REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

Case Number: 2010/46241

DATE: 09/12/2010

In the matter between:

V MEDICAL ADMINISTRATORS (PTY) LTD	First Applicant
V MEDICAL SOLUTIONS (PTY) LTD	Second Applicant
and	
LARRY JACQUES	First Respondent
DANIEL PIENAAR	Second Respondent
LIBERTY MEDICAL SCHEME	Third Respondent
COUNCIL FOR MEDICAL SCHEMES	Fourth Respondent

JUDGMENT

C. J. CLAASSEN J:

[1] In this application the first and second applicants seek a final interdict to restrain the first, second and third respondents from interfering with three contracts concluded between the applicants and the third

respondent. The application was brought on an urgent basis. The relief sought in the notice of motion is as follows:

> "2. Interdicting and restraining the first and second respondents from participating at any meetings of the third respondent's board of trustees at which is discussed any issue relating to the services provided by the applicants to the third respondent in terms of the administration agreement, the managed care administration agreement and the sales, distribution and marketing services agreement concluded between the applicants and the third respondent on 10 March 2009, 30 November 2009 and 11 January 2010 respectively.
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> 3. Interdicting and restraining the third respondent from implementing its resolution to reduce the services which the first applicant is required to provide to the third respondent in terms of the managed care administration agreement concluded between the first applicant and the third respondent on 30 November 2009.
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> 4. In the alternative to prayer 2 above, pending the finalisation of the regulatory processes or enquiries instituted by the fourth respondent against the first and second respondents (pursuant to the complaint filed by the first applicant with the fourth respondent against the first and second respondents), interdicting and restraining the first and second respondents from participating at any meetings of the third respondent's board of trustees at which is discussed any issue relating to the services provided by the applicants to the third respondent in terms of the administration agreement, the managed care administration agreement and the sales, distribution and marketing services agreement concluded between the applicants and the third respondent on 10 March 2009, 30 November 2009 and 11 January 2010 respectively.
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> 5. That the costs of this application be paid by the first, second, and third respondents jointly and severally, the one paying the others to be absolved."

BACKGROUND FACTS

[2] The three agreements concluded are as follows:

1. An administration agreement concluded between the third respondent and the first applicant on 10 March 2009. A copy of this agreement is attached to the founding affidavit as annexure "FA2".

2. A managed care administration agreement was concluded between the third respondent and the first applicant on 30 November 2009. A copy of this agreement is attached to the founding affidavit as annexure "FA3".

3. The sales, distribution and marketing services agreement was concluded between the third respondent and the second applicant on 11 January 2010. A copy of this agreement is attached to the founding affidavit as annexure "FA4".

[3] The *dramatis personae* in this litigation are Mr Peter Botha ("Botha") who is the chief executive officer of Liberty Health Holdings Ltd ("Liberty Health") who in turn is the holding company of the first and second applicants. The first respondent is Mr Larry Jacques ("Jacques") who is the chairperson of the third respondent's board of trustees. The second respondent is Mr Dan Pienaar who is a trustee on the board of trustees of the third respondent. The third respondent is Liberty Medical Scheme ("LMS"). The fourth respondent is the Council for Medical Schemes ("the Council"). The fourth respondent has abided the decision of this court. The real battle lines are drawn between Botha representing the two applicants on the one side and Jacques, Pienaar and LMS on the other.

[4] During the course of 2010, the first applicant played a leading role in facilitating negotiations surrounding a proposed merger between the third respondent and Spectramed Medical Scheme. After a number of meetings the board of trustees of the third respondent took a unanimous decision on 15 June 2010 to terminate all further discussions relating to the merger. Because of this decision, Botha became concerned that the

third respondent intended to terminate its administration agreement which they had concluded.

[5] Subsequently Botha engaged in discussions with a certain Mr Daan van Rensburg and the respondents with the view of reviving the proposed amalgamation discussions between the third respondent and Spectramed. These discussions proved to be fruitless.

[6] On 1 October 2010 in a letter drafted by the applicant's attorneys of record, Botha laid a complaint with the fourth respondent against the conduct of Jacques and Pienaar. A copy of the letter is attached to the founding affidavit as annexure "FA6". Attached to that letter is a lengthy confidential report prepared by Botha setting out the alleged misconduct of Jacques and Pienaar the details whereof are not relevant.

[7] In the founding affidavit, the case made out by Botha can be summarised as follows:

1. Van Rensburg threatened that he would arrange for the administration agreement between the first applicant and the third respondent to be terminated.

2. Van Rensburg proposed that a new marketing company be established for the third respondent and that the shareholders thereof are Liberty Health, the first and second respondents and Pharmacy Direct (Pty) Ltd, a company ran by Van Rensburg and Willem Brits in competition with the third respondent.

3. In return for a fee Van Rensburg would (a) ensure that the administration agreement between the first applicant and the third respondent is not terminated; (b) resuscitate the amalgamation

negotiations between the third respondent and Spectramed; and (c) manage the third respondent's board of trustees.

4. Van Rensburg also required Botha to issue a letter confirming Liberty Health's agreement to the proposals made by him which letter was not issued.

5. When Liberty Health failed to issue the letter, Van Rensburg again threatened to cause the administration agreement to be terminated.

[8] Botha believed that Van Rensburg colluded with Jacques and Pienaar to establish a marketing company for the third respondent and terminate the marketing contract which the third respondent had with the applicants. He regarded the conduct of Jacques and Pienaar as improper and reported them to the fourth respondent for investigation and, if need be, the imposition of disciplinary measures. In this regard the following is stated in the founding affidavit:

> "41 I submitted my report/complaint to the fourth respondent and the fourth respondent has requested the third respondent to respond to the contents thereof. **The first and second respondents cannot be happy about the fact that I have reported them to the fourth respondent who might take action against them, including their removal from the office as trustees on the basis that they are not fit and proper to hold such office. This has clearly resulted in a conflict between the applicants' interests and those of the first and second respondents.**
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> 42 As a result of all the foregoing circumstances, the applicants have a reasonable apprehension that the first and second respondents will do everything in their power to cause the termination of the agreements between the applicants and the third respondent. Even if they might not cause the termination of the agreements, there is a reasonable apprehension that they might act against the applicants in circumstances in which they would not have done so had I not reported them to the fourth respondent. In addition, the applicants **fear and have a reasonable apprehension that the first and second respondents will be biased against them in the event that they have to participate in meetings at which any issue relating to the agreements is discussed.**

> 43 The fact that I, as Chief Executive Officer of Liberty Health, the applicants' holding company, have reported the first and second respondent to the fourth respondent as aforesaid has on its own created a conflict between the first and second respondent, Liberty Health and the applicants. This conflict will continue to exist regardless of the outcome of any regulatory processes which may be instituted by the fourth respondent against the first and second respondents. In fact, the fact that the fourth respondent may institute proceedings to remove the first and second respondents from office as a result of what is contained in my report/complaint is enough to justify the relief which the applicants seek against the first and second respondents.
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> 44 Insofar as the first and second respondents may at any time have to deal with matters relating to the agreements, I respectfully submit that they will be conflicted and will be biased against the applicants. It is for this reason that the applicants seek a **final interdict** against the first and second respondents.
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> 45 The participation of the first and second respondents in the discussion and resolution of matters relating to the agreements will be unlawful in that it will be in violation of section 57(6)(c) of the Act which requires that the first and second respondents shall at all times avoid conflicts of interest. In terms of section 66 of the Act, a contravention of any provision of the Act is a criminal offence. Such participation will also be unlawful in that it will be in contravention of Rule 20.3 which similarly requires the first and second respondents to avoid conflicts of interest.
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> 46 Furthermore, the first and second respondents' participation aforesaid will also amount to an unlawful interference in the contractual relationship between the applicants and the third respondent insofar as their intention is to terminate such contractual relationships and cause the conclusion of new similar agreements between the third respondent and Medscheme (and the envisaged marketing company)." (Emphasis added)

[9] The reference in the quoted paragraph 45 above to section 57(6)(c) is a reference to that section as contained in the Medical Schemes Act 131 of 1998. This sub-section provides:

> "57(6) The Board of Trustees shall --
> (c) take all reasonable steps to avoid conflicts of interest;"

[10] The reference to Rule 20.3 in the quoted paragraph 45 above is a reference to Liberty Medical Scheme Rules a copy whereof is attached to the founding affidavit as annexure "FA5". Rule 20.3 provides:

> "20.3 Members of the Board shall avoid conflicts of interest, and shall declare any interest they may have in any particular matter serving before the Board."

THE ISSUES

[11] At the outset of argument, Mr Brett for the applicants moved for the inclusion of a further set of affidavits by four members of the third respondent's board of trustees. I disallowed the introduction of these affidavits because of the fact that the respondents have raised legal points *in limine* which, if successful, would make the reference to such affidavits unnecessary.

[12] Both Mr Redman, for the first and second respondents, and Mr Wasserman, for the third respondent raised the defence *in limine* that the applicants had no *locus standi* to launch this application and that no cause of action is disclosed in the founding papers. Because of these preliminary points I ruled that these should be argued first whereupon I would give judgment in regard thereto.

LOCUS STANDI

[13] It is common cause that the applicants are not represented on the board of trustees of the third respondent. The board of trustees consists of eight members duly appointed/elected as such in terms of the rules of the third respondent. A *quorum* is established by the presence of four trustees at any meeting of the Board of Trustees.

[14] The nub of the applicants' concern is the possible negative attitude towards them which the first and second respondent may have at any meeting of the board of trustees, in particular where the applicants'

contracts with the third respondent are discussed. They allege that there is a conflict of interest because Botha laid a complaint against the first and second respondents. I fail to understand how that concern entitles the applicants to seek the relief contained in the notice of motion. Even if it is accepted that Jacques and Pienaar are unhappy about Botha's conduct in laying a complaint against them with the fourth respondent, such circumstances do not lead to an entitlement to interfere with the functioning of the board of trustees. In any event, there are eight members on the board of trustees. I fail to see how any negative attitude toward the applicants harboured by two trustees will necessarily affect the decisions and work of the board of trustees vis-a-vis the applicants. No authority was cited by Mr Brett for this startling submission that the applicants have *locus standi* to interfere with the decision making process of the third respondent.

[15] The conflict of interest relied upon by the applicants is not one between the trustees and the third respondent, but at best between two of the trustees and an outside third party. The applicants' reliance on section 57(6)(c) of the Act and Rule 20.3 is, therefore, misconceived. What these statutory provisions provide for is to prohibit conflict of interest between the trustees and the work and/or interests of the third respondents. The provisions do not intend to affect any ill feeling between trustees and outside parties. The applicants can therefore not rely on those provisions to substantiate their claims. Hence, reliance on the criminalising provisions of section 66 is also inapposite.

[16] The duty to avoid conflict of interest is a duty owed by the trustees to the third respondent and its members. It is not a duty owed to the applicants as outside parties. The applicants are not subject to the rules of the third respondent and therefore had no legal enforceable right to interfere in the board of trustees' daily activities. If the applicants were

to be afforded *locus standi* in this litigation, it would mean that outsiders not properly appointed and/or elected to the board of trustees will be entitled to influence the rights and obligations of the third respondent and its members. This cannot be countenanced. It would be akin to a party which is contracted to a company attempting to prevent a director from participating in decisions relating to that contract. There is no basis in law or fact for such a proposition.

[17] It is on the papers, in any event, common cause that the dealings which the first and second respondents had with Van Rensburg are well known to the other trustees. To the extent that there may have been a conflict of interest between the first and second respondents on the one hand and the other trustees and the third respondent on the other, full disclosure has been made. That being the case there was no contravention of either the Act or the Rules prohibiting conflicts of interest.

[18] It should also be remembered that not every interest necessarily constitutes a conflict of interest. Regard must be had to the particular circumstances in each case. Any issue regarding a conflict of interest must be approached on a common sense basis. [1] To my mind, common sense dictates that the conduct of Jacques and Pienaar in negotiating with Van Rensburg can in no way establish a conflict of interest as commonly understood in every day parlance. Whatever fruits the negotiations may have spawned, such are still subject to the approval or rejection of the Board of Trustees.

[19] For all of the above reasons I rule that the applicants failed to establish *locus standi* to seek the relief against the first, second and third respondents applied for in the notice of motion.

[1] See **Atlas Organic Fertiliser (Pty) Ltd v Pikkewyn Guano (Pty) Ltd** 1981 (2) SA 173 (T) at 198H

CAUSE OF ACTION

[20] The applicants' application is premature. No decision has yet been taken by the board of trustees to the detriment of the applicants. The applicants' case is based on speculation and conjecture that the Board *might* decide to terminate the contracts with the applicants. They are basically saying, "if a resolution is taken in future by the board of trustees which may affect our position, we want the court to issue an interdict in advance restraining them to do so". But the clauses in the contracts entitle the third respondent to terminate the agreements with the applicants. The board of trustees may do so without any regard to the rules of natural justice. It may terminate the contracts with the applicants for any reason. If the applicants feel aggrieved by such action, the applicants will be entitled to their normal contractual remedies if it can be established that such termination constitutes an unlawful breach of the contracts. In such event, the applicants' cause of action will be derived from the contracts they concluded with the third respondent irrespective of any conduct on the part of the first and second respondents.

[21] In any event, in terms of clause 16.1.4 of the managed care administration agreement notice to remedy any breach within 30 days, is to be given by the applicants to the third respondent before it may institute any action. It is common cause that this was not done. Thus the application is premature on that score as well. A similar provision is also to be found in clause 15.1.4 of the administration agreement and clause 12.1.1 in the sales, distribution and marketing services agreement.

[22] In effect, the applicants' are attempting to prevent the third respondent by way of an interdict from terminating the contracts lawfully. There is no law against the third respondent terminating the contracts lawfully

and neither can such action on the part of the board of trustees be interdicted.

CONCLUSION

[23] For the reasons set out above, I have come to the conclusion that the points *in limine* raised by the respondents are well taken and should be upheld. The application cannot, therefore, succeed. The following order is made:

> The application is dismissed with costs which costs are to include the costs of two counsel.

DATED THE 9TH DECEMBER 2010 AT JOHANNESBURG

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C. J. CLAASSEN
JUDGE OF THE HIGH COURT

Counsel for the Applicants:	Adv J. J. Brett SC Adv K. Tsatsawane
Counsel for the First and Second Respondents:	Adv N. P. G. Redman
Counsel for the Third Respondent:	Adv J. C. Wasserman SC Adv D. van Zyl
Attorney for the Applicants:	Webber Wentzel
Attorney for the First and Second Respondents:	Majavu Incorporated
Attorney for the Third Respondent:	Wertheim Bekker Incorporated
Attorney for the Fourth Respondent:	Savage Jooste & Adams Inc

The matter was argued on 08th December 2010

Date of Judgment: 09th December 2010