

**NOT REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)**

Date: 2007-06-15

Case Number: 35473/05

In the matter between:

**THE REGISTRAR OF MEDICAL SCHEMES**

Applicant

and

**GEN-HEALTH MEDICAL SCHEME**

First Respondent

**B.M. NEIMANN**

Second Respondent

**A A NEL**

Third Respondent

**M BUDAI**

Fourth Respondent

**T DE FREITAS**

Fifth Respondent

**D S HENSHAW**

Sixth Respondent

**J J HALL**

Seventh Respondent

**S J HALL**

Eighth Respondent

**HALL ADMINISTRATORS CC**

Ninth Respondent

**FMB HALL AGENCIES CC**

Tenth Respondent

**ABSA BANK**

Eleventh Respondent

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**JUDGMENT**

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**SOUTHWOOD J**

[1] The second to tenth respondents seek an order compelling the applicant to make discovery by delivering a discovery affidavit to the

second to tenth respondents' attorney within three days. It must be noted that the respondents do not seek discovery of specified documents and they do not purport to seek this relief in terms of any particular rule of court or pursuant to any specific agreement. In the respondents' heads of argument it is not contended that the respondents are entitled to discovery in terms of the rules or that the applicant agreed to make discovery of specified or any other documents.

[2] On 21 November 2005 the applicant obtained *ex parte* an order placing the Gen-Health Medical Scheme ('the Scheme') under provisional curatorship with return date 31 January 2006. On the same date the applicant obtained *ex parte* Anton Piller relief against the ninth and tenth respondents.

[3] In terms of the provisional curatorship order –

- 1) the Scheme was placed under provisional curatorship as contemplated by section 56(1) of the Medical Schemes Act 131 of 1998 read with section 5(1) and (2) of the Financial Institutions (Protection of funds) Act 28 of 2001;
- 2) Cyprian Mondli Phekhukwayo was appointed provisional curator;

- 3) the provisional curator was given extensive powers including authority to take immediate control of, manage and investigate the business and operation of and concerning the Scheme;
- 4) the respondents were interdicted and restrained from withdrawing, encumbering or dealing in any manner with monies in a number of bank accounts.

[4] On 31 January 2006 the return date was extended by agreement to 14 March 2006 and on 14 March 2006 it was extended again to 20 June 2006. On that date the matter was still not ripe for hearing and the return date was again extended by agreement to 19 September 2006.

[5] The second to sixth respondents did not file answering affidavits or give notice in terms of Rule 6(5)(d)(iii) that they intend to raise a question of law. The seventh to tenth respondents filed an answering affidavit on 3 May 2006. In their answering affidavit the seventh to tenth respondents dealt with the applicant's affidavit by addressing the inspector's report on which it is based.

[6] The applicant did not immediately file his replying affidavit as he required documents obtained pursuant to the Anton Piller order. On 3

July 2006 the applicant's representatives obtained the Anton Piller documents and on 18 August 2006 the applicant filed his replying affidavit. In his replying affidavit the applicant said that the provisional curator had instructed PriceWaterhouseCoopers ('PWC') to conduct a forensic investigation of the Scheme and that the PWC report was to be an annexure to the provisional curator's report-back affidavit. The applicant also said that the provisional curator's affidavit and the report would deal with the respondents' allegations that the appointment of a provisional curator had a detrimental effect on the management of the Scheme. The applicant stated that a copy of the provisional curator's report-back affidavit would be made available at the hearing on 19 September 2006 and would be referred to in argument.

[7] On 25 August 2006 the provisional curator delivered an affidavit together with a report by PWC consisting of 150 pages. The provisional curator also delivered two lever arch files containing documents. In the provisional curator's report-back affidavit the provisional curator stated that all the annexures to the PWC report would not be annexed to his affidavit as they would make the affidavit too voluminous. The annexures were in the two lever arch files which were delivered to the respondents' attorneys.

[8] The respondents allege that the balance of the annexures and

documents referred to by PWC were not made available to them. These documents, none of which are identified, form the subject matter of this application.

[9] Because of the limited time available to consider and deal with both the applicant's replying affidavit and the provisional curator's affidavit the respondents considered that the matter was not ripe for hearing on 19 September 2006. The respondents delivered a formal application for a further extension of the rule *nisi* which the applicant agreed to on 19 September 2006. The rule was then extended by agreement to 23 November 2006. The parties also agreed that the respondents must deliver their answer to the provisional curator's affidavit by 20 October 2006.

[10] This period proved to be inadequate for the investigation contemplated by the respondents. This was of concern to the respondents because of the importance apparently attached to the provisional curator's affidavit by the applicant. He contended that it was unequivocal support for the opinion he had reached in terms of section 56(1) of the Medical Schemes Act when he launched the application. Accordingly, the respondents delivered an application for an extension of the rule from 23 November 2006. The parties then agreed to an order *inter alia* that –

- (1) the respondent is to file an answer to the curator's affidavit and the PCW report by the end of April 2007;
- (2) the applicant/curator is to file a reply thereto by the end of June 2007;
- 3) the rule *nisi* would be extended to 31 July 2007.

[11] There followed extensive communications between the applicant's, provisional curator's and respondents' attorneys relating to access to the relevant documents. Both the applicant's and provisional curator's attorneys consented to the respondents and their expert examining and making copies of the documents. In addition the applicant and the provisional curator made available to the respondents' attorney 55 lever arch files containing documents. A dispute then arose as to whether all the documents required by the respondents had been made available and whether the documents required by the respondents were relevant. Eventually on 27 February 2007 the respondents' attorney addressed a letter to the provisional curator's attorney in which he said –

‘REQUEST FOR DOCUMENTATION

1. The above matter and our correspondence dated 20 February 2007 refers.
2. We have not received any additional information from yourselves and hereby wish to record that our clients now intend to proceed on the assumption that the curator's report and Affidavits, which includes the PriceWaterhouseCoopers report, together with 2 lever arch files, as well as the subsequent 55 lever arch files, which we collected from PriceWaterhouseCoopers is the sum total of documentation to which PriceWaterhouseCoopers had had access in the compilation of its report. Our clients, together with their auditors will prepare and file their Affidavits taking cognisance only of this documentation.'

The letter dated 20 February 2007 was a request that further information or documentation be made available to the respondents.

- [12] Then, on 29 March 2007, just before this application was launched, the applicant's attorney addressed a letter to the respondents' attorney in which he said the following –

'COUNCIL FOR MEDICAL SCHEMES/GEN-HEALTH  
MEDICAL SCHEME & 10 OTHERS

1. The PriceWaterhouseCoopers ('PWC') report attached to the curator's reporting affidavit, bears reference.
2. We confirm that the matter was postponed during

November 2006, to enable your expert to study the documents pertaining to the report and to prepare a response on same.

3. We have now received instructions from our client not to rely on the said PWC report of August 2006 and not to use it as evidence in the hearing of the curatorship application. We point out that our client did not instruct PWC to obtain the report and as such it is not our client's report.
4. To the extent that the curator relies on the said report in his reporting affidavit, we also do not intend relying on such portion of the curator's reporting affidavit and will also not use it as evidence in the hearing of the curatorship application.
5. As such we believe that there is no need for your expert to further comment on the report and the matter can now proceed to hearing without further papers to be filed.
6. We do, however, point out that although we do not intend relying on the PWC report of August 2006 for purposes of the hearing of the curatorship application, all our client's rights are reserved to utilise the contents of the report in any other proceedings.'

[13] Despite this change in stance the respondents insist on receiving all the other documents – still unspecified – which they contend are necessary to deal with the 'wide-ranging and serious allegations of and



concerning certain of the respondents’.

[14] The respondents have not attempted to have the rules of discovery made applicable to the main application in terms of Rule 35(13). In ***Lorentz v MacKenzie 1999 (2) SA 72 (T)*** at 75A-B and ***Afrisun Mpumalanga (Pty) Ltd v Kunene NO 1999 (2) SA 599 (T)*** at 611G it was held that a direction by the court in terms of Rule 35(13) is an essential prerequisite for a notice in terms of Rule 35(1) and an application to compel compliance therewith. The failure to obtain such a direction is therefore fatal to the application.

[15] This is not a case where the court should exercise an inherent power or jurisdiction to regulate its proceedings since there is no *lacuna* in the Rules – ***Lorentz v MacKenzie supra*** at 75; ***Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis & Another 1979 (2) SA 457 (W)*** at 462H-463B. This is a case where the respondents have simply not made use of the rules.

[16] Despite this not being pertinently alleged in the respondents’ founding affidavit or even alluded to in the respondents’ heads of argument, in oral argument the respondents’ counsel contends that the respondent is entitled to the documents sought by virtue of an agreement. An attempt was made to hand up to the court a list of documents

apparently extracted from the PWC report and/or annexures presumably for the purpose of having the court order that these documents be discovered or made available. Without a formal application for an amendment of the notice of motion the court was not prepared to accept this list. The respondents' heads of argument did not refer to an amendment of the notice of motion and no notice of amendment was delivered prior to the hearing. In any event it is clear from the notice of motion and the supporting affidavit that discovery is precisely what the respondents require. No attempt was made in the founding papers to make out the case argued: i.e. identify the documents that should be discovered or made available and to explain the legal basis on which the respondents are entitled to an order that specific documents be discovered or made available. The respondent's counsel was hard-pressed to find such agreement in the correspondence between the attorneys. While it is clear that agreement was reached that the respondents would be given access to the relevant source documents it was not specific about documents. It is clear that a dispute arose because of the respondents' attorney's increasing demands for more documents. The argument based on an agreement is clearly a belated attempt to save a defective application. It is not the case the applicant was required to meet.

The application is dismissed with costs.

**JUDGE OF THE HIGH COURT**

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**B.R. SOUTHWOOD**

CASE NO: 35473/2005

HEARD ON: 13 June 2007

FOR THE APPLICANT: ADV. J.J. BRETT SC

INSTRUCTED BY: Mr K Swart of Edelstein-Bosman Inc.

FOR THE RESPONDENTS: ADV. A.R.G. MUNDELL

INSTRUCTED BY: Savage Jooste & Adams Inc.

DATE OF JUDGMENT: 15 June 2007