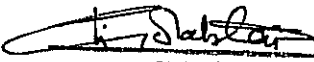


IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
DATE <u>20-12-2006</u>	 SIGNATURE

CASE NO: 06/9459

In the matter between:

REGISTRAR OF MEDICAL SCHEMES

First Applicant

COUNCIL FOR MEDICAL SCHEMES

Second Applicant

and

GUARDRISK INSURANCE COMPANY LIMITED

First Respondent

REGISTRAR OF SHORT-TERM INSURANCE

Second Respondent

J U D G M E N T

GOLDBLATT, J:

[1] The applicants in this matter are the Registrar of Medical Schemes and the Council for Medical Schemes who seek an order against the first respondent ("*Guardrisk*"), a registered short-term insurer in terms of the Short Term Insurance Act, 53 of 1998 ("*the STI Act*"), interdicting it from marketing

or concluding either of two policies known as "*AdmedGap*" and "*AdmedPulse*" on the basis that such acts constitute the carrying on of the business of a medical scheme as defined in the Medical Scheme Act 131 of 1998 ("*the MS Act*").

[2] Both the policies provide for Guardrisk against the payment of a premium, paying to the insured the difference between the amount charged by the provider of medical services to the insured and the amount provided for in the National Reference Price List in respect of particularised medical events provided for in the relevant policies of insurance. Medical aid schemes only pay the amount set out in the aforesaid price list which is frequently much less than the amount charged by providers of medical services and thus the policies are designed to compensate the insurer for the difference between what is paid by the medical aid scheme for the medical services and the amount that the insurer has had to pay for such services. The amount payable by Guardrisk is limited to 3,5 times the amount set out in the aforesaid price list and is subject to two conditions viz. the insured must be a member of a medical aid scheme and must have paid or incurred the cost of the medical services provided.

[3] Section 20(1) of the MS Act prohibits any person from carrying on the business of a medical scheme unless such person is registered as a medical scheme in terms of section 24(1) of the MS Act. Guardrisk is registered as a short-term insurer in terms of the STI Act and is not registered as a medical scheme in terms of the MS Act. Guardrisk has contended that it is entitled to

issue the policies in terms of the STI Act whilst the applicants contend that Guardrisk is not entitled so to do in terms of either of the Acts.

[4] Guardrisk submitted that on a proper interpretation of both the MS Act and the STI Act it was not carrying on the business of a "medical scheme" and further that the applicants had no *locus standi* to bring this application.

[5] Section 1 of the MS Act contains the following definition of the "business of a medical scheme":

"business of a medical scheme' means the business of undertaking liability in return for a premium or contribution –

- (a) to make provision for the obtaining of any relevant health service;*
- (b) to grant assistance in defraying expenditure incurred in connection with the rendering of any relevant health service; and*
- (c) where applicable, to render a relevant health service, either by the medical scheme itself, or by any supplier or group of suppliers of a relevant health service or by any person, in association with or in terms of an agreement with a medical scheme."*

[6] A "relevant health service" is defined in the same section to mean:

"any health care treatment of any person by a person registered in terms of any law, which treatment has as its object:

- (a) the physical or mental examination of that person;*
- (b) the diagnosis, treatment or prevention of any physical or mental defect, illness or deficiency;*

- (c) *the giving of advice in relation to any such defect, illness or deficiency;*
- (d) *the giving of advice in relation to, or treatment of, any condition arising out of pregnancy, including the termination thereof;*
- (e) *the prescribing or supplying of any medicine, appliance or apparatus in relation to any such defect, illness or deficiency or a pregnancy, including the termination thereof; or*
- (f) *nursing or midwifery,*

and includes an ambulance service, and the supply of accommodation in an institution established or registered in terms of any law as a hospital, maternity home, nursing home or similar institution where nursing is practised, or any other institution where surgical or other medical activities are performed, and such accommodation is necessitated by any physical or mental defect, illness or deficiency or by a pregnancy."

[7] Both the MS Act and the STI Act were enacted in 1998 and some assistance in interpreting the MS Act can be derived from considering the appropriate sections of the STI Act in that the legislature in passing both acts could not have intended that they would have contradictory provisions. *"Every part of a statute should be construed as to be consistent, so far as possible, with every part of that statute, and with every other unrepealed statute enacted by the same Legislature"* (*Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatic* 1911 AD 13 at p 24 referred to in footnote 14 p 609 by Ackermann J in *Shaik v Minister of Justice and Constitutional Development* 2004 (3) SA 599 (CC)).

[8] Being a registered short-term insurer Guardrisk is entitled to issue *"short-term policies"* which in terms of the definition contained in section 1 of

the STI Act includes "accident and health policies". An "accident and health policy" is defined as meaning:

"a contract in terms of which a person, in return for a premium, undertakes to provide policy benefits if a –

(a) disability event;

(b) health event; or

(c) death event,

contemplated in the contract as a risk, occurs, but excluding any contract –

(d) of which the contemplated policy benefits –

(i) are something other than a stated sum of money;

(ii) are to be provided upon a person having incurred, and to defray, expenditure in respect of any health service obtained as a result of the health event concerned; and

(iii) are to be provided to any provider of a health service in return for the provision of such service; or

(e)

(i) of which the policyholder is a medical scheme registered under the Medical Schemes Act, 1967 (Act 72 of 1967);

(ii) which relates to a particular member of the scheme or to the beneficiaries of such member; and

(iii) which is entered into by the scheme to fund in whole or in part its liability to such member or beneficiaries in terms of its rules;

and includes a reinsurance policy in respect of such a policy."

[9] The exclusion in subparagraph (d) of the above definition clearly was inserted to exclude policies which fell within the definition of the "business of a

medical scheme" in the STI Act and thus avoid a conflict between the MS Act and the STI Act.

[10] Guardrisk submitted that because the policies issued by it did not result in it undertaking liability either "*to make provision for obtaining of any relevant health service*" or "*to render a relevant health service*" its policies did not fall within the definition of a business of a medical scheme in that it was not undertaking liability for paragraph (a) or (c) in the statutory definition in the STI Act. They argued that paragraph (a), (b) and (c) in the definition had to be read conjunctively and that only if they undertook all of the activities set out in the definition would they be carrying on the business of a medical scheme.

[11] It was further submitted that the policies issued by them were not excluded from the definition of an "*accident and health policy*" in the STI Act in that similarly all the requirements of (d)(i), (ii) and (iii) had to be met before the exclusion applied i.e. (i), (ii) and (iii) had to be read conjunctively.

[12] In summary Guardrisk submitted that on a literal interpretation of the definitions in the MS Act the word "*and*" was to be read between requirements (a) and (b) and unless it undertook liability for both (a), (b) and (c), if applicable, it was not carrying on the business of a medical scheme. Thus it argued that all the subparagraphs had to be read conjunctively.

[13] The applicant, on the other hand, submitted that taking into account the context and subject-matter of the definition it was clear that the providing of any of the benefits set out in the definition would constitute carrying on of the business of a medical scheme if done "*in return for a premium or contribution*".

[14] They submit that (a), (b) and (c) constituted a list of activity which would make the provider of any one or all of the benefit a body carrying on the business of a medical scheme (see *Binda v Binda* 1993 (2) SA 123 (WLD) at 125B-126G).

[15] If (a), (b) and (c) in the definition of a medical scheme are to be read conjunctively, it would, in my view, lead to results which clearly could not have been the intention of the Legislature. If a person made provision for the obtaining of a relevant health service then such person would not have to grant a system in defraying expenditure incurred in connection with the rendering of such health service as no expenditure would be incurred. Thus (a) and (b) of the definition would be in conflict with each other if they were to be read conjunctively. However, if (a) and (b) were separated by "*and/or*" it would make sense and would give effect and meaning to the definition. Similar meaning must be given to the word "*and*" between (b) and (c) to make sense of the definition. If the scheme itself rendered health services or got a supplier or group of suppliers to render such health services then similarly it would not need to grant assistance in defraying expenditure incurred in the rendering of such health service.

[16] I am strengthened in my view of a consideration of exclusion (d) in the definition of an "*accident and health policy*" in the STI Act. If (d)(i), (ii) and (iii) are to be read conjunctively they make no sense as (ii) and (iii) are in conflict and cannot be read together unless the word "*and*" is read as "*and/or*". Courts are not slow to read "*and*" for "*or*" or "*or*" for "*and*" in cases where such a course appears to give effect to the obvious intention of the Legislature and the scheme of the statute. Such reading depends upon the context and subject-matter of the provision against the background of the statute as a whole (*R v La Joyce (Pty) Ltd and Another* 1957 (2) SA 113 (T) at 116A; *Federated Timbers Ltd v Bosman NO and Others* 1990 (3) SA 149 (W) at F-G; *Binda v Binda* quoted above in paragraph [14].

[17] If the exclusion are to be read disjunctively i.e. separated by "*and/or*" then if an insurer provides any of the benefits the exclusion is operative and it would preclude an insurer from providing benefits which constitute the carrying on of the business of a medical scheme in terms of the MS Act. This would have the intended effect of rendering the MS Act and the STI Act compatible.

[18] I am accordingly satisfied that (a), (b) and (c) in the definition of the business of a medical scheme in the MS Act are to be read as separate and distinct activities any of which will result in the undertaker of the business carrying on the business of a medical scheme if the activity is in return for "*a premium or contribution*". The word "*premium*" is clearly used to cover an insurance policy providing one or all of the listed activities.

[19] The policies issued by Guardrisk are in my view clearly for the purpose of defraying expenditure incurred by the insured in connection with the rendering of any relevant health service. The benefits are clearly designed to assist the insurer in paying the difference between the cost incurred by the insured for a health service and the amount received by the insured from his or her medical aid scheme.

[20] Guardrisk submitted that even if this Court should find that it is acting in contravention of the MS Act it should not grant the interdict sought because the MS Act in section 66 thereof provides for criminal sanctions in the event of a party contravening the Act. In my view there is no substance in this submission. This contention could only succeed if Guardrisk could show that the Legislature intended the remedies provided by section 66 to be exclusive and exhaustive (*National Industrial Council v Leather Industry of SA v Parshotam and Sons (Pty) Ltd* 1984 (1) SA 277 (D&CLD) at 279). The provisions of section 66 deal with past contraventions of the MS Act whilst the interdict sought is in regard to the prevention of future breaches or continuing breaches of the MS Act (*Johannesburg City Council v Knoetze & Sons* 1969 (2) SA 148 (W) at 154/5).

[21] Guardrisk also attacked the right of either of the applicants to bring this application in that the MS Act does not grant either of them the power or right to act in this manner. In my view the applicants have the necessary *locus standi* to bring this application and are obliged to do so.

21.1 The MS Act provides *inter alia* for the regulation and control of the activities of medical schemes.

21.2 The Council is established in terms of section 3 of the MS Act and the Registrar is appointed by the Minister of Health in terms of section 18 of the MS Act.

21.3 The functions of the Council are set out in section 7 of the MS Act and include:

21.3.1 to protect the interests of beneficiaries (of medical schemes) at all times;

21.3.2 to control and co-ordinate the functioning of medical schemes in a manner that is complimentary with the national health policy; and

21.3.3 to investigate complaints and settle disputes in relation to the affairs of medical schemes.

21.4 The powers of the Council are set out in section 8 and include the powers to:

- 21.4.1 approve the registration, suspension and cancellation of registration, of medical schemes or a benefit option;
- 21.4.2 exempt, in exceptional cases and subject to such terms and conditions and for such period as the Council may determine, a medical scheme or other person upon written application from complying with any provision of the MS Act;
- 21.4.3 in general to take any appropriate steps which it deems necessary or expedient to perform its functions in accordance with the provisions of the MS Act.

[22] It is clear from *inter alia*" all of the above provisions of the MS Act that the Council and the Registrar are the authorities that are entrusted with the responsibility to control and regulate medical schemes and their business. They enforced the MS Act and monitor compliance with it. I am satisfied that regulatory authorities such as the applicant are entitled to institute proceedings to enforce the provisions of legislation for which they are responsible by seeking appropriate relief which, *inter alia*, includes declaratory and interdictory relief if appropriate. *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996 (3) SA 155 (N); *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA)).

[23] Further it is clear that the first applicant has the right to institute his proceedings in terms of section 6(1) of the Financial Institution (Protection of Funds) Act 28 of 2001 as he is defined as a "*Registrar*" in (c) of the definition of "*registrar*" in such Act and Guardrisk falls within the definition of an "*institution*" in the said Act.

[24] As Guardrisk has some 130 000 beneficiaries in respect of policies issued in contravention of the MS Act it seems to me that I should not order it to forthwith terminate such policies but should give it a reasonable period to terminate the policies in order to give the policy holders an opportunity to seek and obtain whatever other lawful and alternative cover they can obtain to guard them against the risks inherent in the event of them incurring medical expenses not recoverable from their medical aid schemes. A three-month period seems to me to be reasonable bearing in mind that the policies are all terminable on 60 days' notice.

[25] I accordingly make the following orders:

1. It is declared that the first respondent is "*undertaking the business of a medical scheme*" as defined in the Medical Schemes Act 131 of 1998 by marketing, offering for sale, promoting, advertising, administering and acting in terms of each of the following short-term insurance policies:

"*AdmedGap*" and "*AdmedPulse*".

2. The first respondent is interdicted and restrained from directly or indirectly marketing, promoting, advertising and/or concluding any policies of insurance which offer the benefits currently offered in terms of the policies referred to in paragraph 1 of this order.

3. The first respondent is ordered to terminate all existing policies concluded by it (as insurer) in terms of the short-term products referred to in paragraph 1 of this order within 3 months of the granting of this order.

4. The first respondent is to pay the costs of this application which shall include the costs consequent upon the employment of two counsel.



**L I GOLDBLATT
JUDGE OF THE HIGH COURT**

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DATE OF HEARING

1 DECEMBER 2006

DATE OF JUDGMENT

20 DECEMBER 2006