CONSTITUTIONAL COURT OF SOUTH AFRICA

Genesis Medical Scheme v Registrar of Medical Schemes and Another

CCT 139/16

Date of judgment: 6 June 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in an application for leave to appeal against a judgment and order of the Supreme Court of Appeal (SCA). The matter started as a review application in the High Court of South Africa, Western Cape Division, Cape Town (High Court). The applicant, Genesis Medical Scheme (Genesis), sought to review and set aside a decision by the Registrar of Medical Schemes (Registrar) to reject Genesis's annual financial statements.

In rejecting Genesis's statements, the Registrar said that in two respects they did not correctly reflect the scheme's financial position. First, Genesis's accounting was wrong. It mistakenly reflected personal medical savings account (PMSA) funds as assets in its balance sheet. Second, Genesis had also excluded from its list of liabilities the interest the PMSA balances were accumulating because it was keeping that interest for itself, on the basis that the PMSA funds were themselves its assets. The Registrar said this, too, was wrong.

Though the Registrar in rejecting Genesis's statements cited five grounds, they all derived from, and invoked, a decision the High Court gave in 2007 in *Omnihealth.* There, the liquidators of an insolvent medical scheme argued that its PMSA funds fell into its insolvent estate, to be divided up between its creditors. The Registrar disagreed with this, arguing that PMSA funds were "trust property" in terms of the Financial Institutions (Protection of Funds) Act (FIA). They did not therefore form part of the scheme's insolvent estate. The Court in *Omnihealth* agreed. It held that the PMSA funds were "trust property" under the FIA and therefore did not fall into Omnihealth's insolvent estate.

Disagreeing with *Omnihealth*, the High Court (Davis J) upheld Genesis's application. It held the FIA does not assist the Registrar because the funds are not "trust property". Hence a medical scheme is the right-holder of all the funds it holds, including PMSA funds. The Court set aside the Registrar's decision.

Davis J's judgment and order came before the Supreme Court with the leave of the High Court. The minority affirmed the analysis of Davis J and the rejection of *Omnihealth*. It held that neither Genesis's rules, nor the regulations to the MSA, had any bearing on whether the funds in PMSAs constituted "trust property" under the FIA. The MSA did not treat PMSA funds as "trust property".

The majority disagreed. It reversed the High Court's decision and affirmed *Omnihealth*, though with qualification. It held that the MSA "clearly" requires that a medical scheme's liability to its members in respect of their savings accounts "must be an 'on balance sheet' item". Hence the FIA definition of "trust property" applies to PMSA funds, which therefore constitute "trust property" for the purposes of that statute.

In this Court, the first judgment, written by Cameron J (Mogoeng CJ, Nkabinde ADCJ, Froneman J, Khampepe J, Madlanga J, Mhlantla J, Pretorius AJ and Zondo J concurring) (majority judgment) held that PMSA funds do not constitute "trust property" in terms of the FIA. Relying on the definition of "business of a medical scheme" in the MSA, the majority reasoned that the definition contemplates two contracting parties, and a mutual exchange of value (*quid pro quo*). The parties are the scheme and its member. The *quid pro quo* is that the scheme undertakes liability in exchange for money. The relation is commercial, not fiduciary. And funds allocated to a member's PMSA are treated no differently.

The majority held that the accounting provisions of the MSA reinforce this conclusion. The MSA requires a medical scheme at all times to have aggregate–value assets that exceed aggregate–value liabilities and nett assets. It would flout logic, accounting practice, and principles of trust law for any funds held in trust to be included in the calculation of "assets" for the purposes of this "solvency margin". Yet the MSA also requires medical schemes to include PMSAs in its liabilities. The majority upheld Genesis's argument that, if PMSAs were trust funds to be excluded as assets for all purposes, these provisions would require a scheme – to meet the section 35(3) solvency margin – to find *outside, non-PMSA* assets to the value of the PMSA trust assets. This would not be logical, practical or just.

In a dissenting judgment (second judgment) (with Mojapelo AJ concurring) Jafta J held that the real issue here is whether the applicant has established the ground for review relied on in the High Court. In the High Court Genesis asked the Court to set aside the decision of the Registrar, which rejected its financial statements on the sole ground that it was "materially influenced by an error of law" in contravention of section 6(2)(d) of the Promotion of Administrative Justice Act (PAJA). The second judgment held that the determination of this issue required this Court to pay attention to the standard applicable

to an error of law as a ground for review and apply that test to the current facts. According to the second judgment, ordinarily an error of law would arise if an administrative functionary misconstrues the enabling provision or misapplies it. The second judgment held that the misinterpretation or misapplication giving rise to an error of law must be that of the decision-maker. It further held that the Registrar *committed no erro*r by relying on the law as interpreted by the High Court in *Omnihealth*. In conclusion, the judgment held that even if such error existed, it could not have influenced the rejection of the financial statements in a material way. Therefore, the second judgment would have granted leave and dismissed the appeal.

In a judgment that concurs with the second judgment (third judgment), Mojapelo AJ (Jafta J concurring) agreed with the reasoning and outcome of the second judgment to grant leave to appeal, but dismiss the appeal. The third judgment indicated that Genesis appears to have deliberately submitted non-compliant annual financial statements so as to engineer a pure legal question, namely, whether PMSAs constitute "trust property". Given that the effect of the majority judgment was that a reconsideration was made of the rights of medical scheme members, the third judgment held that an insolvency situation or similar matter, where rights of members are directly before court, would have been a better occasion. The third judgment further held that the trust relationship in this case is created when the medical scheme creates and allocates funds to a PMSA of a particular member as contemplated by section 30(1)(e) of the MSA.

In addition, the third judgment found that there is no tension between the FIA and the MSA with the result that the two Acts must be read together, leading to the conclusion that PMSAs established in terms of the MSA are "trust property" as contemplated in the FIA. Finally, the third judgment found that the circulars make mention of additional disclosure requirements in financial statements in respect of PMSA funds which leads to no confusion being created and no need arising for a medical scheme to raise additional funds to cover the PMSA fund liability.

Zondo J (Mogoeng CJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Mhlantla J and Pretorius AJ concurring) wrote a separate judgment (fourth judgment) to give additional reasons why the conclusion and order of the first judgment are correct and why he was unable to agree with the second judgment. In this regard he pointed out that he did not agree that Genesis' appeal be dismissed on the basis that, even if there was an error of law, the error was immaterial. The basis of his disagreement with this was that it was not the Registrar's and the Council for Medical Scheme's case that, even if there was an error of law, the error was immaterial. He pointed out that the parties fought the cases on the basis of whether or not there was an error of law and nothing else.

Zondo J also took the view that it was not necessary to have Circulars 38 and 41 set aside separately because, if the *Omnihealth* decision fell, the Circulars also fell.