THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Optivest Health Services (Pty) Ltd v The Council for Medical Schemes and Others (396/2023) [2024] ZASCA 64 (30 April 2024)

Today the Supreme Court of Appeal (SCA) dismissed an appeal with costs including those of two counsel.

The appellant, Optivest Health Services (Pty) Ltd (Optivest), is accredited as a broker by the first respondent, the Council for Medical Schemes (the Council) which was established in terms of s 3 of the Medical Schemes Act 131 of 1998 (the Act). The second respondent is the Registrar of the Council appointed in terms of s 18 of the of the Act. The third respondent, Open Water Advanced Risk Solutions (Pty) Ltd (Open Water), is the company which was appointed by the Registrar in terms of s 44(2) of the Act, read with s 134(1)*(a)* of the Financial Sector Regulation Act 9 of 2017 (the FSR Act), to undertake an inspection into Optivest. This was after a tip-off was received from an anonymous former employee of Optivest regarding conduct that was alleged to be unlawful, which required further investigation.

The tip-off was in the form of an email which was brought to the attention of the Registrar on or about the 31 May 2019. In the email, it was alleged that the author had been working for Optivest and could not approach anyone at the company. The Council's Compliance and Investigation Unit (the Investigation Unit) prepared a report to the Registrar, which indicated that if the allegations were true, there were irregularities and non-compliance with the Act and the regulations by Optivest, which warranted further investigation in the form of an inspection in terms of s 44(4)*(a)* of the Act, read with the FSR Act. On 30 August 2019, Open Water was appointed in terms of s 44(2) of the Act, read with s 134(1), 129(2) and (3) of the FSR Act, to conduct an inspection into the affairs of Optivest, in terms of s 44(4)*(a)* of the Act.

Open Water attended at the premises of Optivest to investigate Optivest's affairs as per the mandate granted to it in its appointment letter. No notice was given to Optivest of the investigation, considering that it was based on a tip-off from a former employee and involved alleged fraudulent conduct, which could be concealed if notice was given.

The initial inspection took place at Optivest's premises. Optivest co-operated with Open Water on these occasions. The inspectors returned to the premises on a later occasion to continue its inspection and interview Optivest officials. At this point, Optivest withdrew its co-operation and sought to challenge the Council's authority to conduct an inspection into its affairs. It refused to hand over certain documentation which Open Water required to complete its investigation. As a result, Open Water produced a second

draft investigation report dated the 29 November 2019 (the draft report), which contained certain preliminary findings against Optivest, which were regarded as 'damning'.

On 10 December 2020, Optivest instituted review proceedings in the Gauteng Division of the High Court, Pretoria (the high court) seeking to review and set aside the decisions taken by the Registrar. Optivest's review was based on three main grounds: (a) that the Council was not empowered by the Act or the FSR Act to initiate an investigation into it because it is a broker and not a medical scheme (the lawfulness challenge); (b) that the investigation was allegedly initiated pursuant to a written tip-off and Optivest should have been afforded *audi alterem partem* in terms of s 47 of the Act (the procedural challenge); and (c) the investigation was not rationally connected to the purpose sought to be achieved (the rationality challenge). The high court dismissed Optivest's application, finding that: (a) the Council acted *intra vires* the powers statutorily vested in them in initiating the investigation; (b) Optivest, having applied for and been granted accreditation, is subject to the regulatory regime provided for by the Act; and (c) the investigation fell within the bounds of the mischief which the Council was called upon to investigate.

In the appeal before the SCA, Optivest contended that the high court's findings were incorrect and it sought to challenge the decision on five grounds which were encompassed in the three grounds raised in the high court.

The issues before the SCA were thus: whether, upon a proper construction of *inter alia* ss 7 and 44(4) of the Act, the respondents had the power to investigate a complaint concerning a broker; whether the respondents were obliged to utilise the mechanisms in s 47 of the Act, by giving Optivest the opportunity to respond to the complaint before embarking on the investigation of Optivest's activities; whether the decision by the Council to appoint Open Water to investigate Optivest was unlawful, procedurally unfair and lacked rationality.

In addressing these issues, the SCA, in a majority judgment, held that, the interpretation proffered by Optivest would exclude the investigation of brokers in the context of regulation 28. This would mean that the Council would not be entitled to conduct an inspection in order to perform its functions of monitoring or investigating any unlawful conduct or non-compliance with the Act and regulations, A court must construe the language in a statute against the background of the perceived mischief which the statute aims to address and the interpretation proffered by Optivest would fly in the face of this. On this point, it was concluded that the Council, in terms of s 44*(a)*, read with the relevant regulations and provisions of the FSR Act, had the power to inspect and investigate the conduct of brokers such as Optivest.

With regards to the procedural challenge, the majority judgment held that it was in the public interest for a medical scheme or 'any other person' suspected of non-compliance with the Act or improper conduct not to be provided with the opportunity to hide or destroy evidence as without the element of surprise, the effectiveness would be lost. The majority judgment reasoned that the right to *audi alterem partem* is properly provided for by a response to the draft report, which Optivest chose not to deal with.

Lastly, on the issue of the rationality challenge, the majority judgment held that the purpose of the power contained in s 44(4) of the Act is rationally connected to achieving the purpose of the Act and the rationale behind the power provided for in the sub-section. As the Council is empowered to monitor and investigate non-compliance with the Act in order to protect the interests of beneficiaries, the Council is also empowered to take any appropriate steps which it deems necessary or expedient to perform its functions in accordance with the provisions of the Act. The power in terms of s 44(4) of the Act were entrusted to it to achieve such purpose. In the circumstances, the majority held that the conduct of the Council and the Registrar was lawful and in accordance with the rule of law, was not procedurally unfair, or arbitrary, was rationally connected to the purpose sought to be achieved by the Act and did not offend against the principle of legality.

In the result, the appeal was dismissed with costs including those of two counsel.

The minority judgment held that the central issue in the matter was one of interpretation, pointing out that it was important to note that the Act does not specify or define the powers of an inspector, it does so with reference to the now repealed Inspection of Financial Institutions Act, 80 of 1998 (the 1998 Inspection Act). The latter Act contained provisions which specifically limited the powers of inspection into the affairs of the financial institution and specifically defined the powers of an inspector in relation to 'any other person'.

Making reference to s 5(1) of the 1998 Inspection Act, the minority judgment held the view that this section demonstrates that an investigative inspection carried out in terms of s 44 of the Act, as read with the 1998 Inspection Act, was intended to relate only to the affairs of a medical scheme and that was the case both prior to, and after s 44(4) was introduced.

The issue before the SCA was whether the repeal of the 1998 Inspection Act, without amendment of the Act, brought about an extension of the powers of investigation or inspection beyond that which was contemplated prior to the repeal and the enactment of the FSR Act.

In reaching its conclusion, the minority judgment held that, upon a careful reading of s 44(4)*(b)* of the Act, which concerns routine inspections, the Registrar's power to conduct a supervisory on-site inspection can only relate to the supervised entity under its regulatory or supervisory control and that, in this instance, this only related to a registered medical scheme. As concerns such inspection, the repeal of the 1998 Inspection Act and re-enactment of its provisions in the FSR Act, did not bring about an extension of the powers to inspect entities which are not supervised entities in terms of the Act.

In the result, the minority judgment concluded that the appeal ought to have been upheld.

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