



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 1297/2022

In the matter between:

**SOUTH AFRICAN MUNICIPAL WORKERS' UNION
NATIONAL MEDICAL SCHEME (SAMWUMED)**

APPELLANT

and

CITY OF EKURHULENI

FIRST RESPONDENT

MOSO CONSULTING SERVICES (PTY) LTD

SECOND RESPONDENT

THE REGISTRAR OF MEDICAL SCHEMES

THIRD RESPONDENT

**THE FINANCIAL SECTOR CONDUCT
AUTHORITY**

FOURTH RESPONDENT

**THE SOUTH AFRICAN LOCAL
GOVERNMENT ASSOCIATION**

FIFTH RESPONDENT

**THE SOUTH AFRICAN MUNICIPAL WORKERS
UNION (SAMWU)**

SIXTH RESPONDENT

**INDEPENDENT MUNICIPAL AND ALLIED
WORKERS UNION (IMATU)**

SEVENTH RESPONDENT

BONITAS MEDICAL FUND

EIGHT RESPONDENT

HOSMED MEDICAL SCHEME

NINTH RESPONDENT

KEY HEALTH MEDICAL SCHEME

TENTH RESPONDENT

LA HEALTH MEDICAL SCHEME

ELEVENTH RESPONDENT

**THE EMPLOYEES OF THE CITY OF
EKURHULENI**

TWELFTH RESPONDENT

**THE SOUTH AFRICAN LOCAL
GOVERNMENT**

THIRTEENTH RESPONDENT

Neutral Citation: *South African Municipal Workers' Union National Medical Scheme (SAMWUMED) v City of Ekurhuleni and Others* (1297/2022) [2023] ZASCA 182 (22 December 2023)

Coram: Nicholls and Matojane JJA and Chetty, Masipa and Unterhalter AJJA

Heard: 20 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 at 22 December 2023.

Summary: Collective agreement – s 23 of the Labour Relations Act 66 of 1995 – parties to a collective agreement – medical schemes – accreditation of medical schemes under a collective agreement – intentional and unlawful interference with contractual relationship – s 65 of the Medical Schemes Act 131 of 1998 – Regulation 28 – legality of territorial limitation in a broker agreement with a medical scheme.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Oosthuizen-Senekal AJ):

1 The appeal is upheld, the costs of the appeal, including the costs of the application for leave to appeal, are to be borne jointly by the first and second respondents;

2 The orders of the high court are set aside and substituted with the following:

‘1. The first respondent is ordered to accept member application forms and other documents and communications directly from the applicant, and to duly process such applications and related documents submitted by the applicant, for so long as the applicant remains an accredited medical scheme in terms of the collective agreement;

2. It is declared that the second respondent is not entitled to payment of broker fees by the applicant in respect of the employees of the first respondent, in the absence of a written broker agreement having been concluded between the applicant and the second respondent and in the absence of the second respondent having actually rendered broker services;

3. The first and second respondents are interdicted, for so long as the applicant remains an accredited medical scheme in terms of the collective agreement:

3.1 from taking any steps that would prevent or hinder the applicant from marketing its scheme and benefit options and rendering services to its members and all prospective members who are employees of the first respondent by way of the applicant’s own internal consultants or independent brokers appointed by the applicant, should it so wish;

3.2 from holding out that the second respondent is the exclusive broker for the five medical schemes accredited in terms of the collective agreement concluded on 9 September 2015, and that no other brokers or consultants will be allowed to service employees of the first respondent;

3.3 from refusing to accept member application forms and other documents and communications submitted to the first respondent by the applicant, and from refusing to duly process such applications and related documents;

3.4 from insisting that all medical scheme member application forms and other related documents and communications be submitted to the second respondent, as opposed to the first respondent;

3.5 from insisting that payment of broker fees be made by the applicant to the second respondent in the absence of a written broker agreement between the applicant and the second respondent and/or in the absence of the second respondent having actually rendered broker services;

3.6 from approaching members of the applicant and requesting them to execute service notes in favour of the second respondent, in the absence of a written broker agreement between the applicant and the second respondent and/or in the absence of the second respondent having actually rendered broker services to members of the applicant.

4. The first and second respondents are jointly ordered to pay the costs of this application.’

JUDGMENT

Unterhalter AJA (Nicholls, Matojane JJA and Chetty and Masipa AJJA concurring)

Introduction

[1] The appellant, the South African Municipal Workers’ Union National Medical Scheme (SAMWUMED) is a self-administered medical scheme. It is registered in terms of s 24 of the Medical Schemes Act 131 of 1998 (the Act). In September 2015, the South African Local Government Association (SALGA) concluded a collective agreement with two trade unions, one of which was the South African Municipal Workers’ Union (the collective agreement). In terms of Clause 9 of the collective agreement, the Bargaining Council, the South African Local Government Bargaining Council (SALGBC) must annually accredit medical

schemes which qualify for employer contributions. Employees who are scheme members may annually elect to move to another accredited medical scheme. Clause 15 of the collective agreement provides criteria for the recognition of medical schemes. In terms of Clause 15.3.2, accredited medical schemes may market their schemes annually between October and November (the window period) to better inform members who might wish to switch medical schemes. SAMWUMED had for a number of years been accredited by the SALGBC, and was so again in September 2020. Four other medical schemes were also accredited.

[2] SAMWUMED had, through its own consultants, and prior to January 2020, marketed its scheme, as the collective agreement permitted it to do, to employees who were members of accredited medical schemes or wished to become members. In January 2020, SAMWUMED received a letter from the first respondent, the City of Ekurhuleni (COE). COE informed SAMWUMED that it had appointed Alexander Forbes Health (Pty) Ltd (AFH) as broker service consultants to provide services to COE employees, pensioners, and the COE itself. SAMWUMED was informed that its medical scheme had been allocated to AFH. COE requested SAMWUMED to ‘rescind all existing medical aid brokerage contracts’ and stipulated that no other medical aid consultants would be allowed to service employees of COE. SAMWUMED was required to ensure that AFH was paid broker fees for the services it rendered. Like broker appointments were made by COE to the other accredited medical schemes.

[3] For reasons that are not explained, the second respondent, Moso Consulting Services (Pty) Ltd (Moso) replaced AFH as the broker appointed by the COE to employees, COE, SAMWUMED and the other medical schemes. SAMWUMED did not accede to the appointment of Moso. Nor did it accept that it was required to market its scheme in the window period through Moso, and pay Moso brokerage fees to do so. SAMWUMED had marketed its scheme, in prior years, by using its own internal consultants, and wished to continue doing so.

[4] SAMWUMED had, on 5 April 2019, concluded a written broker agreement with Moso (the Moso agreement). SAMWUMED appointed Moso to market SAMWUMED's range of products and render services to its members. It did so on a non-exclusive basis. And, of consequence for this matter, to perform these services within a defined territory. That territory was defined to mean the City of Johannesburg and its municipal entities. The territory, as defined, does not include the COE. I shall refer to this as the territorial limitation.

[5] In November 2020, SAMWUMED wrote to COE. It requested COE to reconsider its decision to preclude SAMWUMED's internal consultants from providing services to COE employees and pensioners. No response was forthcoming. SAMWUMED also wrote to Moso and complained that Moso was not permitted to render services outside the territory allocated to it in the Moso agreement, without the prior written consent of SAMWUMED. Moso, it alleged, was in breach of the Moso agreement by seeking to render services on behalf of SAMWUMED to employees of COE.

[6] SAMWUMED did not receive the undertakings it sought from either COE or Moso. It then applied to the high court, Gauteng Division, Johannesburg (the high court) for the following relief, in relevant part:

- ‘1. An order declaring that the first respondent [COE] is in breach of the collective agreement concluded on 9 September 2015;
2. An order compelling the first respondent [COE] to comply with the collective agreement concluded on 9 September 2015, more specifically to allow the applicant to freely market its scheme and benefit options and to render services to its members and all prospective members who are employees of the first respondent, unhindered and by way of the applicant's own internal consultants or independent brokers appointed by the applicant, should it so wish;
3. An order compelling the first respondent [COE] to accept member application forms and other documents and communications directly from the applicant, and to duly process such applications and related documents submitted by the applicant;

4. An order declaring that the second respondent [MOSO] is not entitled to payment of broker fees by the applicant in respect of the employees of the first respondent [COE], in the absence of a written broker agreement having been concluded between the applicant and the second respondent [Moso] and in the absence of the second respondent [Moso] having actually rendered broker services;
5. An order interdicting and restraining the first and second respondents [COE and Moso]:
 - 5.1 from taking any steps that would prevent or hinder the applicant to market its scheme and benefit options and render services to its members and all prospective members who are employees of the first respondent by way of the applicant's own internal consultants or independent brokers appointed by the applicant, should it so wish;
 - 5.2 from holding out that the second respondent [Moso] is the exclusive broker for the five medical schemes accredited in terms of the collective agreement concluded on 9 September 2015, and that no other brokers or consultants will be allowed to service employees of the first respondent [COE];
 - 5.3 from refusing to accept member application forms and other documents and communications submitted to the first respondent by the applicant, and from refusing to duly process such applications and related documents;
 - 5.4 from insisting that all medical scheme member application forms and other related documents and communications be submitted to the second respondent, as opposed to the first respondent;
 - 5.5 from insisting that payment of broker fees be made by the applicant to the second respondent in the absence of a written broker agreement between the applicant and the second respondent and/or in the absence of the second respondent having actually rendered broker services;
 - 5.6 from approaching members of the applicant and requesting them to execute service notes in favour of the second respondent [Moso], in the absence of a written broker agreement between the applicant and the second respondent and/or in the absence of the second respondent [Moso] having actually rendered broker services to members of the applicant;
6. That the first respondent [COE] be ordered to pay the costs of this application;
7. Should any party/person oppose the present application, ordering such party/person to pay the costs of this application jointly and severally with the first respondent.'

[7] Both the COE and Moso opposed the application, and filed answering affidavits. In addition, Moso brought a counter-application which, in relevant part,

sought declaratory relief that the Moso agreement does not preclude Moso from rendering services outside the territorial area defined in the agreement. This relief was, in turn, opposed by SAMWUMED.

[8] The high court (*per* Oosthuizen-Senekal AJ) dismissed SAMWUMED's application, with costs, such costs to be limited to the hearing of the matter. It found that SAMWUMED was not a party to the collective agreement, and hence, SAMWUMED enjoyed no rights under the collective agreement. As to the territorial limitation that SAMWUMED sought to impose upon Moso, the high court found this limitation to offend against the right of employees to choose a broker, and, furthermore, offended against the Financial Advisory and Intermediary Service Act 37 of 2002 (FAIS Act) and its Code of Conduct. The high court declined to decide Moso's counter-application.

[9] With the leave of the high court, SAMWUMED appeals to this court. COE elected to abide our judgment. Moso opposed the appeal but was at pains to emphasize the limited ambit of its opposition. Moso, as in the high court, opposed the final relief set out in prayers 4, 5.5 and 5.6 of the notice of motion. It was common ground between the parties that this appeal was not concerned with the alternative interim relief that was originally sought in the notice of motion. By way of further clarification, counsel for Moso, during oral argument, made it plain that Moso's case rested on the proposition that the territorial limitation in the Moso agreement was unenforceable. Moso did not seek to defend the position of COE. Indeed it disavowed the conduct of the COE that had sought to impose Moso upon SAMWUMED as its exclusive broker to market its scheme to employees of COE. As Moso's counter-application was not determined by the high-court, and Moso had made no cross-appeal, Moso correctly submitted that the counter-application was not before us.

The COE appeal

[10] The principal relief that SAMWUMED sought against COE was that COE must comply with the collective agreement and permit SAMWUMED to market its scheme and benefit options to employees of COE. In addition, SAMWUMED should be permitted to render services to employees of COE who are members or prospective members of SAMWUMED. It will be recalled that clause 15.3.2 of the collective agreement states that accredited medical schemes may market their schemes annually during the window period. Membership of an accredited medical scheme is an important benefit enjoyed by employees under the collective agreement, to which employers are required to contribute. The collective agreement permits employees who are scheme members of accredited schemes to transfer from one scheme to another. To allow scheme members to make informed choices, the collective agreement provides for a window period during which accredited schemes may market their schemes.

[11] In addition, the collective agreement, in terms of clause 15.2 sets out the criteria for the accreditation of medical schemes. Among these criteria, a scheme must demonstrate the service levels to which it will adhere to process claims and pay accounts. The collective agreement requires an accredited scheme to perform these services. Part of the relief sought by SAMWUMED is that it should be permitted to render these services to its members who are employees of COE, without having Moso imposed upon it as the intermediary through which this will be done.

[12] The high court held that SAMWUMED is not a party to the collective agreement, and therefore it cannot seek the enforcement of this agreement. SAMWUMED is not reflected as a party to the collective agreement. The collective agreement makes provision, as I have sketched above, for the accreditation of schemes so that employees may enjoy the benefit of selecting and joining a scheme to which their employers contribute. To protect the interests of employees, the marketing of the schemes, in the window period, secures competition between

accredited scheme to enhance informed choices by employees. Hence, Clause 15.3.2 provides that accredited medical schemes may market their schemes.

[13] Does this provision give rise to any enforceable right on the part of SAMWUMED? SAMWUMED is not reflected as a signatory to the collective agreement. SAMWUMED nevertheless contended that it was a party to the collective agreement because the collective agreement was a contract for the benefit of a third party. *Total South Africa (Pty) Ltd*¹ sets out what is required to find that a provision of an agreement constitutes a stipulation for the benefit of a third party (a *stipulation alteri*): the provision cannot simply be designed to benefit a third person or merely do so; the parties to the contract must have the intention that a third person can, by adopting the benefit, become a party to the contract.

[14] I should have been inclined to conclude that Clause 15.3.2 was designed to benefit accredited medical schemes and that SAMWUMED had adopted this benefit by marketing its scheme over a number of years. However, the collective agreement cannot constitute a stipulation for the benefit of a third party because the collective agreement is a statutory construct. A collective agreement is defined in s 213 of the Labour Relations Act 66 of 1995 (the LRA) to mean, ‘a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and, on the other hand – (a) one or more employers; (b) one or more registered employers’ organisations; or (c) one or more employers and one or more registered employers’ organisations.’

[15] A collective agreement, in terms of these provisions of the LRA, is not an agreement concluded with an accredited medical scheme. Section 23 of the LRA

¹ *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 917 (A) at 625.

sets out the legal effect of a collective agreement. The collective agreement binds the parties to the agreement. Since the statutory definition of a collective agreement identifies the parties to such an agreement, this statutory scheme makes no provision for a collective agreement to bind parties who fall outside of the definition. The LRA thus excludes a collective agreement containing a stipulation for the benefit of a third party, if that third party is not a party falling within the statutory definition. To like effect, s 31 of the LRA binds parties to the bargaining council who are also parties to the collective agreement. SAMWUMED is not such a party. Section 32 of the LRA does permit of the extension of a collective agreement to a non-party upon request by the bargaining council to the Minister. But there is no suggestion this has taken place.

[16] It follows that SAMWUMED is not a party to the collective agreement. The parties who concluded the collective agreement, whatever their intention, could not, as a matter of law, have made SAMWUMED, upon adopting the benefit conferred by the collective agreement, a party to the agreement. The LRA excludes such an outcome, by definition. The COE was, in terms of clause 1 of the collective agreement, required to observe the terms of the agreement, including clause 15.3.2. But that duty gave rise to no right on the part of SAMWUMED to enforce that duty because SAMUWUMED was not a party to the collective agreement.

[17] This conclusion does not entail that clause 15.3.2 had no efficacy. Section 27 of the LRA provides for the establishment of bargaining councils. Among the powers conferred upon bargaining councils by s 28 of the LRA is to establish and administer medical schemes for the benefit of parties to the bargaining council or their members (s 28(1)(g)). Section 33A of the LRA empowers a bargaining council to monitor and enforce compliance with its collective agreements.

[18] Under the collective agreement with which this case is concerned, the SALGBC was the bargaining council that concluded the collective agreement.

Clause 9 of the collective agreement regulates membership of medical schemes and contributions to these schemes. The SALGBC must accredit medical schemes against stipulated criteria. Employers, which includes COE, must make contributions on behalf of their employees to accredited medical schemes. Employees must belong to one of the accredited medical schemes, unless they elect to belong to no medical scheme. And, as I have referenced, on an annual basis, employees are afforded a choice before 1 January to move to an accredited medical scheme.

[19] The collective agreement thus confers important benefits upon employees to choose an accredited medical scheme; to switch schemes annually; and to enjoy the compulsory contributions of employers. The collective agreement deposes the SALGBC to give effect to this scheme. SALGBC has done so. The accreditation of SAMWUMED, and four other medical schemes, by SALGBC is to be found in circular 12/2020 issued by SALGBC. It records the schemes accredited for 2021 by SALGBC's executive council. It also records that the accredited schemes may market their schemes from 1 October 2020 – 30 November 2020.

[20] The accreditation of SAMWUMED by SALGBC constitutes an agreement. How otherwise could an accredited medical scheme be held to the obligations set out in clause 15 of the collective agreement? The collective agreement, for example, in clause 15.6 sets out a code of conduct to which accredited medical schemes are obliged to adhere. Accredited medical schemes can only be bound to adhere to the code of conduct by reason of their agreement with SALGBC. They cannot be bound to do so by the collective agreement because, as I have found, they are not parties to that agreement. Thus, accredited medical schemes derive their rights and obligations from their agreement with SALGBC, arising from their accreditation by SALGBC.

[21] That agreement provides in express terms for the right of accredited medical schemes to market their schemes, as reflected in circular 12/2020. The agreement also necessarily entails that accredited medical schemes are entitled and required to service their members who are employees that have opted to join one or other of the accredited schemes. That is so because the very essence of what a medical scheme registered in terms of the Medical Schemes Act 131 of 1998 (MSA) must do is to process the claims of its members and provide the benefits to which their membership entitles them. That is also the plain entitlement of employees under the collective agreement which SALGBC is mandated to bring about by way of accreditation. I therefore find that the accreditation of SAMWUMED constituted an agreement between it and SALGBC that conferred a right upon SAMWUMED to market their scheme in the window period and service those employees who opted to become members of SAMWUMED.

[22] SAMWUMED's principal cause of action was to enforce what it conceived to be its rights under the collective agreement and COE's breach of that agreement. That cause of action cannot prevail because SAMWUMED enjoyed no rights under the collective agreement. However, SAMWUMED's application framed an alternative cause of action. It alleged that the conduct of COE 'constitutes unlawful and intentional interference with the rights of SAMWUMED and its employees to lawfully participate in the market comprised of the COE's employees'. SAMWUMED did not elaborate upon the source of its right to participate in this market. However, there are sufficient averments in the founding affidavit as to its accreditation by SALGBC to derive the source of its rights to be the agreement between SAMWUMED and SALGBC that I have identified.

[23] The question that then arises is whether SAMWUMED has made out a cause of action based on these averments. In *Lanco*² it was held that the delict of the

² *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 1993 (4) SA 378 (D) at 384.

unlawful and intentional interference by a third party in a party's contractual relationship may be sustained, even though the interference does not consist of an inducement to breach the contract. The Constitutional Court gave further treatment to this species of delictual liability in *Masstores*.³ Though the case concerned unlawful competition, together with the holding in *Country Cloud*,⁴ the following may be stated of a cause of action founded upon the delict of unlawful interference with contractual relations. First, the delict must comport with the general principles of Aquilian liability. Second, the unlawfulness requirement is not confined to the inducement of a breach of contract. An unlawful interference with contractual relations is ultimately based upon the duty not to cause harm and to respect rights. Third, fault is satisfied by proof of intent which may consist of *dolus eventualis* (and perhaps even negligence). The degree of fault may also be relevant to the enquiry as to unlawfulness.

[24] Does the conduct of COE amount to an unlawful interference with the contractual relationship subsisting between SAMWUMED and SALGBC? It will be recalled that what COE sought to impose upon SAMWUMED was the interposition of Moso as the exclusive broker and intermediary that SAMWUMED was required to use to service its members who were employees of COE and to market its scheme during the window period. SAMWUMED was also required to pay Moso for rendering its services as a broker, and to cancel any agreements that it might have concluded with other brokers. SAMWUMED was, under this imposition, not to make use of its own employees to market its scheme and service COE employees who were members of the scheme.

[25] Clause 1 of the collective agreement bound employers falling within SALGBC to observe the terms of the agreement. COE is such an employer. It was

³ *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC).

⁴ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC).

bound to observe the collective agreement. The collective agreement, as I have observed, provided for the accreditation of medical schemes and stipulated for a regime under which employees could choose from among the accredited schemes and benefit from their membership. That regime permitted accredited schemes to market their schemes during the window period and to service their members. Nothing in this regime limited the freedom of accredited medical schemes to determine how to do so. It did not require the use by accredited medical schemes of brokers, much less permit employers to impose the use of brokers upon these schemes.

[26] The conduct of COE clearly interfered with the contract subsisting between SAMWUMED and SALGBC. It did so by restricting the means by which SAMWUMED could carry out its duties to service its members and exercise its right to market its scheme in the window period. The collective agreement placed no restraints upon SAMWUMED of the kind that COE sought to impose. COE had a duty to observe the terms of the collective agreement. It did not do so. Rather, it sought to impose a broker upon SAMWUMED and stipulated conditions under which SAMWUMED could enjoy its rights and carry out its duties under the agreement with SALGBC. That was plainly harmful to SAMWUMED because it imposed a broker that SAMWUMED did not either need or wish to employ, and at a cost that SAMWUMED was required to meet. This amounts to unlawful interference in the contractual relationship subsisting between SAMWUMED and SALGBC.

[27] Nor can there be doubt that COE interfered with the required intent. It knew that SAMWUMED was an accredited medical scheme in terms of the collective agreement. It knew what the collective agreement permitted SAMWUMED to do. Yet COE decided to act as it did knowing it would interfere with the manner in which SAMWUMED enjoyed its accreditation from SALGBC and cause it loss.

The COE is thus liable for its unlawful and intentional interference with the contractual relationship subsisting between SAMWUMED and SALGBC.

[28] While SAMWUMED, for the reasons given, cannot enjoy the relief sought in its notice of motion that is predicated upon breach by COE of the collective agreement and the enforcement of that agreement, SAMWUMED has made out a case to prevent COE from: imposing Moso upon SAMWUMED; requiring SAMWUMED to pay Moso for its unwanted services; and restricting the basis upon which SAMWUMED may carry out its duties and enjoy its rights under its agreement with SALGBC.

The Moso appeal

[29] I turn next to consider the appeal of SAMWUMED against the dismissal by the high court of the relief it sought against Moso. It will be recalled that Moso does not seek to defend the conduct of COE and its unilateral imposition of Moso as a broker upon SAMWUMED. Moso confined its case to one issue. It contended that it was not confined by the territorial limitation contained in its broker agreement with SAMWUMED, and hence it was at liberty to offer its services to SAMWUMED (outside of the territorial limitation), and to COE, and its employees. If the territorial limitation is lawful and remained enforceable, Moso accepts that SAMWUMED was entitled to restrain it from offering its services outside of the agreed territorial limitation.

[30] Moso sought to impugn the territorial limitation on three grounds. First, it contended that the territorial limitation offends against s 65 of the MSA read with Regulation 28 promulgated in terms of the MSA. Second, it submitted that the territorial limitation offends against public policy and it is thus rendered unenforceable. Third, it claims that SAMWUMED has waived the territorial limitation. I consider each of these grounds in turn.

[31] Section 65 of the MSA provides for the accreditation of brokers and their compensation. Regulation 28(1) prohibits any person from being compensated by a medical scheme in terms of s 65, unless the broker has entered into a prior written agreement with the medical scheme concerned. Regulation 28(6)(a) renders the ongoing payment of a broker by a medical scheme conditional upon the broker meeting the service levels agreed upon in the written agreement between the broker and the medical scheme. Regulation 28(7) requires a medical scheme to discontinue payment to a broker upon notice that a member or employer no longer requires the services of that broker.

[32] Moso reads these provisions to mean that members enjoy free choice as to whether to use a broker and which broker they wish to select. Provided the broker is accredited and the other stipulations as to compensation are met, that choice is sovereign and the territorial limitation is repugnant to that sovereignty. Moso, with the high court, also rely upon the provisions in s 1(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act) read with section 20 of its code of conduct which are said to privilege the free choice of clients to appoint (and dismiss) a broker. Moso also placed reliance on the decision of this Court in *Hlela*⁵ and the decision of the appeals committee of the Council for Medical Schemes in *LA Health Medical Scheme*.⁶

[33] Nothing in s 65 or Regulation 28 forbids the adoption of a territorial limitation in the written agreement between a medical scheme and a broker. What is required is that there should be a written agreement; and Regulation 28 regulates some of the contents of that agreement, such as the maximum compensation payable to a broker for the introduction of a member and the rendering of ongoing services. Furthermore Regulation 28(3) proscribes certain differential compensation. This

⁵ *Hlela v SA Taxi Securitisation (Pty) Ltd* 2014 JOL 32305 (SCA).

⁶ *LA Health Medical Scheme v The Office of the Registrar & Others* CMS Ref: CMS 76106.

scheme of regulation contains certain prohibitions and imposes certain requirements. But beyond these stipulations, the Regulation runs out, and it is permissive. Thus, there must be a written agreement between a broker and a medical scheme; and it must comply with certain content requirements and prohibitions. Nothing in the Regulation, however, states or implies that a broker agreement cannot contain a territorial limitation upon where it is that the broker may render its services.

[34] Moso contended that s 65 of the MSA read with Regulation 28 is predicated upon the primacy of member choice. And the territorial limitation is a constraint upon such choice and is thus prohibited. This reasoning does not hold. First, it is the medical scheme that appoints the broker to secure introductions and render services, on its behalf, to members for which the medical scheme compensates the broker. It is for the medical scheme to decide whether to appoint brokers, and if it does, how and where to deploy them under service levels set out in a written broker agreement. Brokers may have utility in one area, but not in another. The medical scheme may choose, as in this case, to use its own employees to service its members in a particular area. These are all choices for the medical scheme to make and nothing in Regulation 28 says otherwise.

[35] Second, Regulation 28(7) simply prevents a medical scheme from compensating a broker if a member or employer no longer requires the broker's services. This provision recognises that a member or employer may not wish to receive the services of a particular broker. Upon notice of this, the broker may no longer be compensated. It is not possible to derive from this provision that members may dictate to a medical scheme that every broker appointed by a medical scheme must be available to provide services to them or, more radically, that if a medical scheme has appointed no brokers at all, they must do so to provide members with some (unspecified) plurality of choice. Regulation 28 does not so provide. Very

considerable complexity would arise if a regulation sought to do so, requiring detailed provisions, that are not to be found in Regulation 28.

[36] Third, as I have observed, Regulation 28 is predicated upon the premise that it is for medical schemes to decide whether to appoint brokers and if so, how many, in what areas and on what terms. The logic of this is well understood. Provided there are a sufficient number of medical schemes competing for members, it is for the schemes to decide how to win members and service their needs. If the medical schemes make bad choices and service suffers, members will switch. The Regulation could have been constructed on a different regulatory premise of broker plurality, but nothing indicates the adoption of such a scheme.

[37] Fourth, the *Hlela* decision and the provisions of the FAIS Act provide no assistance, even of an analogical kind. In *Hlela*, it was the clients who had appointed the broker, and the question was whether their choice of broker could be rejected under s 20 of the FAIS Code of Conduct. This Court held that it could not. Regulation 28, however, is not concerned with a member's appointment of a broker. Under Regulation 28, the medical schemes may appoint brokers, and members can choose whether to use their services. That entails no recognition of some requirement that a medical scheme, at the instance of a member, must appoint a broker or do so on particular terms. Much less, the further entailment that territorial limitations are impermissible. I find nothing in the reasoning in *LA Health Medical Scheme* that persuades me of a different conclusion. And hence, the contention of Moso that the territorial limitation is repugnant to s 65 of the MSA and Regulation 28 falls to be rejected.

[38] Moso next advanced the submission that the territorial limitation offends against public policy and is therefore rendered unenforceable. It relied upon

Beadica,⁷ and certain of the cases of the Constitutional Court analysed in *Beadica*. The majority in *Beadica* held that the value of honouring obligations freely and voluntarily entered into has no primacy in the pantheon of public policy, it is one of the number of constitutional rights and values that may be implicated in deciding whether the enforcement of a contractual term is contrary to public policy.⁸

[39] Following *Beadica*, the fact that Moso agreed to the territorial limitation does not exhaust the considerations of public policy that might bear upon the enforcement of such a provision. Moso reprises its invocation of the value that should attach to the freedom of members to choose a broker, and that the territorial limitation restricts such choice. The statutory scheme, analysed above, does not reflect this value. Rather, it recognises that a member does not need to use a broker if they should choose otherwise. Apart from the statutory scheme, I do not apprehend that the territorial limitation offends against any important constitutional right or value. It simply constitutes a means by which medical schemes may choose to provide services through brokers. This is a matter of efficacy. Other means may also be effective. But it is hard to see how an insistence that once a broker is appointed by a scheme that broker must be entitled to operate without territorial limitation infringes upon any constitutional right or value. Nor has a case been made that the territorial limitation has led to any deterioration of the service rendered by SAMWUMED or any lack of competitive alternatives for employees of COE who might want to switch medical schemes. The invocation of broker choice is an abstract claim, without an obvious constitutional mooring.

[40] It follows that I can discern no consideration of public policy that counts in favour of rendering the territorial limitation unenforceable. On the contrary, Moso

⁷ *Beadica 231 CC & Others v Trustees, Oregan Trust & Others* 2020 (5) SA 247 (CC).

⁸ *Ibid* at para [87].

agreed to this restriction in its broker agreement with SAMWUMED, and there is no reason why it should not be held to it. Moso's challenge on this score must fail.

[41] Finally, Moso contends that SAMWUMED waived or abandoned the territorial limitation during the currency of the broker agreement with Moso. Moso avers that SAMWUMED appointed Moso to render brokerage services in the city of Tshwane; Moso introduced 596 new members and was paid by SAMWUMED. SAMWUMED contests this version; it sets out the history of its broker agreements with Moso, over the years, which have defined different territories, but these appointments, prior in time to the current agreement, could not amount to a preemptive waiver of a later agreement.

[42] It is unnecessary to resolve this factual dispute. The version offered by Moso is struck by clauses 13.1 and 13.2 of the broker agreement. They provide that no variation of the terms of the agreement shall be binding unless reduced to writing and signed by the parties; and further, that no indulgence shall constitute a waiver, nor preclude the grantor (of the indulgence) from exercising any rights. The documentary evidence proffered by Moso does not meet the standard set by clause 13.1 to effect a valid variation. And to the extent that SAMWUMED permitted Moso to introduce new members in Tshwane, no such indulgence can constitute a waiver. The waiver challenge must be rejected.

[43] It follows that Moso's challenges to the territorial limitation cannot succeed. As counsel made plain at the commencement of his oral submissions, if this Court should reach this conclusion, then SAMWUMED's appeal must be upheld and it is entitled to the relief that Moso contested.

Conclusion

[44] SAMWUMED has prevailed against COE, and its appeal must be upheld. SAMWUMED is not entitled to relief predicated upon the enforcement of the

collective agreement. It is entitled to the relief in its notice of motion that protects it from the conduct of COE that sought to impose a broker upon SAMWUMED, and the entailments of that conduct. As against COE, the orders sought in prayers 3,5 and 6 of the notice of motion should thus be granted. Although COE abided the judgment of this Court, it did not abandon the order of the high court in its favour. This meant that SAMWUMED was required to come to this Court to appeal the high court's order. Once that is so, SAMWUMED is entitled to the costs of the appeal as against COE, on an unopposed basis.

[45] As to the appeal against the dismissal by the high court of the relief sought by SAMWUMED against Moso, Moso opposed the appeal on a limited basis, and, in particular limited its opposition to the issue of the territorial limitation and prayers 4 and 5.5. That opposition has not succeeded. SAMWUMED's appeal is upheld as against Moso. Costs must follow that result.

[46] The following order is made:

- 1 The appeal is upheld, the costs of the appeal, including the costs of the application for leave to appeal, are to be borne jointly by the first and second respondents;
- 2 The orders of the high court are set aside and substituted with the following:
 1. The first respondent is ordered to accept member application forms and other documents and communications directly from the applicant, and to duly process such applications and related documents submitted by the applicant, for so long as the applicant remains an accredited medical scheme in terms of the collective agreement;
 2. It is declared that the second respondent is not entitled to payment of broker fees by the applicant in respect of the employees of the first respondent, in the absence of a written broker agreement having been concluded between the applicant and the second respondent and in the absence of the second respondent having actually rendered broker services;
 3. The first and second respondents are interdicted, for so long as the applicant remains an accredited medical scheme in terms of the collective agreement:

- 3.1 from taking any steps that would prevent or hinder the applicant from marketing its scheme and benefit options and rendering services to its members and all prospective members who are employees of the first respondent by way of the applicant's own internal consultants or independent brokers appointed by the applicant, should it so wish;
- 3.2 from holding out that the second respondent is the exclusive broker for the five medical schemes accredited in terms of the collective agreement concluded on 9 September 2015, and that no other brokers or consultants will be allowed to service employees of the first respondent;
- 3.3 from refusing to accept member application forms and other documents and communications submitted to the first respondent by the applicant, and from refusing to duly process such applications and related documents;
- 3.4 from insisting that all medical scheme member application forms and other related documents and communications be submitted to the second respondent, as opposed to the first respondent;
- 3.5 from insisting that payment of broker fees be made by the applicant to the second respondent in the absence of a written broker agreement between the applicant and the second respondent and/or in the absence of the second respondent having actually rendered broker services;
- 3.6 from approaching members of the applicant and requesting them to execute service notes in favour of the second respondent, in the absence of a written broker agreement between the applicant and the second respondent and/or in the absence of the second respondent having actually rendered broker services to members of the applicant.
4. The first and second respondents are jointly ordered to pay the costs of this application.'

DN UNTERHALTER
ACTING JUDGE OF APPEAL

APPEARANCES

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