IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 963/99

In the matter between

DR. MOHAMMED MONADJEM	APPLICANT
And SWAZILAND MEDICAL AID FUND	RESPONDENT
Coram	S.B. MAPHALALA –J
For the Applicant	MR. MATSEBULA
For the Respondent	MR. D. SMITH

(Instructed by Millin & Currie)

RULING ON POINTS OF LAW

(07/06/99)

Maphalala J:

Before court is an urgent application for an order in the following terms:

1. Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.

2. That a rule nisi be issued calling upon the respondent to show cause at a time and date to be determined by the court, why an order in the following terms should not be made final.

2.1. That the execution of the decision of the Swaziland Medical Aid Board of the 15th December 1998, withdrawing the priviledge of direct settlement of applicants account be unconditionally stayed pending the outcome of review proceedings that he intends to bring for review of the aforesaid decision of the Board.

2.2. That the rule nisi in paragraph 2.1 and 2.2 operate with immediate effect pending the outcome of these proceedings.

3. Costs of this application.

4. Further and/or alternative relief.

The application is supported by the affidavit of the applicant with a number of pertinent annexures. In turn, the respondent has filed an answering affidavit deposed by one Peter Msupha Simelane who is the Manager of Medscheme Swaziland and also he is the Administrator of Swazimed. The answering affidavit is supported by various annexures relevant to the issues at hand. The applicant further filed a replying affidavit in answer to the respondent's answering affidavit. It is also supported by a number of annexures relevant to the applicant's case.

The respondent raised three points in limine which were argued before me. Before disposing of these preliminary objections it is imperative to briefly outline the history of the matter and the cause of the lis between the parties. The applicant is a specialist physician practising as such at Lot No. 205, Mhlakuvane Street.

The respondent is the Swaziland Aid Fund, a medical aid fund duly registered with limited liability in

accordance with the company laws of the Kingdom of Swaziland under certificate of incorporation No. 170/80 with its registered offices at Lot No. 36 (CR Sandlane and Krog Streets Manzini, commonly referred to as "Swazimed", carrying on business at 1st Floor, Development House, Swazi Plaza, Mbabane.

It is common cause that during February 1991, applicant submitted his credentials to the respondents for consideration as a specialist physician for treatment of members of Swazimed who came to him for medical treatment and thereafter submit his bills to them at the end and every month for their kind consideration and payment. His credentials were considered during March 1991, and he was thereafter accorded a Swazimed Practice number and he commenced treating members of the scheme who came to his practice for medical attention. An oral agreement was entered into by both parties which entitled applicant to claim payment for services rendered to their members who came to his practice attention direct from Swazimed at the end of each

and every month. During September 1998 he received a letter from Swazimed dated the 14th September 1998 requesting certain information regarding treatment, materials used and investigations done on some of his patients. He replied to this letter by letter dated the 24th October, 1998. He further received a letter from Swazimed dated the 11th December, 1998 suspending the arrangement of direct settlement of his accounts. This did not go well with the applicant as he felt such a decision was clearly unfair and contrary to the dictates of the principles of natural justice. This then is the cause of action presented to court for determination.

Having laid the background of the matter I now revert to the points in limine raised by the respondent. The respondent raised three points in limine, viz that the applicant has failed to prove urgency as required by the rales of this court, secondly, that the applicant has failed to satisfy the requirement for the granting of an interim interdict and lastly, that the decisions by the respondent as it relates to the applicant is not reviewable in terms of the law.

Mr. Smith for the respondent hand to court from the bar Heads of Arguments, with decided cases to support the points raised.

On the issue of urgency it is submitted on behalf of the respondent that this application is not urgent and that same constitutes a gross abuse of the rules of this court. It is submitted that it is to be noted that the certificate of urgency is dated the 20th April 1999 and the application to be enrolled on the same day, namely 20th April 1999, notwithstanding the application is only served on the respondent at 15.30hrs on the 21st April 1999. The applicant therefore approaches the court on an extremely urgent basis and it is incumbent on him to make out a case justifying the urgency with which it was brought. Mr. Smith went further to cite the cases of Luna Maubel Vervaarmigers (EDMS) BPK vs Makin and another t/a Makins Furniture Manufactures 1972 (4) S.A. 135 (w) at 1366 - 1376; Gallagher vs Norman's Transport lines Ltd 1992 (3) S.A. 500; Patcor Quarries CC vs Issroff 1998 (4) S.A. 1069 (SE) at 1075; and that of Humprey H. Henwood vs Maloma Colliery Ltd and others/Swaziland High Court Case No. 1623/94 to buttress this point. It is submitted that the applicant's cause of action and/or complaint is based on the decision of the Board of the Directors of the respondent, dated the 15th December 1998 subsequent to

the respondent's letter of 11th December 1998, the applicant enquired form Mr. Simelane as to the basis of the unfortunate decision. No date is given when this meeting took place. On the 21st December 1998, the applicant sent a letter to the Swazimed for the attention of Mr. Simelane on the 19th January 1999, the applicant came into possession of a letter from the respondent, dated the 29th December 1998. On the 20th January, 1999 the applicant responded to the letter dated 29th December 1998. During early February 1999, the respondent's Board reaffirmed its decision of the 11th December 1998. It is submitted by the respondent at the very best for the applicant, his cause of action was completed during the early part of February 1998. Respondent submits for these reasons this application should be struck from the roll, such costs to be on the scale as between attorney and own client and to include the costs of counsel. The applicant has not complied with the requirements of Rule 25 (b) of the High Court Rules.

It was further argued for the respondent that the basis of urgency in the applicant's application is financial loss being suffered by virtue of the respondent's decision of the 11th December, 1998. The mere fact that irreparable losses are being suffered by the applicant is not sufficient by itself to warrant urgency. Serious and irreparable financial losses may well satisfy a requirement justifying a claim for an interdict, but they do not, as such, render the application urgent. The court was referred to the case of Trustees - BKA Besigheinds Trust vs Enco Produkte en Dienste 1990 (2) S.A. 102 (T) at 108 B-6 to support this proposition. Mr. Smith further argued that a litigant with a claim sounding in money may suffer serious financial consequences by having to wait his turn for the hearing of his claim, does not entitle him preferential treatment (see IL's B Marcon Caterers (Pty) Ltd vs Greatemans S.A. Ltd and another 1981 (4) S.A. 108 © at 113 (H). Further that even if it is found that a matter is inherently urgent, such urgency may be rendered not urgent and fall outside the provisions of the rale where an applicant delays in bringing the application as one of urgency, or having brought it on an urgent basis incurs delays thereafter. The court was referred to the following cases to that effect.

• Juta & Co. Ltd vs Legal and Financial Publishing Co. (Pty) 1969 (4) S.A. 443 © at 445

• Chopra v Avalon Cinemas S.A. (Pty) Ltd and another 1974 (1) S.A. 469 (A) at 472 C - F
• 20th Century Fox Film Corporation and another vs Anthony Black Films (Pty) Ltd 1982 (3) S.A. 582 (w) at 586 A - D.

• Trustees - BKA (supra)

On the second prong of the points in limine that applicant has not satisfied the requirement for granting an interim interdict. It was argued that the applicant has not made out aprimafacie right and on the contrary and by his own admission, the direct settlement of applicant's accounts by the respondent was "a priviledge". This it alleged in prayer 2.1 of the notice of application. The respondent's rules and more particularly Rules 14.1 and 14.2 read as follows:

"14.1 the fund may, by mutual agreement with any supplier or group of suppliers of a service, pay the account or the benefit to which a member is entitled in respect of a service rendered, direct to such supplier.

14.2 unless the Board decides otherwise where a supplier of service has rendered an account that is in excess of an agreement entered into in terms of Rule 14.1 the account shall not be paid by the fund direct to the supplier of service, but the benefit due to the member shall be paid direct to the member concerned"

A prima facie right can also be established if the applicant satisfies the court that he has a reasonable success in the main action. I was referred to the cases of Van Woudenberg N.O. v Roos 1946 T. P. D. 110 at 113 and that of S.A. Motor Racing Co. Ltd and others vs Peri Urban Areas Health Board and another 1955 (1) S.A. 334

(T) at 339 E - F to buttress this point. The court was further referred to Rule 12.7 of the respondent's rules to the effect that no member of the fund shall cede, transfer, pledge or hypothecate or make over to any third party any claim or part of a claim or any right to the benefit which the member may have against the fund, and such

cession or assignment will be of no force and effect and will not be recognized by the fund.

It was further argued that in so far as the other prerequisites of an interim interdict are concerned, it is to be noted that the applicant's complaint is financial loss based on a breach of contract for which he has a clear alternative remedy, namely the institution of an action for damages for breach of contract. The respondent submitted that there is another adequate remedy and accordingly also the fourth

requirement for an interim interdict is absent. It is also significant that the applicant does not allege that he intends suing the respondent for damages and accordingly there can be no question of any irreparable harm being caused to him.

On the third leg of the points raised by the respondent, viz that in terms of the law the decision of the fund is not reviewable. Mr. Smith submitted in this regard that review as interpreted by practice, is capable of three distinct and separate meanings, namely:

1. In its first and most usual signification it denotes the process by which, apart from appeal, the proceedings of inferior courts of justice, both civil and criminal, are brought before this court in respect of grave irregularities or illegalities occurring in the course of such proceedings (see Wayland v Cawood N.O. and another 1980 (1) S.A. 738 (2RA) at 742 C. G.).

2. Whenever a public body has a duty imposed upon it by a statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, the court may be asked to review the proceedings complained of and set aside or correct them. This is commonly known as review under the common law (see National Union of Textile Workers vs Textile Worker Industrial Union (SA) and others 1988 (1) S.A. 925 (A) at 938 6 -939B).

3. Powers of review granted to the courts or a judge by the legislature.

Mr. Smith submitted that only decisions capable of review are those of inferior courts (both civil and criminal), parastatal bodies, quanges (quasi non-governmental

organizations, administrative bodies created by statute, incorporated organizations and/or societies duly registered in terms of one or other statute, these organizations being, for example, Universities, the Jockey Club of South Africa, Estate Agency Board, etc. The respondent does not qualify under any of these and on the applicant's own admission, the respondent is a company duly incorporated in terms of the company laws of the Kingdom of Swaziland with limited liability. Mr. Smith further directed the court's attention to the fact that the relationship existing between the applicant and respondent is a contractual one as such not reviewable. To support this proposition the court was referred to the cases of Herbert Porter and Ano vs Johannesburg Stock Exchange 1974 (4) S.A. 781 at 788 A - H) and that of Dawn Laan Belegings vs Johannesburg Stock Exchange 1983 (3) S.A. 344 (WLD).

These, therefore, are the submissions in support of the points in limine raised by the respondent.

Mr. Matsebula for the applicant advanced applicant's submissions in opposition. His first point was that the Chief Justice of this court had dispensed with the issue of urgency and ruled that the parties join issue by the relevant exchange of affidavits. He further submitted that on the question of urgency there has been negotiations between the parties in an endeavor to resolve the dispute amicably and various letters of correspondence were exchanged towards that end. However, Mr. Matsebula conceded a point raised by Mr. Smith in his Heads of Argument at paragraph 1.11 at page 6 to the effect that a litigant with a claim sounding in money may suffer serious financial consequences by having to wait his turn for the hearing of his claim, does not entitle him to preferential treatment (see IL & B Marcon Caterers (Pty) Ltd (supra).
On the question of whether applicant has satisfied the requirements for the granting of an interim interdict Mr. Matsebula is of the view that the prima facie right arose when the parties entered into an oral agreement in 1991. There were obligations which flowed thereof. He referred the court to the case of Jockey Club vs Fellman 1942 A. D. 340 to support his submission on this point.

He submitted that the applicant will suffer irreparable harm in the event the court refuse to grant the rule nisi. Further, that the balance of convenience favour the granting of an interim interdict.

On the issue of review it is Mr. Matsebula's view that this court has the power to review the decision of the Board in this case. To support his submission he cited the case of Manzini Wanderers Football

Club vs Special Coca-Cola Committee of the National Football Association of Swaziland and others 1970 - 76 S. L. R. 428.

Lastly, he made a point as to the scale of costs in the event the applicant fails that the court can grant such counsel's fees if shown that the case was complicated. To support this view he promised to furnish the court with an authority on point, however, I have had no benefit of that authority, as he has not furnished me with such.

These, therefore, are the submission advanced on behalf of the applicant in his opposition of the points in limine raised by the respondent.

These are the issues for determination. I thus proceed to address them in seriatim.

On the question of urgency my view on the matter after reading the papers before me and considering the sequence of events leading to this application Rule 6 (25) has not been complied with by the applicant. The subject of the dispute arose on the 15th December 1998, and the applicant five months later comes to court with an application with a certificate of urgency. Mr. Matsebula submitted that the learned Chief Justice dispensed with the question of urgency by ordering the parties to file papers. I do not think that the learned Chief Justice did such a thing here. He merely ordered the parties to file paper within a prescribed time. That is surely, not to dispense with the preremptory requirement of Rule 6 (25) of the rules of this court. Further, the letter that Mr. Matsebula is referring to does not form part of the papers. In my view the applicant has not proved urgency at all. Dunn J in the case of Humprey H. Henwood (supra) dealing with the same rule after making an instructive survey of South African decisions on the rule which is similar to our rule including the case of Gallacher (supra) made this trenchant observation:

" There existence of some urgency does not permit an applicant to disregard the provisions of this rule, for the court is called upon to dispose of urgent application in such a manner and in accordance with such procedure which shall as far as practicable be in terms of these rules the proper application of the corresponding South African Rule 6 (12) has been subject of numerous instructive decisions to which I was referred in the court in arguments"

The learned judge went on to consider the cases of Luna Meuhel Vervaardigers (supra), Galtasher (supra) Mangala vs Mangala 1967 (2) S.A. 415 at 415 H - 416 A to drive his point home.

It is my respectful view on the basis of the facts in this application and on the question of law that the applicant has failed to prove urgency in terms of the prescribes of Rule 6 (25) of the High Court Rules.

I thus find that the first point in limine raised by the respondent ought to succeed.

I now turn to the second point raised, viz that the applicant has not proved the prerequisites for the granting of an interim interdict. The requirements have been stated and restated in numerous cases and have assumed a form which in some respects differ markedly from Van Der Linden's exposition. The following statement of the requirements by Corbett J (as he then was). In the case of L F Boshoff Investments (Pty) Ltd vs Cape Town Municipality 1969 (2) S.A. 256 © at 267 - F is representative of what has become the almost standard formulation of the requirements:

"Briefly these requisites are that the applicant for such temporary relief must show:

a) That the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear, is prima facie established, though open to some doubt;
b) That, if the right is only prima facie established, there is well grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
c) That the balance of convenience favours the granting of interim relief, and
d) That the applicant has no other satisfactory remedy (see also C. B. Prest on Interlocutory

In casu it appears to me that the applicant has failed to prove requisite (a) above, viz a prima facie right. The applicant on his own admission states in his notice of motion that the direct settlement of applicant's accounts by the respondent was a priviledge. It appear the applicant has "shot himself on the foot" to use a colloquial expression. Further applicant's complaint is financial loss based on a breach of contract for which he has a clear alternative remedy, namely the institution of an action for damages for breach of contract. It is clear, therefore, that there is another adequate remedy and accordingly also this requisite for an interim interdict is absent.

In sum, as relates to this point in timine, I agree in toto with the submissions made by Mr. Smith on his analysis of facts and expositions of law and find that the point succeeds.

Now I turn to the last point in timine, viz, whether the decision of the Board of Directors of the fund which is a company with limited liability incorporated in terms of the company laws of the Kingdom of Swaziland is reviewable. My view on the matter is that the Fund does not belong to the class of bodies whose decisions are reviewable. It is a limited liability company. To this effect I refer to the recent decision of Sapire CJ in the case Lindsey Veloso vs A. E. Wolmarans, The Chairman Disciplinary Enquiry Standard Bank of Swaziland Limited Civil Trial No. 932/98 delivered on the 15th March 1999, where the learned Chief Justice has this to say:

"The difficulty facing the applicant is that the substantive relief that he sought is that the 2ad respondent's decision dated the 24th February, 1998 summarily dismissing the applicant be reviewed and set aside. I know of no case, none has been quoted to me, where the decision of a Board of Directors of a private company has been reviewed and set aside"

Further, in the case of Herbert Porter & Ano vs Johannesburg Stock Exchange (supra) Coetzee J at page 788 (c - d) had this to say:

"It does not follow that in every case where one of the parties has the right to decide or approve something under their contracts the other is entitled to insist that the rules of fundamental fairness be observed by the other in arriving at this decision, or that he may have the remedy of the kind now sought if that be not done. Only when on a proper construction of

the agreement a "tribunal or adjudicating body, which obviously may even be an individual, is created, which is charged with the duty to decide, does the principle apply".

In casu the rules of the Fund provide a dispute resolution mechanism which on proper construction only provides for members of the Fund. The applicant is not a member of the Fund but a supplier and he is excluded in that pertinent clause which deals only with members of the fund. The case cited by Mr. Matsebula that of Manuni Wanderers Football Club (supra) is distinguishable and cannot apply in this case in support of the applicant's case.

Again in view of the depth and breath of the authorities before me I come to the conclusion that the applicant cannot invoke this remedy in law and thus the third point in limine also succeed.

In the totality of things it appears to me that the only remedy available to the applicant is to pursue his case within the preview of the law of contract.

In the result, all points raised by the respondent succeed and the application is dismissed with costs and that costs of counsel to be exempt from the rigours of the High Court Rules which govern taxation of costs.

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