genuine factual dispute must proceed by action or risk dismissal for attempting to have a factual dispute ventilated on motion proceedings.

[35] The factual dispute referenced in the first and second respondents answering affidavit deal with the factual matters arising from the first respondent's services rendered to and on behalf of Batsumi. No other factual dispute is identified by the first and second respondents.

[36] I am in agreement with the applicant that a party that raised the question of dispute of facts has to identify the issues in dispute and ask that said issues be accepted on the version of the respondent on the basis of the *Plascon-Evans* principle⁷, failing which, that such disputes be referred to oral evidence.

[37] Where disputes of fact have arisen on affidavits in motion proceedings⁸, final relief may nonetheless be granted, if the allegations or denials of the respondents are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers, and/or where the facts as stated by the respondents, together with the admitted facts in the applicant's affidavit, justify such an order, or where it is clear that the facts, although not formally admitted, cannot be denied and must be regarded as admitted.⁹

⁷ *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634H-635C.

⁸ See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (TPD) at 1162.

⁹ *Supra* note 7 above; *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at para 245E-G.

[38] The applicant has provided evidence by way of annexures to its founding affidavit (see paragraph 46 below). The applicant's facts as alleged are undisputed by the first and second respondent. The first and second respondent only submitted that it acts by virtue of a lien it has. To that end, there are no factual disputes.

[39] The applicant's evidence is not refuted by the first and second respondents, all they say is that the money it receives "are monies in respect of Batsumi files which work was already done, and contractually, these monies belong to Batsumi."

[40] A lien (right of retention) is the right to retain physical control of another's property, whether moveable or immovable, as a means of securing payment of a claim relating to the expenditure of money or something of monetary value by the possessor (termed "retention" or "lien holder", while exercising his or her lien) on that property, until the claim has been satisfied.¹⁰

[41] I am in agreement with the applicant's contention that at the essence of this concept is the fact that there must be a debt and/or improvement of the property of, or under the control of the applicant in this instance. It is clear from the fact of this case that we are not dealing with an improvement lien. This leave the space only for one aspect, that is the debtor/creditor lien. This too does not find expression because the applicant does not and never had a contract with the first respondent. Consequently, the first respondent cannot exercise or claim a lien against the applicant, because it has no claim against the applicant, there is no debt. And if there is no debt, there is nothing to secure.

[42] In the premises, I find that the third point *in limine* raised by the first and second respondents is without success.

Misrepresentation and evidence of collections

[43] It is common cause that the first respondent is a separate entity to the third respondent. The first respondent was a sub-contractor to the third respondent and has no agreement or business arrangement with the applicant.

¹⁰ The Law of South Africa (LAWSA) 15(2) (2008) at para 49.

[44] It is submitted by the applicant that the first respondent presents itself to the public at large as an agent of the applicant. An example of this is a correspondence provided to the court dated 01 April 2022, below is an extract from the correspondence:

"Our client will accept the amount tendered by the Road Accident Fund in the sum R261 025.41.

We further confirm our trust particulars as follows:

Sikahala Attorneys Trust Account

First National Bank

REF: POLMED/64104103791/NDLAGAMANDLA"

[45] The applicant averred that by making a statement such as above, the first respondent has purported to be acting on the mandate of the applicant, which is untrue, and the first respondent has further purported to be acting on instructions from the applicant, this too is incorrect. To that end, the applicant submitted they seek an order directing the first respondent to put an end to this conduct.

[46] By way of annexures and confirmatory affidavits the applicant presented the following evidence to the court:

46.1 On the 08 December 2022, acting under the belief that the first respondent represented the applicant, Komane Attorneys, after it received the amount of R261 025,41 from the RAF for past medical expenses, deducted its own fees and transferred to the first respondent, using the same reference provided by the first respondent an amount of R231 007,49.

46.2 On the 24 February 2021, the first respondent admitted that it received payments in the amount of R279 723,51 and that it paid it over to the applicant.

46.3 On the 09 March 2021, the first respondent informed the applicant that it had paid the applicant an amount of R936 849,39.

- 46.4 The applicant's recovery services are now conducted by Karl Els Attorneys on behalf of the applicant. On 28 October 2022, Karl Els Attorneys informed the applicant that it had discovered that Ackerman Swart Attorneys paid an amount of R105 795,19 on behalf of one of the applicant's members named A Tshangana to the first respondent. Karl Els Attorneys had compiled a report of payments from information it obtained from other attorneys who, believing that the first respondent was acting on behalf of the applicant, made payments to the first respondent on behalf of the applicant.
- 46.6 From the Karl Els Attorneys report of payments, it was noted that the first respondent received payment from TARR A who claimed from the RAF on behalf of Delene F, an amount of R50 589, 81 on 30 January 2023, and again an amount of R173 619,14 was paid to the first respondent on 31 January 2023 from Luthuli Mkhanyisi.
- 46.7 Buckle KA made payments to the first respondent in the amount of R5 712,20 on 17 December 2022. A further amount of R123 463,24 was paid to the first respondent on behalf of Nkwadipho GMS and on behalf of Smit G who claimed from the RAF on behalf of Christoffel, an amount of R160 711,33 was also paid to the first respondent during February 2022. On behalf of Punjabi Derby, the law firm Niehaus McMahon Attorneys made payment to the first respondent in the amount of R46 368,68.

[47] As stated earlier, the evidence above is not refuted by the first respondent, all it says is that the money it receives, "are monies in respect of Batsumi files which work was already done, and contractually, these monies belong to Batsumi."

Declarator

[48] The following are the jurisdictional grounds the applicant must meet before the grant of the declarator:

48.1 The applicant must be an interested person in the subject matter.¹¹ The right must attach to the applicant personally and should not be a derivative interest.¹²

48.2 The applicant must have an interest in an existing, future, or contingent (conditional title to) right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest.¹³

[49] Taking into account the totality of evidence presented in this case, I am satisfied that the applicant has met the jurisdictional requirements for the declarator it seeks.

Interdict

[50] It is trite in our law that in order to be successful in seeking interdictory relief, the applicant will have to show (i) that they have a clear right; (ii) an injury actually committed or reasonable apprehension of harm; and (iii) the absence of an alternative remedy or relief. The discretion of a court to refuse an interdict, provided the three requisites are present is very limited.

[51] It is submitted by the applicant that the first respondent collects money due to the applicant. It is alleged that the respondent presents itself as an agent or service provider of the applicant. The applicant is entitled to those funds in terms of Rule 14 of its Rules. The applicant contended that the first respondent's conduct clearly infringes on the applicant's rights. I am of the view that the applicant has established the existence of a clear right which it seeks to enforce.

[52] The second requisite for an interdictory relief is an injury actually committed or reasonable apprehension of harm. The applicant has submitted that the term "injury" should be understood to mean an infringement of the right, which has been established, and resultant prejudice. Prejudice, the applicant contended is not synonymous with damages, and it is sufficient to establish potential prejudice, While a reasonable apprehension of injury/harm is one that a reasonable person

¹¹ *Milani and Another v South African Medical and Dental Council and Another* 1980 (1) SA 899 (T) at 902H-903A.

¹² *Harms Civil Procedure in the Superior Court* at p A4.18.

¹³ *Supra*.

might entertain on being faced with the facts, the test is thus objective, and the applicant need not establish on a balance of probabilities that the injury will follow. Where a party is seeking to protect ownership, irreparable prejudice is presumed.¹⁴

[53] Taking into account the totality of evidence in this matter, I am in agreement with the applicant that the actions of the first respondent has caused prejudice to the applicant, as the first respondent has continued to collect recoveries from the RAF due to the applicant under the misrepresentation that it represents the applicant.

[54] The third requisite for interdictory relief is the absence of an alternative remedy/relief. It is the applicant's contention that it has no other remedy. The applicant averred that it has no contract with the first respondent. The applicant had asked the first respondent to stop its conduct, and the applicant also pointed out that the first respondent, insists that they continue to receive money from the "files that belong to Batsumi." The applicant contended that there is no such thing as "Batsumi files" when it comes to the applicant's members. The applicants contended that it has no other means to obtain the protection it seeks save for this application.

[55] In the premises, I find that the applicant has met the requisites for interdictory relief, I therefore grant the prohibitory interdict.

Order

[56] In the circumstances, I hereby order the following:

56.1 It is declared that the conduct of the first respondent, in so far as it continues to undertake collections on behalf of the applicant and accepts and/or receives payments on behalf of the applicant under circumstances where the first respondent is not a service provider of the applicant be and is hereby declared unlawful.

¹⁴ *Supra* at p A5.4

- 56.2 The first respondent is hereby prohibited and interdicted from continuing to present itself as a service provider of the applicant.
- 56.3 The first respondent is hereby prohibited and interdicted from continuing to undertake collections and to receive into its Trust Account, funds belonging to the applicant, which funds are paid into its Trust Account by members of the applicant who have successfully claimed payments for past and where applicable future medical expenses from the Road Accident Fund.
- 56.4 The first respondent is hereby directed to furnish the applicant with a consolidated report containing a list of all names, file numbers and payments that it has received since 09 December 2020 to date of this order.
- 56.5 The first respondent is directed to pay the applicant all monies received by it, on behalf of the applicant, and paid to it by members of the applicant who have successfully claimed compensation for past and where applicable future medical expenses against the RAF from the 09 December 2020 to date of this order.
- 56.6 In the event that the first respondent fails to comply with the orders in paragraphs 56.4 and 56.5 above within 14 days from the date of this order, that an independent auditor be appointed by the Independent Regulatory Board of Auditors (IRBA) to:
- 56.6.1 Undertake an audit of the first respondent's Trust Account from the period 09 December 2020 to date of this order;
- 56.6.2 To determine the amounts received by the first respondent in relation to the Road Accident Fund recoveries pertaining to payments made by members of the applicant to the first respondent pursuant to successful claims for compensation for

past and where applicable, future medical expenses against the Road Accident Fund; and

56.6.3 To furnish the applicant with a report containing the exact amount collected by the first respondent in relation to the aforementioned claims.

56.7 It is declared that the first respondent is liable to pay to the applicant the amount so determined by the independent auditor referred to above.

56.8 Costs of this application are to be paid by the first respondent on an attorney and client scale.



W DOMINGO
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. This matter was heard in open court on 12 February 2025. The date for hand down is deemed to be 12 May 2025.

APPEARANCES

For the Applicant: ADVOCATE ITUMELENG HLALETHOA instructed by MALUKE ATTORNEYS, MR EDDISON MOGANE and MR LUFUNO MATHIVHA

For the First Respondent: NO APPEARANCE

For the Second Respondent: NO APPEARANCE

For the Third Respondent: NO APPEARANCE

