

SOUTH AFRICA / JUDGMENT

Genesis Medical Scheme v Ngalwana N.O. and Others (2639/2011) [2013] ZAGPPHC 546 (11 November 2013) [2013] ZAGPPHC 546

COURT

North Gauteng High Court, Pretoria

BEFORE

C Pretorius

CASE / FILE NUMBER

2639/2011

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IN THE HIGH COURT OF
SOUTH AFRICA
(NORTH GAUTENG HIGH
COURT. PRETORIA

Case

number: 2639/2011

Date: 11

November 2013

REPORTABLE

Not of

interest to other judges

Revised

In the matter between:

GENESIS MEDICAL

SCHEME.....Applicant

and

VUYANI NGALWANA

N.O.....First

Respondent

THE COUNCIL FOR MEDICAL

SCHEMES.....Second

Respondent

ANNALISE DU

TOIT.....

Third Respondent

JUDGMENT

PRETORIUS J.

[1] This is a review application in which the applicant requests:

“1. Reviewing and setting aside the decision of the Appeal Committee of the Council for Medical Schemes, chaired by the first respondent,

handed down on 3 August 2010 in which the Appeal Committee dismissed the applicant’s appeal against the decision of the Registrar

for Medical Schemes handed down on 18 December 2009;

2. Referring the applicant’s appeal back to the Appeal Committee, together with such directions as this Honourable Court deems fit;
3. Directing that the Appeal Committee is to be differently constitute from the one whose decision is hereby reviewed and set aside;
4. Directing the second respondent, jointly and severally with such other respondents as oppose the application, to pay the applicant’s costs. ”

[2] The two issues the court has to determine is whether the applicant was required to exhaust an internal remedy, namely an appeal to the Appeal Board in terms of section 50 of the Medical Schemes Act 131 of 1998 (the “Act”) and whether the decision of the Appeal Committee is reviewable for procedural unfairness based on an alleged failure by the Appeal Committee to await further submissions from the applicant in response to two questions posed by the Appeal Committee.

Background:

- [3] On 31 August 2007 the third respondent underwent spinal surgery. According to the third respondent she was experiencing pain to such an extent that her ability to walk properly was affected.
- [4] Both the orthopaedic surgeon and the neurosurgeon recommended spinal surgery. The third respondent sought pre-authorisation for the surgery from the applicant on 30 August 2007. She was advised on 31 August 2007 to seek a further opinion in accordance with the applicant’s protocol. Unfortunately the third respondent was already in surgery when the request for a second opinion was made by the applicant.
- [5] The fact that she was already in surgery caused the applicant to decline the request for pre-authorization and subsequently declined to reimburse her for the costs of the spinal surgery, as she had not complied with the applicant’s spinal protocol.

- [6] The third respondent lodged a complaint in terms of section 47 of the Act and the Registrar of the second respondent ruled on 18 December 2009 that the applicant was liable for the full costs incurred for the spinal surgery. A co-payment in terms of rule 1.3.5 of the applicant's rules had to be made by the third respondent, which amounted to R2.000.00. This co-payment is levied should a member fail to obtain pre-authorisation 72 hours prior to surgery.
- [7] The applicant appealed to the Appeal Committee. The Appeal Committee dismissed the appeal and upheld the Registrar's

ruling.

In September 2010 the applicant launched a so-called "provisional appeal" pending the outcome of the present application, which was instituted in January 2011.

- [8] The main complaint against the Appeal Committee dismissing the appeal is that the Appeal Committee acted in a manner that was procedurally irregular. The Appeal Committee heard the appeal on 29 June 2010. Both the applicant and respondents were legally represented. During the hearing the first respondent raised a legal question. It was decided that the first respondent's legal representative would prepare a note on the legal issue, which would be submitted to the Appeal Committee.
- [9] A further factual question was raised and it was agreed that the hearing will be postponed indefinitely to grant the applicant an opportunity to obtain a neurosurgeon's report.
- [10] The Appeal Committee then proceeded to give a ruling on 3 August 2010, without the note on the legal issue or the neurosurgeon's report being submitted and considered. Hence the review application.
- [11] In the heads of argument, filed and served by the respondent on 24 July 2013 the respondent raised a point in limine that the applicant did not exhaust its internal remedy, namely the section 50 appeal of the Act as required by section 7(2)(a) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). According to the applicant a section 50 appeal only deals with the merits and not with any reviewable irregularities in the section 49 appeal and therefore section 7(2)(a) of PAJA is not applicable.
- [12] The applicant submits that the Appeal Committee committed a reviewable irregularity by failing to await the applicant's further submissions on the two questions posed by the Appeal Committee during the hearing of the section 49 appeal.
- [13] On 1 November 2013 the applicant filed and served an application for exemption in terms of section 7(2)(c) of PAJA requesting the following relief:

"The applicant is exempted from first exhausting the internal remedy provided by section 50 of the Medical Schemes Act No. 131 of 1998 and permitted to proceed with the review application. "

Point in limine:

[14] I will deal with the respondent's point in limine, before deciding whether an exemption is applicable.

[15] Section 7(2) of PAJA provides:

“(2)

- (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
- (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
- (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.” (Court's emphasis)

[16] It is clear from these provisions that the common law has been reformed substantially. Unless all available internal remedies had been exhausted or exceptional circumstances exist or it is in the interest of justice, the court should not hear a review application in terms of the common law.

[17] In *Koyabe v Minister for Home Affairs* 2010

(4) SA 327 (CC) at paragraph 46 Mokgoro J held:

“Section 7(2)(a) of PAJA provides that a court shall review administrative action only when all relevant internal remedies provided for in any other law are exhausted. The provision therefore does not preclude courts from exercising their judicial review jurisdiction. A court must exercise its judicial review powers once one of two circumstances arises: when all available internal administrative

remedies are found to have been exhausted or when exceptional circumstances are found to exist.” (Court's emphasis)

[18] [In *Nichol and Another v Registrar of Pension Funds and Another* 2008 (1) SA 383 (SCA) at paragraph 15 van Heerden JA found:

“[15] Under the common law, the mere existence of an internal remedy was not, by itself, sufficient to defer access to judicial review until the remedy had been exhausted. Judicial review would in general only be deferred where the relevant statutory or contractual provision, properly construed, required that the internal remedies first be exhausted.¹⁰ However, as is pointed out by Iain Currie and Jonathan Klaaren, 'by imposing a strict duty to exhaust domestic remedies, [PAJA] has considerably reformed the common law'. It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under s 7(2)(c). Moreover,

the person seeking exemption must satisfy the court of two matters: first, that there are exceptional circumstances, and second, that it is in the interest of justice that the exemption be given." (Court's emphasis)

[19] The provisions of section 7(2)a is thus peremptory that the internal remedy provided for in section 50 of the Act must be exhausted before this court can review the matter. The Nichols case relates to similar facts as the facts in the present application, where the Supreme Court of Appeal had to consider the powers of the Financial Services Board ("FSB") Act 97 of 1990 in order to determine whether the FSB Appeal Board had powers of appeal and review.

[20] The wording of section 26(2) of the FSB Act is similar to that of section 50(3) of the Act which provides:

"(3) Any person aggrieved by a decision of the Registrar acting with the concurrence of the Council or by a decision of the Council under a power conferred or a duty imposed upon it by or under this Act, may within a period of 60 days after the date on which such decision was given and upon payment to the Registrar of the prescribed fee, appeal against such decision to the Appeal Board. "

and section 50(9) provides:

"(9) For the purpose of ascertaining any matter relating to the subject of its investigation, the Appeal Board shall have the powers which a High Court has to summon witnesses, to cause an oath or affirmation to be administered by them, to examine them, and to call for the production of books, documents and objects. "

[21] In the Nichols case (supra) the court determined that such an Appeal Board had wide powers. The appeal board is a tribunal consisting of three persons where one person is appointed on account of that person's knowledge of the law and the other two persons are appointed on account of their knowledge of medical schemes.

[22] It is clear that section 50(9) provides the same powers as that of the High Court, which are wide powers as the Board has the power to vary, confirm or set aside the registrar's decision, refer the matter back to the registrar for reconsideration or give their own decisions.

[23] Therefore the court held in the Nichols case (supra) at paragraph 22:

"[22] The appeal board therefore conducts an appeal in the fullest sense - it is not restricted at all by the registrar's decision and has the power to conduct a complete rehearing, reconsideration and fresh determination of the entire matter that was before the registrar, with or without new evidence or information." (Court's emphasis)

[24] The applicant has therefore to show that the Appeal Board will not be effective to deal with the grounds of review, albeit on the grounds of irregularity.

[25] In paragraph 26 of the Nichols case (supra) Van Heerden JA found:

“Even assuming there to have been non-compliance with the requirements for procedural fairness set out in s 3, this would simply afford the aggrieved party grounds for review on the basis that the administrative action in question ‘was procedurally unfair’. As with any of the other grounds of review listed in s 6 of PAJA, however, the manner of review of such procedurally unfair administrative action is still governed by s 7(2), in terms of which the aggrieved party is obliged to exhaust his or her internal remedies before bringing review proceedings.” (Court’s emphasis)

[26] The appeal in terms of section 50 of the Act must be considered an appeal in the fullest sense, as it has all the powers of the High Court to rehear the matter, reconsider it and to determine afresh the entire matter that was before the Appeal Committee and may hear and consider new evidence or information. The principles enunciated in the Nichols case (supra) is applicable in the present application, where the complaint is similarly that procedurally unfair administration action took place.

[27] The applicant at no stage indicated that the Appeal Board will not be able to review the matter due to procedural irregularities in terms of section 3(2)(b)(ii) of PAJA which provides:

“(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4),

must give a person referred to in subsection (1)-

(I)...

(ii) a reasonable opportunity to make representations;”

[28] Section 50 of the Act provides for an appeal in the wide sense and the Appeal Board will not be confined to the record of the Appeal Committee.

[29] Mokgoro J explained in Koyabe (supra) at paragraph 36:

“[36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms

undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a 'fair' procedure will depend on the nature of the administrative action and

circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action.” (Court’s emphasis)

[30] In the present application I find that the point in limine must succeed if all the arguments, evidence and precedents are considered. Therefore the court has to consider the exemption application before deciding the matter.

The exemption application:

- [31] The exemption application was only filed on 1 November 2013, although the point in limine was raised on 24 July 2013.
- [32] This court has to decide whether the internal remedy in terms of section 50 of the Act would not provide the applicant with effective redress. The court has to consider the nature of the internal remedy to enable it to establish whether exceptional circumstances exist or that it is in the interest of justice to exempt the applicant from the provisions of section 7(2)(a) of PAJA.
- [33] The court was referred to *Tantoush v Refugee Appeal Board and Others* [2007] ZAGPHC 191; 2008 (1) SA 232 (T) paragraph 82 by the applicant's counsel. However, this application is distinguishable and the part of the authority the court was referred to, contains no applicable principles or facts pertaining to the present application. In the *Tantoush* matter (supra) Murphy J found that the Appeal Board was biased and unfair, which cannot be said to be so in the present case.
- [34] This is not the case in the present application, as there is no indication by the applicant that the Appeal Board would be biased. Although the applicant contends that the applicant only received a partial hearing and its' right to the audi alteram partem rule was denied, this court cannot find that the Appeal Board cannot cure these complaints. Even if the Appeal Board refers the matter back to the

Appeal Committee the Appeal Committee would consist of new members.

- [35] The applicant seeks exemption from the duty to exhaust its internal remedy as provided for in section 50 of the Act. The applicant relies on the founding affidavit of Mr van der Merwe, in the main application in the exemption application. The first and second respondents relied on the allegations made in the answering affidavit, but also replied to the exemption application.
- [36] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) O'Regan J held at paragraph 48:

"[48] In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. "

and further:

This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.” (Court’s emphasis)

[37] It must be noted that although the applicant knew that the respondents would rely on a point in limine since 23 July 2013 and had the opportunity to deal with this point in limine, the applicant did not regard it of sufficient importance to deal with it as soon as could reasonably be expected. The applicant waited until 1 November 2013 to file and serve the application for exemption in terms of section 7(2)(c) of PAJA.

[38] The mere launching of the exemption application in terms of section 7(2)(a) of PAJA is contradictory to the allegation by the applicant that it has no duty to exhaust any internal remedy, as the Appeal Board lacks the power to set aside decisions of the Appeal Committee on review grounds of irregular procedure. The applicant cannot rely on both. The only inference the court can draw from this is that the applicant concedes that it had a duty to exhaust all internal remedies in terms of section 50 of the

Act unless it was exempted due to exceptional circumstances or the interest of justice, which the applicant did not do.

[39] In the case of Nichol (*supra*) the Supreme Court of Appeal found at paragraph 16:

“[16] Counsel for the registrar and the FSB submitted that, while there is no definition of 'exceptional circumstances' in PAJA, these must be circumstances that are out of the ordinary and that render it inappropriate for the court to require the s 7(2)(c) applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the courts rather than resort to the applicable

internal remedy.” (Court’s emphasis)

[40] I cannot find in this instance, that the immediate intervention of the court is required in the present circumstances.

[41] The applicant did not allege that section 50 of the Act does not confer wide powers on the Appeal Board. Nowhere did the applicant contend that the Appeal Board will not be able to give effect to the applicant’s right to administrative justice. There is no indication by the applicant that the Appeal Board is tainted or compromised in any way.

[42] This court can find no reason as to why the Appeal Board will not be able to afford the applicant relief as set out in the main application. I cannot find that the applicant has established exceptional circumstances which justify exemption in the interest of justice. Therefore the applicant has to exhaust all the internal remedies in terms of section 7(2)(C) of PAJA, before a review application will be entertained by this court.

[43] The application for exemption has to be dismissed.

The application to strike out:

[44] The court has to deal with is the application to strike out the replying affidavit of Mr Dennis van der Merwe dated 12 November 2013 alternatively paragraphs 4, 5, 7, 8, 11, 12.1, 12.2, 14.2 and 15.2.

[45] According to the first and second respondents the allegations in these paragraphs are irrelevant, scandalous, argumentative and contain matter which is not in reply to the first and second respondents answering affidavit.

[46] This replying affidavit was only served and filed on 12 November 2013, the date the application was set down for argument. I cannot contemplate that Mr van der Merwe can decide on behalf of the first and second respondents that the filing of their answering affidavit was unnecessary, it is for a party to decide whether to answer. Therefore I agree that paragraphs 11, 12.1 and 12.2 should be struck out. The same applies to paragraph 5, as it is for the court to decide who should pay the costs and this paragraph is struck out as irrelevant and argumentative.

[47] The application was set down for hearing on 12 November 2013 and not 11 November 2013, although the applicant's attorney and counsel did attend court on 11 November 2013 as they had not received the roll. Paragraph 4 sets out the history of how the matter was handled, which I find totally irrelevant in the adjudication of the application. Paragraph 4 is thus struck out.

[48] Paragraphs 7 and 8 are argumentative and irrelevant to adjudicate the main and exemption applications and are struck out.

[49] I will allow paragraph 14.2 to stand as it is. Paragraph 15.2 is a legal argument and should therefore be struck out as irrelevant, argumentative and does not contain facts to oppose the first and second respondents allegations.

[50] Therefore the following orders are made:

1. The main application is dismissed with costs;
2. The exemption application is dismissed with costs;
3. The application to strike out paragraphs 4, 5, 7, 8, 11, 12.1, 12.2, 15.2 is granted.

Judge C Pretorius

Case number: 2639/2011

Head on: 13 November 2013

For the Applicant: Adv E Fagan Sc

Instructed by: Webber Wentzel

For the Respondent: Adv AJ Lapan

Instructed by: Routledge Modise INC

Date of Judgment: 27 November 2013

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