THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1265/2021

In the matter between:

KEYHEALTH MEDICAL SCHEME **APPELLANT**

and

GLOPIN (PTY) LTD **RESPONDENT**

Neutral citation: *KeyHealth Medical Scheme v Glopin (Pty) Ltd* (1265/2021) [2022] ZASCA 147 (28 October 2022)

Coram: MOLEMELA, PLASKET and MABINDLA-BOQWANA JJA and WEINER and MASIPA AJJA

Heard: 5 September 2022

Delivered: 28 October 2022

Summary: Contract – revocation of mandate – whether agreement may be revoked at will by one of the parties – terms of duration and termination of agreement validly agreed between the parties.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mogotsi AJ, with Van der Westhuizen and Collis JJ concurring, sitting as court of appeal):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Mabindla-Boqwana JA (Molemela and Plasket JJA and Weiner and Masipa AJJA concurring):

[1] The issue in this appeal is whether the appellant, KeyHealth Medical Scheme (KeyHealth), was entitled to revoke the agreement it had with the respondent, Glopin (Pty) Ltd (Glopin), on the basis that it constituted a mandate revocable at any time by KeyHealth.

[2] On 20 October 2004, Glopin concluded a written broking agreement (the agreement) with Munimed Medical Scheme (Munimed) incorporating the following material terms:

'2. INTRODUCTION:

2.1 GLOPIN wishes to introduce and admit new members to Munimed and provide ongoing services in relation to the products of Munimed for the benefit of GLOPIN's clients.

2.2 Munimed has agreed to accept the appointment of GLOPIN, subject to the terms and conditions of this agreement.

3. DURATION AND SCOPE:

3.1 GLOPIN is *authorised*, with effect from the commencement date, to submit to Munimed, on behalf of GLOPIN's clients, applications for the products for the benefit of GLOPIN's clients and to provide ongoing broker services.

3.2 GLOPIN's *authority* in terms of this agreement is limited to what is set out in 3.1 above. Without limiting the generality of the aforegoing, *GLOPIN is not appointed as agent or representative of Munimed and is not authorised to or to purport to:-*

3.2.1 contract on behalf of or in any way bind Munimed;

3.2.2 incur any debt or liability or accept any insurance risk on Munimed's behalf;

3.2.3 agree to alter any policy (including, but not limited to, the premiums payable) or waive any lapse, forfeiture or other non-compliance with conditions by any policyholder or insured;

3.2.4 extend the time for the payment of any premium;

3.2.5 collect and accept premiums for and on behalf of Munimed.

3.3 GLOPIN shall not publish anything concerning Munimed without its prior written approval.

3.4 For the purposes of sub-clauses 3.2 and 3.3, any reference to GLOPIN shall include GLOPIN's employees, agents and/or consultants.

4. DURATION AND TERMINATION:

4.1 This agreement shall commence on 1 September 2004 and shall continue for the period of accreditation of GLOPIN by the Council for [M]edical Schemes and may be terminated by either party hereto, pursuant to the terms contained in this agreement.

4.2 This agreement may be terminated by either party in terms of ruling legislation.

4.3 This agreement shall automatically terminate:

4.3.1 In the event of GLOPIN entering into any compromise with its creditors; or

4.3.2 In the event of GLOPIN been provisionally or finally wound up or sequestrated; or

4.3.3 In the event of GLOPIN not complying with the [Medical Schemes Act 131 of 1998 and regulations thereto, or any legislation which may amend or replace the Act or regulations thereto][1] (to be read in conjunction with the Corruption Act No. 94 of 1994),

[1] As defined in the agreement.

the minimum service levels as required by the scheme or the Act, the broker code of conduct/ethics as determined by the Council for Medical Schemes, and the Financial Advisory and Intermediary Services Act (FAIS Act).

. . .

6. COMPENSATION:

6.1 GLOPIN shall be paid compensation for premiums paid to, received and allocated by Munimed for the products issued by Munimed pursuant to applications procured and submitted by GLOPIN. The rates at which such compensation shall be paid shall be equal to the maximum payable by statute or regulation from time to time. GLOPIN shall be provided with a schedule setting out the total sum of all compensation payable by Munimed to GLOPIN.' (My emphasis.)

[3] The agreement was assigned to KeyHealth by Munimed on 24 October 2011. On 14 February 2017, KeyHealth's attorneys sent a letter to Glopin terminating the agreement citing Glopin's failure to comply with legislation, service levels and the code of conduct as stated in clause 4.3 of the agreement, which KeyHealth viewed as constituting a serious breach. Glopin regarded this as repudiation of the agreement, which it did not accept.

[4] Glopin subsequently approached the Gauteng Division of the High Court, Pretoria (the high court) for urgent relief, seeking an interim order preventing KeyHealth from acting upon its repudiation pending the outcome of an action it intended to institute against KeyHealth. An order to this effect was taken by agreement between the parties on 28 February 2017.

[5] On 31 March 2017, KeyHealth's attorneys sent a letter to Glopin's attorneys informing them of KeyHealth's abandonment of the notice of

termination, which meant the agreement remained extant. Importantly, the letter further advised the following:

'*4.1 Glopin (Pty) Ltd is herewith notified on behalf of Keyheath Medical Scheme that the authority which is referred to in clauses 2.1, 3.1 and 3.2 of the Broker Agreement is revoked with effect from 1 July 2017.*

4.2 The three month notice period is not provided for in the Broker Agreement, but is regarded by our client as reasonable to afford your client adequate time to mitigate any damages it may suffer as a result of the revocation of the authority.

4.3 As from 1 July 2017 Glopin (Pty) Ltd will not be entitled to render any further broker services to our client.

4.4 As we are not at liberty to communicate directly to your client, we will cause a copy of this notice to be forwarded to your client by our client. We trust, however, that you will confirm that this notice to you constitutes notice to Glopin (Pty) Ltd.' (My emphasis.)

[6] Following this letter, Glopin instituted an action in the high court, which served before Basson J (the trial court), seeking a declarator that the agreement between the parties was of full force and effect; that the purported cancellation on 14 February 2017, as well as the subsequent purported revocation of Glopin's authority under the agreement, were unlawful and invalid.

[7] Glopin further sought a confirmation of the mandamus granted in the interim order agreed to between the parties on 28 February 2017. In the alternative, Glopin sought a declarator that, notwithstanding KeyHealth's revocation of its authority in terms of clauses 2.1, 3.1 and 3.2 of the agreement, it was entitled to continued payment of remuneration and broker compensation in terms of the agreement.

[8] In its defence, KeyHealth contended that the revocation of Glopin's authority constituted termination of the agreement. It further alleged that, in February 2018, Glopin had repudiated the agreement by insisting on payment of broker commission in terms of regulation 28 of the Regulations promulgated in terms of the Medical Schemes Act 131 of 1998 (the MSA), in respect of members of the Retired Municipal Employees Association (RMEA). KeyHealth no longer pursues this defence. Thus, save for highlighting it where necessary, in the context of the findings of the courts below, that issue does not form part of questions to be determined by this Court.

[9] In grappling with the revocation issue, the trial court determined whether the agreement between the parties was a contract of mandate. In this regard, it referred to a passage in *Lawsa*[2] which contained the following description:

'A contract of mandate is a consensual contract between one party, the mandator, and another, the mandatary, in terms of which the mandatary undertakes to perform a mandate or commission for the mandator. In essence the mandatary undertakes to do something at the request or on the instruction of the mandator. Although the mandate is usually performed gratuitously, provision may be made for the payment of a reward or remuneration.

Because the word "mandate" suggests an instruction or "command" given by the mandator, the impression may be created that a mandate is constituted by the unilateral act of the mandator in giving the mandate. Such impression is erroneous since the conduct of mandate requires consensus between the parties thereto. There must hence be an agreement between the parties brought about by an identifiable offer, in the form of a request that the mandate in question be performed, and an acceptance of that offer, in the sense of acceding

[2] 17(1) *Lawsa* 2 ed para 2.

to that request, together with an undertaking to carry out the mandate and to perform the various duties imposed by it. For the rest the agreement must comply with all the requirements for a valid and enforceable contract.
A mandate should be distinguished from an authority or power of attorney. An authority gives the authorised party the power to perform juristic acts in the name or on behalf of the grantor of the authority, while a mandate does not necessarily include any power to represent the mandator legally.'

[10] Relying on this passage, the trial court agreed with KeyHealth that 'the authority extended in clause 3.1, read together with clauses 2.1 and 3.2 establishe[d] a mandate to Glopin to market Keyhealth's products and to introduce to Keyhealth new members by submitting to Keyhealth applications by its clients for products of Keyhealth and, should medical cover result from that, to render ongoing services to Keyhealth in accordance with the service level agreement. As already pointed out, such introduction and the resulting medical cover will then cause Glopin to become entitled to compensation in terms of clause 6.1 of the broking agreement'.

[11] On the question of revocation, the trial court stated that 'the general rule is that the mandator is entitled to revoke the mandate, whether irrevocable or not, upon which the contract in its entirety is terminated (except where the terms of the contract may indicate that such revocation is a breach of contract)'.[3] It then concluded that KeyHealth's revocation of the agreement was unlawful and invalid, because Glopin's insistence on being paid compensation in respect of RMEA members was not a repudiation of the

[3] The trial court relied on *Firs Investment Ltd v Levy Bros Estates (Pty) Ltd* 1984 (2) SA 881 (A) at 886F-H, and *Consolidated Frame Cotton Corporation Ltd v Sithole and Others* 1985 (2) SA 18 (N) at 22H-I.

agreement because it did not create an impression that it no longer intended to comply with the terms of the agreement.

[12] It appears that the trial court based its decision on KeyHealth's alternative argument, thus interlinking the revocation question with repudiation. Glopin, therefore, succeeded in obtaining a declaratory order invalidating KeyHealth's revocation.

[13] With the leave of the trial court, the matter went before the full court of the Gauteng Division of the High Court, Pretoria. While endorsing the decision of the trial court, the full court found that the agreement was not a mandate simpliciter, but a contract which created obligations between the parties, and which could be terminated only if clause 4 of the agreement was triggered.

[14] The appeal before us is with the special leave of this Court. KeyHealth contends that the agreement between the parties amounted to a contract of mandate and, as a result, either party was free to revoke it at any time. Therefore, it was entitled to revoke Glopin's mandate as it did on 31 March 2017. To advance this argument, KeyHealth contends that the services provided for in the Service Level Agreement (SLA) were provided on KeyHealth's behalf and not on behalf of the members of the medical scheme per se.

[15] Furthermore, KeyHealth asserts that any services provided by Glopin to the members were based on their relationship with the medical scheme and

not with Glopin. Therefore, so the argument goes, any private services between Glopin and its members would have had to be accommodated outside the SLA. This is because s 65 of the MSA read with regulation 28, from which compensation in the SLA is derived, would not allow payment for services other than those performed on behalf of the medical scheme directly. In this regard, KeyHealth's counsel contends that the full court, firstly, failed to take into consideration the effect and the obligations in the SLA in reaching its decision; and, secondly, that it did not take cognisance of s 65 of the MSA.

[16] Compensation in the SLA means 'the compensation payable by Munimed to GLOPIN in terms of [s]ection 65 of the [MSA] and Regulation 28 thereto'. Section 65 of the MSA provides:

'65. Broker services and commission -

(1) No person may act or offer to act as a broker unless the Council has granted accreditation to such a person on payment of such fees as may be prescribed.

(2) The Minister may prescribe the amount of the compensation which, the category of brokers to whom, the conditions upon which, and any other circumstances under which, a medical scheme may compensate any broker.

(3) No broker shall be compensated for providing broker services unless the Council has granted accreditation to such broker in terms of subsection (1).

(4) . . .

(5) A medical scheme may not directly or indirectly compensate a broker other than in terms of this section.

(6) A broker may not be directly or indirectly compensated for providing broker services by any person other than -

(a) a medical scheme;

(b) a member or prospective member, or the employer of such member or prospective member, in respect of whom such broker services are provided; or

(c) a broker employing such broker.'

[17] Regulation 28 in turn stipulates:

'Compensation of brokers -

(1) No person may be compensated by a medical scheme in terms of section 65 for acting as a broker unless such person enters into a prior written agreement with the medical scheme concerned.

(2) Subject to subregulation (3), the maximum amount payable to a broker by a medical scheme in respect of *the introduction of a member to a medical scheme* by that broker and the provision of ongoing service or advice *to that member*, shall not exceed –

(a) R50, plus value added tax (VAT), per month, or such other monthly amount as the Minister shall determine annually in the *Government Gazette,* taking into consideration the rate of normal inflation; or

(b) 3% plus value added tax (VAT) of the contributions payable in respect of that member,

whichever is the lesser.

(3) . . .

(4) . . .

(5) Payment by a medical scheme to a broker in terms of subregulation (2) shall be made on a monthly basis and upon receipt by the scheme of the relevant *monthly contribution in respect of that member*.

(6) The ongoing payment by a medical scheme to a broker in terms of this regulation is conditional upon the broker –

(a) continuing to meet service levels agreed to between the broker and the medical scheme in terms of the written agreement between them; and

(b) receiving no other direct or indirect compensation in respect of broker services from any source, *other than a possible direct payment to the broker of a negotiated professional fee from the member himself or herself (or the relevant employer, in the case of an employer group*).

(7) A medical scheme shall immediately discontinue payment to a broker in respect of services rendered to a particular member if the medical scheme receives notice from that

member (or the relevant employer, in the case of an employer group), that the member or employer no longer requires the services of that broker.

(8) . . .

(9) . . .' (My emphasis.)

[18] The trial court referred to *Firs Investment*,[4] which pointed to the controversy that surrounds the question of whether an authority to conclude juristic acts on behalf of a principal can be granted irrevocably. According to *Lawsa*,[5] the uncertainty that exists stems partly from the fact that the distinction is sometimes not made between revocation of authority and termination arising out of contracts of mandate. These are two distinct terms with different rules. The appreciation that a contract of mandate cannot be terminated at will by one of the parties, does not mean that 'a mandatary's authority to conclude *juristic acts* on behalf of [a] principal can be irrevocable. Even if the representative's authority is linked with a contract of mandate which cannot be terminated unilaterally by the mandator, the authority is revocable. The mandator is liable in damages for breach of the contract of mandate, but the mandatary can no longer conclude *juristic acts* on behalf of the mandator'. (My emphasis.)

[19] This distinction is important, because the general rule that an agent's authority may be terminated at will seems to relate to certain types of mandates. In *Eileen Louvet Real Estate (Pty) Ltd*,[6] in a matter that dealt with

[4] *Firs Investment Ltd (The) v Levy Brothers Estates (Pty) Ltd* [1984] 2 All SA 211 (A); 1984 (2) SA 881 (A).
[5] 1 *Lawsa* 3 ed para 149.
[6] *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* [1989] 2 All SA 290 (A); 1989 (3) SA 26 (A).

a sole and exclusive mandate to sell property given to an agent, this Court observed:

'It has, of course, often been held that, save for certain exceptions, an agent's mandate may be summarily revoked by the principal, even if it is expressed to be irrevocable. *A mandate in this sense is an authority, derived from an agreement of agency, to perform a juristic act on behalf of the principal.* But in law an ordinary estate agent (to whom, for convenience, I shall refer as a realtor) is not appointed by virtue of such an agreement. *He cannot sell the property on behalf of the owner, nor can he perform any juristic act binding the owner.* The latter merely undertakes to compensate him should a certain eventuality occur; usually if he introduces a willing and able purchaser as a result of which the property is sold to the person thus introduced. The contract between the owner and the realtor is therefore also not an agreement of mandate; the realtor is not obliged to perform his mandate. Hence the contract is *sui generis* (cf *Gluckman v Landau & Co* 1944 TPD 261 at 274-5). For the sake of convenience I shall, nevertheless, use the word mandate to denote the realtor's authority.'[7] (My emphasis.)

[20] In this case, by its own admission, Glopin is not an empowered agent. This is confirmed by the express term of the agreement, clause 3.2, which says: 'GLOPIN is not appointed as agent or representative of Munimed and is not authorised to or to purport to', inter alia, 'contract on behalf of or in any way bind Munimed'. The agreement only authorised or permitted Glopin to submit applications to KeyHealth for the benefit of Glopin's clients and to provide ongoing broker services. In those dealings, it could not represent KeyHealth.

[21] Apart from aligning itself with the trial court's findings, KeyHealth has not attempted to show whether the mandate it contends for is the kind of

[7] *Firs Investment* at 292.

mandatary's authority in respect of which the irrevocability clause cannot be applicable. KeyHealth seems to base its argument purely on the use of the word 'authority' in the agreement and ignoring other clauses which give rise to the context of the use of the expression.

[22] Reliance on s 65 of the MSA read with reg 28 does not assist KeyHealth's case at all. Those provisions simply deal with how the brokers are to be appointed, compensated and for which services. Moreover, the SLA effectively mirrors what is intended in those provisions. What is clear in both the SLA and those legislative provisions is their appreciation of a triangular relationship between the medical scheme, the broker, and the members of the medical scheme. The duties described in the SLA are not services solely rendered on behalf of KeyHealth. Glopin provides services to KeyHealth and to the members of KeyHealth who are also its clients as regards to the products of the medical scheme.

[23] Subregulation 28(6)*(b)* is instructive. It provides that the broker may not receive compensation from any source other than the medical scheme, except 'other than a possible direct payment to the broker of a negotiated professional fee from the member himself or herself (or the relevant employer)'. The use of the words 'direct payment' seems to be a recognition that services provided by the broker to the member are ordinarily paid for 'indirectly' through the medical scheme.

[24] The suggestion, therefore, that s 65 and reg 28 are supporting the contention that the agreement is a mandate on the basis that it provides for

services to be performed only on KeyHealth's behalf, does not seem correct. In light of that, and based on the principles articulated above, it is not clear on what basis the agreement can be said to constitute authority to Glopin to conclude juristic acts on behalf of KeyHealth.

[25] Even assuming that the agreement is a contract of mandate, parties can validly agree that it may not be terminable at the pleasure of any of them.[8] As pointed out in *Ward v Barret*,[9] it is important to examine the terms of the agreement, because the principal might have bound himself or herself to the agent in terms of the expressed or implied terms of the agreement.

[26] The Court in *Eileen* made these further important observations:

'I agree, however, with the submission of counsel for the appellant that the answer to the above question depends on the terms of the contract of mandate. If the mandate was conferred for a specific period, the agreement of mandate may obviously not be terminated during its currency. Should the owner in such a case purport to revoke the mandate, the agreement will not be terminated, and should the agent perform the agreed services, or show that, but for an act of the owner frustrating the performance of the services entitling him to payment of commission, he would have earned the same, the realtor will be entitled to commission or damages as the case may be. Of course, the mere conferment of a sole *agency* does not give rise to such a claim should the owner sell the property without the intervention of any agent. The position may be different if a sole authority is created: *The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd* 1984 (2) SA 881 (A) at 886. Although the appellant was authorised to "sell" the property, it was rightly common cause that it was not an agent with authority to sell on behalf of the respondent; *on the contrary, the appellant's "right to sell" was intended to confer a "right" to introduce prospective purchasers. The written agreement was consequently not a contract of agency but of*

[8] 1 *Lawsa* 3 ed para 149.
[9] *Ward* v *Barrett N O and Another* [1962] 4 All SA 557 (N); 1962 (4) SA 732 (N) at 737D-F.

mandate in the sense outlined above. That mandate was not granted for a specific period. The agreement did, however, confer upon the appellant "the sole and exclusive right" to sell the properties, and furthermore provided that "if during the period of this sole mandate" the properties were to be sold by the respondent or any other person the appellant would be entitled to commission calculated with reference to the purchase price. *If the agreement is construed as entitling the respondent to terminate it summarily, it would be, practically speaking, virtually worthless. The right to commission preserved in the last paragraph could be frustrated by unilateral termination on the part of respondent before the conclusion of a sale.* This it would be entitled to do even if appellant had gone to considerable expense in procuring the prospective purchaser, and even if the appellant was on the point of introducing such a purchaser. It therefore appears to me that in accordance with the general rule applicable to agreements having efficacy for an unspecified period, the agreement under consideration could only have been terminated by the respondent on reasonable notice.' (My emphasis.)

[27] In this case, the parties agreed on the duration and the termination of the agreement. In terms of clause 4.1, a peremptory expression 'shall' is used. It states that '[t]his agreement . . . *shall* continue for the period of accreditation of GLOPIN by the Council for [M]edical Schemes'. And in terms of clause 4.2, it states that '[t]his agreement may be terminated by either party in terms of ruling legislation'; and in terms of clause 4.3, it 'shall automatically terminate' if any of the events stipulated therein occur.

[28] None of the events stipulated in clause 4 for triggering termination has taken place. KeyHealth was, therefore, not permitted to revoke the contract at will. Its predecessor, Munimed, bound itself in terms of clause 4 as to the duration of the agreement and how the agreement may be terminated.

Accordingly, there are no grounds to interfere with the decision of the full court.

[29] In the result, the appeal is dismissed with costs, including the costs of two counsel.

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N P MABINDLA-BOQWANA

JUDGE OF APPEAL

Appearances

For appellant:	M M Rip SC (with C M Rip)
Instructed by:	Kotzé and Roux Attorneys Incorporated, Pretoria
	EDJ Attorneys Incorporated, Bloemfontein.
For respondent:	P F Louw SC (with D J Vetten)
Instructed by:	Edward S Classen & Kaka, Johannesburg
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