THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 1387/2018

In the matter between:

MEDIHELP MEDICAL SCHEME **APPELLANT**

and

MINISTER OF FINANCE NO **RESPONDENT**

Neutral citation: *Medihelp v Minister of Finance NO* (1387/2018) [2020] ZASCA 29 (26 March 2020)

Coram: PONNAN, VAN DER MERWE and MOKGOHLOA JJA

Heard: 26 February 2020

Delivered: 26 March 2020

Summary: Practice – pleadings – real import of upholding special plea that particulars of claim did not disclose a cause of action – leave to amend ought to have been granted.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Molopa-Sethosa J sitting as court of first instance):

1 Save as is set out in paragraph 2 hereof, the appeal is dismissed with costs, including the costs of two counsel.

2 The order of the court a quo is varied by replacing paragraph 2 thereof with the following:

'2.1 It is declared that the plaintiff's particulars of claim do not disclose a cause of action and the plaintiff is directed to pay the costs of the separated hearing, including the costs of two counsel.

2.2 The plaintiff is granted leave, if so advised, to amend its particulars of claim within 15 days from the date of this order.'

JUDGMENT

Van der Merwe JA (Ponnan and Mokgohloa concurring)

[1] The appellant, Medihelp Medical Scheme, duly registered as such under the Medical Schemes Act 131 of 1998, sued the respondent, the Minister of Finance, in the Gauteng Division of the High Court, Pretoria for payment of members' contributions owed to it in respect of a number of its members. In a special plea, the respondent challenged the appellant's *locus standi* in the matter. By agreement the special plea was determined separately, without evidence, by Molopa-Sethosa J. She upheld the special plea and dismissed the appellant's claim with costs, including the costs of two counsel. The appeal is with the leave of this court.

[2] In its particulars of claim the appellant referred to an agreement reached by the Public Service Bargaining Council on 4 November 1993, between, on the one hand, the South African Government as the employer and, on the other, a number of employee organisations representing civil servants (the Agreement). The essence of the

Agreement was that the employer agreed to fund medical assistance for its employees after retirement or the termination of their service, on a basis specified in an annexure to the Agreement. The particulars hereof are not relevant to the appeal.

[3] In the particulars of claim, the appellant also alluded to a general notice that had been given to members of the appellant by the National Treasury on behalf of the respondent on 8 July 2005 (the General Notice). The General Notice was directed to ex-employees of the South African Government who were members of the appellant and received benefits under its Medihelp 100 benefit option. It informed these members that by reason of a decision of the Council of Medical Schemes, that option would no longer be available. It proceeded to state that these members were entitled to join any approved benefit option of a registered medical scheme. The General Notice referred to the Agreement and emphasised that the State remained bound to make payment of the members' contribution in respect of the new benefit options thus chosen.

[4] The appellant further alleged that a number of these members, listed in an annexure to the particulars of claim (the affected civil servants), elected to take up other benefit options with the appellant. The appellant proceeded to plead that the respondent had at all relevant times paid the members' contributions in respect of the affected civil servants to the appellant. The respondent admitted all of these allegations.

[5] The nub of the appellant's case was pleaded as follows:

'The defendant, despite the granting by the plaintiff of membership to the affected civil servants (and their surviving spouses) and in breach of its obligations in terms of the Agreement and General Notice, deducted from the monthly subscription payments the total sum of R9 997 256.75 being the subscriptions of the 94 affected civil servants listed in Annexure "MH3" in respect of past subscriptions paid.'

In the result it was alleged that the respondent was indebted to the appellant in the amount of R9 997 256.75, as well as *mora* interest thereon.

[6] In the special plea the respondent pointed out that, on its own pleadings, the appellant was not a party to the Agreement and the General Notice was directed to the affected civil servants. It thus concluded that 'there being no privity of contract between the Plaintiff and the Defendant, the Plaintiff has no locus standi to assert any rights or obligations which attach to an agreement to which it is not a party.'

[7] A person might lack standing to sue or be sued in either of two circumstances. The first is where the person is in law not capable of suing or being sued, such as an unassisted minor or a person suffering from a mental disorder. The second is where the person indeed has such capacity, but has insufficient interest in the proceedings. See *Lupacchini NO and Another v Minister of Safety and Security* [2010] ZASCA 108; [2011] 2 All SA 138 (SCA); 2010 (6) SA 457 (SCA) para 13.

[8] In respect of the latter circumstance the general rule is that a party claiming relief in respect of any matter must establish a direct interest in that matter. A direct interest is one that is not academic, abstract or hypothetical. An interest which all citizens have, would generally be too remote to found standing. An actual and existing interest in the matter is required. See *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* [1988] 2 All SA 379 (A); 1988 (3) SA 369 (A) at 388B-H and *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 534B.

[9] Standing is thus determined without reference to the merits or demerits of the claim in question. A contract or administrative decision may, for instance, patently invalid, but a party may have insufficient interest in the matter to rely thereon for relief. A finding that a party has no standing to sue or be sued generally brings an end to the action or defence. It follows that it is not correct to find a lack of *locus standi* where a party is of a class of persons that may in principle obtain the relief claimed, but fails to plead a cause of action in law.

[10] What the special plea raised, was that the appellant's alleged right to receive payment from the respondent was solely based on the Agreement and the General Notice. But, on its own showing, the appellant was not a party to the Agreement and the undertaking contained in the General Notice was not directed to it. In terms of these documents the respondent was bound to the affected civil servants and not to the appellant.

[11] The appellant clearly had a direct interest in receiving payment of members' contributions of some R10 million. But it failed to plead a basis in law to hold the respondent liable to make payment thereof to it. In short, its particulars of claim did not disclose a cause of action against the respondent.

[12] In effect, the parties by agreement requested the court a quo to determine *in limine* whether the particulars of claim disclosed a cause of action. By allowing the special plea the court a quo effectively correctly held that it did not. This was akin to allowing an exception against the particulars of claim. As a result, the *dictum* of Ponnan JA in *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Company (South Africa) Limited* [2018] ZASCA 9; 2018 (3) SA 405 (SCA) para 8 was applicable:

'The upholding of an exception disposes of the pleading against which the exception was taken, not the action or defence. An unsuccessful pleader is given the opportunity to amend the plea, even when the plea has been set aside because it does not disclose a defence. The rationale for this seems to be that although the defence contained in the pleading may be bad the pleading as such continues to exist. Ordinarily therefore the court should grant leave to amend and not dispose of the matter. Leave to amend is not a matter of an indulgence; it is a matter of course unless there is a good reason that the pleading cannot be amended.'

[13] It follows that the respondent's successful argument in the court a quo should not have resulted in the dismissal of the appellant's claim and that fairness and justice required that the appellant be afforded the opportunity to amend its particulars of claim, if so advised. These matters were raised *mero motu* by this court, not by the appellant and do not translate into substantial success on appeal for the appellant.

[14] In the result the following order is issued:

1 Save as is set out in paragraph 2 hereof, the appeal is dismissed with costs, including the costs of two counsel.

2 The order of the court a quo is varied by replacing paragraph 2 thereof with the following:

'2.1 It is declared that the plaintiff's particulars of claim do not disclose a cause of action and the plaintiff is directed to pay the costs of the separated hearing, including the costs of two counsel.

2.2 The plaintiff is granted leave, if so advised, to amend its particulars of claim within 15 days from the date of this order.'

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C H G VAN DER MERWE

JUDGE OF APPEAL

APPEARANCES

For appellant:	H F Jacobs SC
Instructed by:	MacRobert Inc., Pretoria
	Claude Reid Attorneys, Bloemfontein
For respondent:	I A M Semenya SC, N I Mayet
Instructed by:	State Attorney, Pretoria
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