IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO: 9252/05
DATE: 23/08/06

REPORTABLE

In the matter between

ROAD ACCIDENT FUND Applicant

and

ALEXANDER FORBES ACCIDENT COMPENSATION TECHNOLOGIES (PTY) L TD TRADING AS A FACT First Respondent

ALEXANDER FORBES COMPENSATION TECHNOLOGIES (PTY) L TD Second Respondent

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JUDGMENT

MABESELE, AJ:

This is an application in terms of which the applicant seeks the following relief:

1. Declaring the agreement of 29 April 2002, entered into between
the applicant on the one hand and the respondents on the other
in terms of which provisional payments were made by the

applicant to the respondents to be *ultra vires* and therefore illegal and invalid.

2. Ordering the first and second respondents jointly and severally, the one paying the other to be absolved, to repay to the applicant the balance of the provisional payments received by the first and second respondents pursuant to the said agreement.

3. Ordering the interest to be paid at the rate of 15,5% per annum from the date each respective payment was made, alternatively, interest at the rate of 15,5% on a reducing balance from 3 February 2003 (being the date demand was received) to date of payment.

The background to an agreement reached by the parties and the objective of the said provisional payments are as follows:

The applicant had an unfortunate history of delay in making payments to suppliers. The delay has been caused by the creation of a backlog in the processing of claims which arose as a result of dramatic increase in suppliers' claims lodged against the applicant. This delay became so bad that private health care effectively stopped treating road accident victims unless the victim was a member of a medical aid.

By February 2002 a multitude of summonses by the suppliers had been served on the applicant, followed by the judgments by default and issuing of warrants of execution.

On 18 March 2002 a meeting was held between both the representatives of the applicant and the respondents. The agreement reached at the meeting was minuted. At the meeting it was agreed as follows:

(i) The respondents would act as agent on behalf of medical service provider clients (hospitals and medical practitioners) in submitting section 17(5) supplier claims to the applicant without the intervention of attorneys.

(ii) All efforts would be made to attain a payment cycle of 45 days, with a maximum of 60 days, from date of registration of the claim by the applicant.

(iii) The new process would be implemented with effect from 1 April 2002.

(iv) A major contributing factor in the drive to curtail unnecessary expenditure in the applicant's environment would be to minimise the involvement of attorneys.

(v) When the respondents act as agent, the applicant would not be liable for any legal costs.

(vi) The respondents would receive payment on behalf of suppliers.

(vii) The backlog in the payment of suppliers' claim needed to be cleared in the shortest possible time through close co-operation between the applicant and the respondents.

(viii) The envisaged further interim payments are to be looked into.

Following the meeting of 18 March 2002, the respondents had ceased the taking of action by attorneys acting on behalf of suppliers, on the basis of the assurance given by the applicant that the backlog in settling suppliers' claims which were overdue, would be cleared. That had not happened, and the extreme pressure was being exerted by the suppliers on the respondents to ensure that the backlog was cleared, failing which suppliers indicated that they would stop treating uninsured patients.

In a letter dated 25 April 2002 Mr Steenhuisen who acted for the respondents proposed that the applicant provides the respondents with a float equivalent to 80% of the value of suppliers' claims which were older than 180 days, and that the respondents then disburse the money to suppliers as interim

payments, pending final settlement of their claims by the applicant.

The essence of the proposal, and to which the applicant subsequently agreed, was that a provisional payment would be made to the supplier in respect of an already lodged claim. The applicant would then process the claim and finalise it. If the claim was repudiated or settled for an amount lower than the provisional payment, the supplier would, in terms of the written agreement concluded, be obliged to refund the amount in question to the applicant.

The payment effected through the respondents to the supplier would constitute a provisional payment made by the applicant to the supplier. Where the claim was finally settled for an amount in excess of the provisional payment, the applicant would effect a payment of the difference.

The proposal was accepted by the applicant on 29 April 2002, giving rise to the 29 April 2002 agreement in respect of which the applicant seeks the declaratory order.

The applicant's case is that the agreement is *ultra vires* the Road Accident Fund Act, 1996. Mr Epstein SC who appeared on behalf of the applicant argued that such agreement is in contravention of the provisions of section 4 of the Act which gives the applicant powers and functions to perform in accordance with the Act, which, according to him, may not be delegated to any person or body.

Mr Epstein argued that certain powers and functions of the applicant, such as investigation and settlement of claims arising from loss or damage caused by

the driving of a motor vehicle were unlawfully delegated to the respondents.
He argued that only the Minister of Transport may enter into an agreement
with any person or body in terms of section 9 of the Act. Mr Epstein argued
also that the provisional payment may be made out to the third parties but not
suppliers
.

Mr Maritz SC who appeared on behalf of the respondents argued, in the

contrary, that the officials of the applicant who entered into an agreement with
the respondents acted within the parameters of sections 4 and 12 of the Act
and therefore the agreement is *intra*
vires.

Mr Maritz argued that section 12(2)(d) of the Act makes provision for the
officials of the applicant to enter into an agreement with any person,

respondents included, for the rendering of a particular service related to the
management of the applicant or its functions. He argued that the officials of
the applicant deemed it necessary and in the interest of both the applicant
and respondents to seek the assistance of the respondents to settle the

claims of suppliers which were
overdue.

A further argument raised by. Mr Maritz was that section 4 of the Act

empowers the applicant, *inter alia,* to stipulate the terms and conditions upon
which claims for the compensation shall be
administered.

Mr Maritz argued that although it is required of the officials to exercise their powers and functions subject to the directives of the applicant or Board, the applicant did not allege in its founding affidavit that it did not direct the officials to enter into agreement with the respondents. He submitted that in the absence of such allegation in the founding affidavit it cannot be assumed that the officials acted without directives from the applicant.

Mr Epstein, in my view, quite correctly, conceded that the applicant did not allege in its founding affidavit that its officials acted without directives. He argued, however, that after the agreement of 29 April 2002 the officials did inform the respondents in writing that the applicant's Board did not give them authority to enter into such an agreement. Mr Epstein accordingly submitted that the said agreement should then be declared illegal and invalid.

The correspondences between the representatives of the applicant and the respondents are the following:

In the letter dated 22 December 2002 Mr Kgomongwe who acted for the applicant advised Mr Steenhuisen for the respondents that the reinstatement of provisional payments process has been referred to the applicant's Board by the applicant's Audit Committee for authority. Subsequent to that letter, Mr. Steenhuisen addressed a letter dated 13 December 2002 to Mr Kgomongwe wherein he enquired about the outcome of the Board's meeting of 6 December 2002.

, ..~ t Payment of Refund Schedule 8

Date Payment

	Refund	Balance
30/04/2002	14 551,076.79	
21/05/2002		
40,801,53		
24/05/2002	16	
209.573.58		
24/06/2002		
582,837,80		
25/05/2002		
11,069,543,04		
25/07/2002		
995,408,75		
29/07/2002		
8,268,624,47		
948,823,14		
14/08/2002		
1,478,266,27		
27/08/2002		
1,609,787,25		
30/08/2002		
6,735,450,56		

In the letter dated 28 January 2003 Mr Kgomongwe advised Mr Steenhuisen as follows:

"*Dear Sir*

RE: PAYMENT MADE TO ALEXANDER FORBES COMPENSA TION TECHNOLOGIES

The previous correspondences refers.

Having taken advice and considered the situation I am *compelled to insist that AFCT immediately pay over the amount of forty seven million, nine hundred and twenty six rand, seven hundred and ninety eight and forty eight cents (R47,926,* 798,48).

The amount is calculated in accordance with the table appearing as *annexure 'A* '.

The reason for requesting payment of the amount stipulated is that there was no authority, express or implied, for the payments to AFCT of the amounts set out in the second column of the table.

In particular, it is the position that the Fund is precluded in terms of its legislative mandate from making such payments.

In such circumstances the Fund is entitled to a *return* of *the monies paid over together with any interest that has accrued thereon whilst the monies were in your possession.*

In the event of payment not being received within seven (7) *days of this letter the Fund will be compelled to resort to legal process.*

In the circumstances this letter serves as a *final demand for the capital sum stipulated together with any interest that has accrued thereon.*

It also necessarily follows that the Fund is unable to accede to your repeated requests for what you refer to as reinstatement of provisional payments."

Section 12(2) of the Act provides:

"*Subject to the directives of the Board, the Chief Executive Officer shall conduct the current business of the Fund, and he or she may*

(a) *exercise the powers and shall perform the functions* of *the Fund mentioned in section 4(1)(b), (c) and (d)(2) and* (3)."

The annexure "A" which Mr Kgomongwe referred to in his letter reflected the following:

13/09/2002	927,226,36
8/10/2002	2,324,318,86

56.834.268,44	8.907,469.96	47.926.798.48

It is undoubtedly clear from the letters dated 22 November 2002 and 28 January 2003 that the applicant's Board did not authorise or give directives as to the provisional payments agreed to by the officials of the applicant and the respondents .

In the review matter of *Mathipa v Vista University and Others* 2000 (1) SA 396 (T) De Villiers J, set aside the appointment of the director of Mamelodi Campus of the Vista University on the basis that the Vice-Chancellor of the University had no authority to appoint the director of the Mamelodi Campus. The power to appoint was vested in the Council of the University. (See also *University of the North v Franks and Others* 2002 (8) BLLR 701 (LAC).)

Since the officials of the applicant entered into an agreement with the respondents without the authority of the applicant, the agreement reached is clearly *ultra vires.*

Mr Epstein's second leg of argument is that the respondents put the money which they received from the applicant into their trust account and thereby enriching themselves. He argued that the respondents distributed money to suppliers on their own discretion while the money was in their trust account.

Mr Maritz argued in the contrary that the respondents are not in possession of any funds received from the applicant or refunded by the suppliers to whom provisional payments were made as all the amounts received by the respondents have been applied in terms of the agreement to the making of

provisional payments or have been refunded to the applicant. In my view, there is merit in this argument in that the respondents acted as agents of the suppliers and were distributing to the suppliers money which was due to them. The money left was intended for future distribution to the suppliers and the respondents communicated their intention to the applicant who did not object to it. Therefore, Mr Epstein's argument insofar as it relates to prayer 3 of Notice of Motion cannot stand.

Since the agreement of 12 April 2002 is *ultra vires,* the respondents have no option but to repay to the applicant the balance of the provisional payments which they received from the applicant.

In the premises I make the following order:

1. The agreement of 29 April 2002, entered into between the applicant and the respondents in terms of which provisional payments were made by the applicant to the respondents is *ultra vires* and therefore illegal and invalid.

2. The first and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to repay to the applicant the balance of the provisional payments received by the first and second respondents pursuant to the said agreement.

3. The first and second respondents are ordered to pay costs of the application, including costs of two counsel.

M MABESELE

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	H EPSTEIN SC
INSTRUCTED BY	GILDENHYS LESSING MALATJ ATTORNEYS
COUNSEL FOR FIRST RESPONDENT	N G D MARITZ SC
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INSTRUCTED BY	
DATE OF HEARING	
DATE OF JUDGMENT	23/08/2006