THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 542/10

In the matter between:

THE SOUTH AFRICAN POLICE SERVICE MEDICAL SCHEME ('POLMED') First Appellant
QUALSA HEALTHCARE (PTY) LTD Second Appellant

and

ANDILE ROBERT LAMANA First Respondent
NZWANA VICTOR MZILI Second Respondent
TANDIE COLEMAN MALONI Third Respondent

Neutral citation: *The South African Police Service Medical Scheme ('Polmed') v Lamana* (542/10) [2011] ZASCA 91 (31 May 2011).

Coram: CLOETE, PONNAN, CACHALIA and MALAN JJA and MEER AJA

Heard: **19 MAY 2011**

Delivered: **31 MAY 2011**

Summary: Section 21A of the Supreme Court Act 59 of 1959: if facts relevant to the exercise of a court of appeal's discretion under s 21A of the Supreme Court Act do not appear from the record, they should be placed before the court by way of affidavit by the party seeking to rely upon them and in sufficient time to enable the other party to deal therewith. The same applies in an application for leave to appeal.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Seriti J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel, which are to be paid by the appellants jointly and severally.

JUDGMENT

CLOETE JA (PONNAN, CACHALIA and MALAN JJA and MEER AJA concurring):

[1] The respondents are all serving members of the South African Police Services. They are also members of the first appellant, the South African Police Service Medical Scheme ('Polmed') which, as its name suggests, is a medical aid scheme (duly registered as such in terms of the Medical Schemes Act 131 of 1998). The first appellant is administered by the second appellant, Qualsa Healthcare (Pty) Ltd ('Qualsa'). The respondents, as applicants, instituted motion proceedings in the North Gauteng High Court, Pretoria, against Polmed and Qualsa, the purpose of which was to compel the latter to pay benefits to which the respondents were entitled to receive from Polmed, into a particular bank account nominated by them.

[2] For a number of years the respondents and their dependants have been patients of Dr Gualam Muhammed Peer, who practises as a general practitioner in King William's Town. The respondents never paid Dr Peer directly for his services: Qualsa did so on behalf of Polmed, until October 2008 when Polmed's attorney informed the respondents' attorney that 'payment will only be effected into members' personal banking account[s], and not that of a third party', and Qualsa informed Dr Peer that 'you are hereby

advised that direct payment of your claims will cease and indirect payment will be implemented effective from 11 October 2008'.

[3] In December 2008, as a result of the communications just quoted, each respondent signed three documents. The first was a 'Service Agreement' with Dr Peer in terms of which he undertook to provide healthcare services to the respondent concerned and his dependants, and the respondent undertook to instruct Polmed to pay amounts due to him in respect of such services into the bank account of the Sheh-Rahim Trust. The second was a letter addressed to Polmed giving that instruction. The third was an 'Agency Agreement' entered into between each respondent and the Trust, represented by Dr Peer, in terms of which the respondent concerned nominated the Trust to receive payments due to him by Polmed in respect of services rendered by Dr Peer and to pay them over to the latter. Polmed and Qualsa refused to make any payment into the account of the Trust.

[4] The question before the court a quo was whether Polmed and Qualsa were entitled to act as they did. The answer to this question depended upon an interpretation of the applicable Polmed rules which then provided:

'17.4 Notwithstanding the provisions of this rule, the Scheme has the right to pay any benefit directly to the member concerned.

17.5 Payment of amounts due to a member is made by means of a transfer to an acceptable bank account as elected by the member. The Board of Trustees may in its discretion, approve that payments be made by cheque.'

[5] Polmed and Qualsa contended inter alia that they were entitled to refuse to make payments into the account of the Trust as they considered it not to be 'an acceptable bank account'. The answering affidavit went on to explain that from information gathered by Polmed and Qualsa over the years, what they called 'the most favoured practice' in defrauding Polmed is that an amount of money is paid by a medical practitioner to a member, and non-existent treatment is then recorded and claimed by the practitioner, the claim usually far exceeding the sum of money received by the member; but if the incentive to the member is taken away, it is their experience that the incidence

of such malpractice is curbed substantially. It was precisely for those reasons, said Polmed and Qualsa, that they decided that all medical claims by the respondents would be paid directly to them.

[6] The court a quo, in its judgment delivered on 9 August 2009, rejected these submissions and found that the phrase 'an acceptable bank account' in terms of rule 17.5 meant 'an account which is [a] generally acceptable account'. Leave to appeal was refused.

[7] Leave to appeal was subsequently sought from this court. The notice of motion was dated 13 May 2010 and the founding affidavit was deposed to three days earlier, on 10 May. The respondents delivered an answering affidavit opposing the application a month later, on 10 June. No replying affidavit was delivered. Leave was granted on 13 July 2010, obviously on the basis that there were prospects of success on appeal. And indeed there were. The finding of the court a quo cannot be supported. The interpretation given to rule 17.5 raises more questions than it answers: By what criteria must the acceptability of the account be judged? Is the test subjective or objective? Having heard argument on the merits of the appeal, it seems to me that the correct interpretation of the word 'acceptable' is 'acceptable to Polmed' and that, as Polmed did not find the Trust's account acceptable for good and sufficient reasons, the application should have been dismissed. But it is not necessary, for the reasons which follow, to express a final view in this regard.

[8] The judges considering the application for leave to appeal were not furnished with one vital fact: On 11 May 2010, before the application was lodged with the Registrar of this court on 21 May 2010, and more than two months before leave was granted, amendments to the rules had been registered by the Registrar of Medical Schemes. The relevant rules now read:

'17.5 Notwithstanding the provisions of this rule, the Scheme has the right to pay any benefit directly to the member concerned.

17.6 Payment of amounts due to a member is made by means of payment into the personal bank account of the member.'

The amendments render the issues between the parties academic.

[9] We were told from the bar by counsel representing Polmed and Qualsa that it takes about a week for notification of the registration of an amendment to reach his clients. That is no excuse for not informing the court of the registration of the amendments once it had taken place or, for that matter, that registration was pending when the application was lodged. Had the judges considering the application for leave to appeal known of the registration of the amendments, they could well have refused leave in terms of s 21A of the Supreme Court Act 59 of 1959, which provides:

'(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

. . .

(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.'

The same questions arise when leave to appeal is sought from this court (because of the provisions of s 21A(4)) and a lower court (see *Logistic Technologies (Pty) Ltd v Coetzee & others* 1998 (3) SA 1071 (W)). There was nothing in the application to indicate that the order sought on appeal would have some practical effect or result despite the amendment to the rules, or that there were exceptional circumstances as contemplated in subsec (3). Nor is there anything of that nature properly before us now.

[10] We were informed by counsel representing Polmed and Qualsa that the amendments were brought to his attention the day before the appeal was set down for hearing (which was a public holiday). This court only came to know of the amendments on the day of the hearing ─ over a year after they had been registered. Had we been informed earlier, we might well have invoked the provisions of s 21A(2), which provides:

'(a) If at any time prior to the hearing of an appeal the Chief Justice or the Judge President, as the case may be, is *prima facie* of the view that it would be appropriate to dismiss the appeal on the grounds set out in subsection (1), he or she shall call for written representations from the respective parties as to why the appeal should not be so dismissed.

(b) Upon receipt of the written representations or, failing which, at the expiry of the time determined for their lodging, the matter shall be referred by the Chief Justice or by the Judge President, as the case may be, to three judges of the Division concerned for their consideration.

(c) The judges considering the matter may order that the question whether the appeal should be dismissed on the grounds set out in subsection (1) be argued before them at a place and time appointed, and may, whether or not they have so ordered ─

(i) order that the appeal be dismissed, with or without an order as to the costs incurred in any of the courts below or in respect of the costs of appeal, including the costs in respect of the preparation and lodging of the written representations; or

(ii) order that the appeal proceed in the ordinary course.'

We would certainly have asked why the appeal was proceeding when the issues between the parties had become moot. We nevertheless heard argument both on the proper course to be adopted in the circumstances and on the merits of the appeal.

[11] Counsel on both sides were agreed that there were no live issues remaining between the parties. Counsel representing the respondents submitted that for that reason the appeal should not be entertained and asked that Polmed and Qualsa be ordered to pay the costs of the application for leave to appeal and of the appeal. (I pause to note that the costs of the application were made costs in the appeal, with the consequence that an order in respect of the latter would automatically include the former.) Counsel representing Polmed and Qualsa submitted on the other hand that the court should decide the appeal, and put forward two submissions in this regard.

[12] The first submission was that should the respondents challenge the validity of the amendment to the rules and should the challenge be successful, a decision on the merits of the appeal would not be academic. The submission rests on pure speculation and does not provide a basis for the discretion vested in this court in terms of s 21A to be exercised in favour of Polmed and Qualsa.

[13] The second submission, made in response to a question from the bench, was based on an instruction which counsel took in court that issues similar to those raised in this appeal frequently arise before the Council for Medical Schemes and that a decision on the merits of the application would accordingly benefit other medical aid schemes, particularly one he mentioned by name. I shall assume, without deciding, that the practical effect or result referred to in s 21A(1) is not restricted to parties inter se and that the expression is wide enough to include a practical effect or result in some other respect (cf *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA) para 40). But even if that is a correct interpretation of the section, Polmed and Qualsa have not laid a proper factual foundation for such a finding. It would be quite improper for this court to act upon information tendered informally from the bar, which should have been contained in an affidavit when leave to appeal was sought, which is still not in that form and where the respondents have not had an opportunity of challenging it. Furthermore, the court would have to make a finding as to the meaning of s 21A(1), an issue that was not argued before us. If facts relevant to the exercise of a court of appeal's discretion under s 21A(1) do not appear from the record, they should be placed before the court by way of affidavit by the party seeking to rely upon them and in sufficient time to enable the other party to deal therewith. The same applies to an application for leave to appeal in whatever court it is brought.

[14] In the circumstances, I consider that the court should exercise the discretion vested in it by s 21A(1) in favour of dismissing the appeal. The following order is made:

The appeal is dismissed with costs, including the costs of two counsel, which are to be paid by the appellants jointly and severally.

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T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	D E van Loggerenberg SC (with him S S Maakane) Instructed by Maenetja Attorneys, Pretoria Naudés Bloemfontein
RESPONDENTS:	N Singh SC (with him G J Gajjar) Instructed by Smith Tabata Inc, King William's Town Webbers, Bloemfontein