THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1213/2016

In the matter between:

HMI HEALTHCARE CORPORATION (PTY) LIMITED **APPELLANT**

and

MEDSHIELD MEDICAL SCHEME **FIRST RESPONDENT**

JOHANNES ZACHARIAS HUMAN MULLER NO **SECOND RESPONDENT**

MICHAEL MMATHOMO MASILO NO **THIRD RESPONDENT**

THE MASTER OF THE GAUTENG HIGH COURT, PRETORIA **FOURTH RESPONDENT**

Neutral citation: *HMI Healthcare Corporation (Pty) Limited v Medshield Medical Scheme & others* (1213/2016) [2017] ZASCA 160 (24 November 2017)

Bench: Ponnan and Petse JJA and Tsoka, Lamont and Mbatha AJJA

Heard: 13 November 2017

Delivered: 24 November 2017

Summary: Application for rescission – whether applicant an affected party as contemplated in Rule 42(1)*(a)* of the Uniform Rules of Court – whether rescission appealable.

ORDER

On appeal from: Gauteng Division, Pretoria (Tuchten J (Tolmay J concurring) and Makgoka J dissenting sitting as a court of appeal):

The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

JUDGMENT

Ponnan JA (Petse JA and Tsoka, Lamont and Mbatha AJJA concurring):

[1] The appellant, HMI Healthcare Corporation (Pty) Ltd (HMI), is the sole shareholder of Calabash Health Solutions (Pty) Ltd (in liquidation) (Calabash). Calabash was incorporated during 1999 and commenced business as a provider of capitation services to medical schemes in 2005. In October 2006 it concluded a written capitation agreement[1] with the first respondent, the Medshield Medical Scheme (Medshield). The agreement commenced operating with retrospective effect from 1 January 2006 and was to endure for a period of three years until 31 December 2008. During its subsistence several disputes arose between the parties, consequently the agreement came to be prematurely terminated during the middle of 2008.

[1] In terms of the general regulations promulgated under the Medical Schemes Act 131 of 1998, capitation agreement means: 'an arrangement entered into between a medical scheme and a person whereby the medical scheme pays to such person a pre-negotiated fixed fee in return for the delivery or arrangement for the delivery of specified benefits to some or all of the members of the medical scheme.'

[2] Calabash was liquidated by way of a creditors' voluntary liquidation pursuant to a special resolution dated 13 July 2009.[2] On 18 August 2009 Johannes Zacharias Human Muller NO (the second respondent) and Michael Mmathomo Masilo NO (the third respondent) were appointed by the fourth respondent, the Master of the Gauteng High Court, Pretoria (the Master) as the joint provisional liquidators of Calabash. Their appointment was subsequently made final by the Master, who issued a certificate to that effect on 23 October 2009. At the first meeting of creditors on 22 September 2009 HMI proved a claim in the sum of R3 530 000.00 against Calabash. The second meeting of creditors was held on 27 October 2009 at which, a related company, Agility Global Health Solutions Africa Ltd (Agility) proved a claim in the sum of R9 959 829.96 against Calabash. HMI, Agility and Calabash are related companies, being subsidiaries within the Bathabile Group of Companies.

[3] During April 2011, Medshield called for a special meeting of creditors to be convened, at which it proved claims in the total sum of R39 226 814.40 against Calabash. On 29 November 2012 Medshield caused summons to be issued against Calabash, wherein it claimed payment as follows:

(i) R2 000 000.00 in respect of claim A;
(ii) R3 500 000.00 in respect of claim B;
(iii) R26 526 715.00 in respect of claim C;
(iv) R2 922 197.00 in respect of claim D;
(v) R2 952 831.00 in respect of claim E;
(vi) R1 025 375.20 in respect of claim F;
(vii) R299 696.18 in respect of claim G;
(viii) R935 605.00 in respect of claim H; and
(ix) R459 690.00 in respect of claim I.

[4] Claims A to G, although initially proved at a meeting of creditors, were subsequently expunged by the Master in terms of the provisions of s 45 of the Insolvency Act 24 of 1936 (the IA). Thereafter, Medshield sought to prove claims H and

[2] In terms of s 349 and 351 of the old Companies Act 61 of 1973.

I at a further meeting of creditors, but these claims were also rejected by the Master. In expunging the claims, the Master stated:

'The nature of the factual disputes of these claims is of such technical intensity that the Master as a quasi-judicial officer cannot investigate and adjudicate on these claims. It would in this instance be prudent of the Master to expunge these claims and afford creditors the opportunity to prove their claims by way of action. All interested parties can voice their respective merits of either proving or disallowing the claims in a court of law.'

[5] On 2 October 2012 and, at the instance of the Registrar of Medical Schemes, Medshield was placed under provisional curatorship by the North Gauteng High Court, Pretoria. Mr Themba Benedict Langa was appointed the provisional curator of Medshield.

[6] On 18 December 2012 HMI applied *ex parte* to the North Gauteng High Court, Pretoria for an order in the following terms:

'1. That, in terms of s 387(4) and s 388 of the Companies Act, 61 of 1973: –

1.1 the applicant be and is hereby empowered to defend the action instituted by Medshield Medical Scheme ("Medshield") against Calabash Health Solutions (Pty) Ltd (in liquidation) ("Calabash") out of the above Honourable Court under case number 2012/69139, in the name of Calabash and subject to the applicant furnishing an indemnity as to cost to the duly appointed joint liquidators of Calabash, Johannes Zacharias Human Muller NO and Michael Mmathomo Masilo NO ("the joint liquidators");

1.2 the applicant be and is hereby empowered to defend any other legal proceedings brought against Calabash by Medshield, in the name of Calabash and subject to the applicant furnishing an indemnity as to costs to the joint liquidators;

1.3 the applicant be and is hereby empowered to institute action against Medshield, or to launch a counterclaim under case number 2012/69139, for recovery of the claim articulated in the draft particulars of claim attached to the letter addressed by the applicant's attorneys to the joint liquidators on 6 September 2012, as well as for any other claim which Calabash may have against Medshield, in the name of Calabash and subject to the applicant furnishing an indemnity as to costs to the joint liquidators;

2. That the costs of this application be costs in the action under case number 2012/69139, *alternatively*, costs in the liquidation of Calabash, unless opposed by any third party, in which event such third party be ordered to pay the costs of this application.'

[7] The ex parte application succeeded before Van der Merwe DJP, who issued the following order:

'1. The applicant is empowered and authorised to defend the action instituted by Medshield Medical Scheme, against Calabash Health Solutions (Pty) Ltd (In Liquidation), in the North-Gauteng High Court under case number 2012/69139, in the name of Calabash Health Solutions (Pty) Ltd (In Liquidation), subject to it furnishing an indemnity as to costs to the joint liquidators, Johannes Zacharias Human Muller NO and Michael Mmathomo Masilo NO;

2. The applicant is empowered and authorised to defend any other legal proceedings brought against Calabash Health Solutions (Pty) Ltd (In Liquidation) by Medshield Medical Scheme, in the name of Calabash Health Solutions (Pty) Ltd (In Liquidation), subject to it furnishing an indemnity as to costs to the joint liquidators, Johannes Zacharias Human Muller NO and Michael Mmathomo Masilo NO;

3. The applicant is empowered and authorised to institute legal proceedings, either in the form of a summons or a counterclaim, substantially in the form of annexure "A", against Medshield Medical Scheme, in the name of Calabash Health Solutions (Pty) Ltd (In Liquidation), subject to it furnishing an indemnity as to costs to the joint liquidators, Johannes Zacharias Human Muller NO and Michael Mmathomo Masilo NO;

4. The cost of this application will be cost in the action under case number 2012/69139.'

[8] On 4 April 2013 Medshield applied to the high court to rescind the order of Van der Merwe DJP. It sought an order in the following terms:

'2. Rescinding the *ex parte* order of his lordship, Mr Justice van der Merwe, dated 18 December 2012 ("the *ex parte* order"), in terms of rule 42(1)*(a)* of the Uniform Rules of Court;

3. Setting aside the further steps taken by HMI Healthcare Corporation (Pty) Ltd ("HMI") pursuant to the *ex parte* order, namely:

3.1 The notice of intention to defend Medshield's action in case number 2012/69139, filed on behalf of Calabash Health Solutions (Pty) Ltd (in liquidation) ("Calabash");

3.2 The notice of substitution in terms of Rule 15(2) filed by HMI on 18 December 2012; and

3.3 The special plea, plea over and counterclaim, filed on behalf of Calabash in case number 2012/69139;

4. Declaring that HMI is not entitled to:

4.1 defend the action instituted by Medshield against Calabash, in the name of Calabash, in case number 2012/69139;

4.2 defend any other legal proceedings brought against Calabash by Medshield, in the name of Calabash; and

4.3 institute any action against Medshield, or launch a counterclaim against Medshield under case number 2012/69139, in the name of Calabash;

5. Directing HMI to pay the costs, on an attorney and own client scale:

5.1 of this application, including the costs of two counsel; and

5.2 associated with the notice of intention to defend, the notice in terms of Rule 15(2) and the special plea, plea over and counterclaim under case number 2012/69139, including the costs of two counsel where applicable.'

[9] The rescission application succeeded before Tlhapi J, who subsequently granted leave to HMI to appeal to the full court of that division. The full court (per Tuchten J (Tolmay J concurring) and Makgoka J dissenting) dismissed the appeal. The further appeal by HMI is with the special leave of this court.

[10] I deal later in this judgment with whether an appeal against the order of Tlhapi J is competent. Before turning to that issue it is necessary to first consider whether Medshield had the necessary *locus standi* to bring the rescission application. HMI contends that Medshield is not an affected party as contemplated in Rule 42(1)(a) of the Uniform Rules of Court. That rule provides:

'The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary [a]n order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.'

An applicant for an order setting aside a judgment or order of court must show, in order to establish *locus standi*, that 'he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which judgment was given or order granted'.[3] A court will accordingly refrain from deciding a dispute unless and until all persons who have a direct and substantial interest in both the subject matter and the outcome of the litigation, have

[3] Per Corbett J in *United Watch & Diamond Co (Pty) Ltd & others v Disa Hotels Ltd & others* 1972 (4) SA 409 (C) at 415A.

been joined as parties.[4] It has been held that a 'direct and substantial interest' is more than a financial interest in the outcome of the litigation.[5]

[11] It is important to determine what interest it is that Medshield claims to have had in the proceedings leading to the grant of the ex parte order. HMI approached the court for relief in terms of s 387(4) of the Companies Act 61 of 1973, which provides that: '[a]ny person aggrieved by any act or decision of the liquidator may apply to the court after notice to the liquidator and thereupon the court may make such order as it thinks just.' That provision empowers a court in the exercise of its discretion to make any order that it considers that justice requires.[6] Medshield contends that HMI failed to properly disclose such interest as it (Medshield) had to the court hearing the *ex parte* application and that its version should have been placed before the court so as to enable that court to properly exercise the discretion conferred by s 387(4).

[12] According to Medshield, that it had *locus standi* to bring the rescission application is evident from the following: First, Medshield has a direct and substantial interest in the relief sought in the *ex parte* order. The extensive references in HMI's founding affidavit to its interactions with Medshield are evidence of this. Second, Medshield is an asserted creditor of Calabash. It is allegedly owed a total amount of approximately R40 million by Calabash and has instituted action against the latter for the recovery of the money. Its claims are set out in its particulars of claim, which were attached to HMI's founding affidavit in the *ex parte* application. The Master expunged claims A to G, and rejected claims H and I, in order that Medshield could prove its claims by way of action proceedings. That case is pending. Until a decision is made in that action, Medshield retains a substantial interest in the affairs of Calabash and in particular, whether HMI is entitled to litigate on behalf of Calabash. Third, Medshield's action against Calabash

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[4] See eg *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657 and 659; *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) para 9; *City of Johannesburg & others v South African Local Authorities Pension Fund & others* (20045/2014) [2015] ZASCA 4 (9 March 2015) para 9.

[5] See *Judicial Service Commission & another v Cape Bar Council & another* 2013 (1) SA 170 (SCA) para 12, where Brand JA stated: 'It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned . . . .'

[6] *Cohen NO & another v Ruskin and Smith NNO & another* 1981 (1) SA 421 (W) at 425.

appears to be the principal reason for the *ex parte* application. By contrast, neither HMI nor Agility, whose claims against Calabash were also expunged by the Master, have attempted to prove their claims against Calabash by way of action. Those claims might well have since prescribed, in that event, HMI and Agility would no longer be creditors of Calabash. Fourth, the terms of the *ex parte* order cite Medshield expressly.

[13] It thus seems clear that Medshield was indeed an affected party and that the *ex parte* order was granted in its absence, despite it having a direct and substantial interest in the relief sought. As it was put by Streicher JA in *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*:[7]

'Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously.'

It follows that the *ex parte* order could not stand and was correctly rescinded by Tlhapi J.

[14] I turn to a consideration of whether the rescission order is appealable. It was stated in *Zweni v Minister of Law and Order*[8] that a judgment or order is a decision which, as a general principle, has three attributes: first, the decision must be final in effect and not susceptible to alteration by the court that made it; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. *Zweni,* more particularly the requirement of finality, has been affirmed by this court in a number of subsequent decisions.[9] In *Guardian National Insurance Co Ltd v Searle NO*,[10] Howie JA, with reference to the three *Zweni* attributes, said:[11]

'As previous decisions of this court indicate, there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the

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[7] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 para 24.
[8] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533A.
[9] Those judgments are usefully collated in *Maize Board v Tiger Oats Ltd & others* 2002 (5) SA 365 (SCA) para 6.
[10] *Guardian National Insurance Co Ltd v Searle NO* [1992] 2 All SA 151 (A).
[11] *Zweni* supra fn 8 at 301B-C.

same court and at one and the same time. Where this approach has been relaxed it has been because the judicial decisions in question, whether referred to as judgments, orders, rulings or declarations, had three attributes.'

[15] In *Pitelli v Everton Gardens Projects CC*[12] Nugent JA observed:

'An order is not final for the purposes of an appeal merely because it takes effect, unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable (perhaps there might be cases in which it is appealable, but for the moment I cannot think of one). It is not appealable because such an order is capable of being rescinded by the court that granted it, and it is thus not final in its effect. In some cases an order that is granted in the absence of a party might be rescindable under rule 42(1)*(a)*, and if it is not covered by that rule, as Van der Merwe J correctly found, it is in any event capable of being rescinded under the common law.'

[16] It is so that the *Zweni* attributes are not cast in stone[13] and that even where a decision does not bear all those attributes it may nevertheless be appealable if some other considerations are evident. This includes instances where the order disposes of any issue or any portion of the issue in the main proceedings[14] or if the appeal 'would lead to a just and reasonably prompt resolution of the real issue between the parties'.[15] This court has held that no distinction can be drawn between 'a decision' in s 16(1)*(a)* of the Superior Courts Act 10 of 2013 and 'a judgment or order' in s 20 of the Supreme Court Act 59 of 1959.[16] Therefore, a decision for the purposes of s 16(1)*(a)*(i) of the Superior Courts Act must still bear the three attributes identified in *Zweni*.

[17] More recently, this court and the Constitutional Court have expanded on this test by adapting the general principles on the appealability of interim orders to accord with the equitable and more context-sensitive standard of the interests of justice.[17] A

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[12] *Pitelli v Everton Gardens Projects CC* 2010 (5) SA 171 (SCA) para 27.
[13] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F-11C.
[14] *Jacobs & another v Baumann NO & others* 2009 (5) 432 (SCA) at 436F-G.
[15] *Zweni* supra fn 8 at 531D-E and *Jacobs* ibid at 436E-G.
[16] See *Neotel (Pty) Ltd v Telkom SA Soc & others* [2017] ZASCA 47 (31 March 2017) and the cases there cited.
[17] *Philani-Ma-Afrika & others v Mailula & others* 2010 (2) SA 573 (SCA) and *International Trade*

consideration of the interests of justice is now of particular importance. But, this does not mean that it is the sole consideration or that one no longer takes into account the factors set out by this court in *Zweni*. Specifically, this court has held that in deciding what is in the interests of justice, each case has to be considered on its own facts, including whether a judgment is dispositive of the main or real issues between the parties.[18] The Constitutional Court has elaborated on this as follows:

'The test of irreparable harm must take its place alongside other important and relevant considerations that speak to what is in the interests of justice, such as the kind and importance of the constitutional issue raised; whether there are prospects of success; whether the decision, although interlocutory, has a final effect; and whether irreparable harm will result if leave to appeal is not granted. It bears repetition that what is in the interests of justice will depend on a careful evaluation of all the relevant considerations in a particular case.'[19]

[18] It is plain that a rescission order does not have a final and definitive effect. In *De Vos v Cooper & Ferreira* this court expressed the view that '[s]o 'n bevel [that is, a rescission order] het immers nie enige finale of beslissende uitwerking op die geskilpunte in die hoofgeding nie'.[20] The rescission order simply returns the parties to the positions which they were in prior to the *ex parte* order being granted. *De Vos* relied inter alia on *Gatebe v Gatebe*[21] and *Ranchod v Lalloo*.[22] In *Gatebe*, De Villiers JP held:

'The order therefore does not dispose of the main case or of any of the issues in the main case, and therefore has not the effect of a definitive sentence in this behalf. It still remains to consider whether it has not the effect of a definitive sentence in that it causes irreparable prejudice. Here again it seems to me to be clear that an order merely rescinding a default judgment does not cause irreparable prejudice, for in the definitive sentence the effect of the decision can obviously be repaired.'[23]

In *Ranchod*, Millin J endorsed the reasoning of De Villiers JP. He expatiated:

Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC) para 53.
[18] *Nova Property Group Holdings v Corbett* 2016 (4) SA 317 (SCA) at paras 8-10.
[19] *International Trade Administration Commission* supra fn 17 at para 55.
[20] *De Vos v Cooper & Ferreira* 1999 (4) SA 1290 (SCA) at 1297A-D.
[21] *Gatebe v Gatebe* 1928 OPD 145.
[22] *Ranchod v Lalloo* 1942 TPD 211.
[23] *Gatebe* supra fn 21 at 149.

'The plaintiff's claim remains intact. Nothing has been decided about it. All that has happened is that the defendant has been given an opportunity of answering it; and the setting aside of the default judgment for that purpose is reparable in the final stage.'[24]

[19] Counsel for HMI sought to escape these authorities with the argument that the reasoning of Tlhapi J finally determined some of the issues between the parties and, as a result, on the facts of this case the order was indeed appealable. That argument is untenable. First, an appeal lies not against the reasoning, but the substantive order of the court below.[25] Second, as *Ranchod* makes plain: '[I]f the question of appealability were to depend on the facts of each case, the same order might be appealable by one litigant but not by another; and the court would in every case have to enter into the merits of the appeal in order to determine whether there should be an appeal.' It may be that the rescission order will cause HMI some inconvenience but as Harms AJA pointed out in *Zweni*:[26] '[t]he fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability'.

[20] In my view, the rescission order bears none of the attributes identified by the court in *Zweni*. This is a central consideration in determining whether the interests of justice favour a finding that the order is appealable. By rescinding the *ex parte* order, the way is paved for the parties' respective versions to be fully ventilated and deliberated upon by a court, thereby ensuring a resolution of the real issues between the parties. To find that the rescission order is appealable will therefore effectively unnecessarily delay the resolution of the true issues between the parties. The interests of justice therefore do not favour such an order being appealable.

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[24] *Ranchod* supra fn 22 at 217.
[25] See inter alia *Absa Bank Ltd v Mkhize & another, Absa Bank Ltd v Chetty, Absa Bank Ltd v Mlipha* 2014 (5) SA 16 (SCA); *Western Johannesburg Rent Board & another v Ursula Mansions* (Pty) Ltd 1948 (3) SA 353 (A) at 355; and *Atholl Developments (Pty) Ltd v The Valuation Appeal Board for the City of Johannesburg & another* [2015] ZASCA 55 (30 March 2015).
[26] *Zweni* supra fn 8 at 533B-C.

[21] In the result the appeal must fail and it is accordingly dismissed with costs, including the costs consequent upon the employment of two counsel.

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V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellant:	E Kromhout
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For First Respondent:	A Subel SC (with him N Rajab-Budlender)
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