IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 3196/2017

In the matter between:

DR LUCAS SELLO MOKWENA 1st Applicant

DR NTHABISENG MOKWENA 2nd Applicant

DR LS MOKWENA & ASSOCIATES (PTY) LTD 3rd Applicant

and

GOVERNMENT EMPLOYEES MEDICAL SCHEME Respondent

HEARD ON: 17 AUGUST 2017

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 21 SEPTEMBER 2017

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[1] These are motion proceedings. The relief sought by the applicants is to have the respondent interdicted from declining payment of all future claims which the applicants contemplate submitting to the respondent for certain medical services rendered or still be

rendered. The respondent opposes the application. This is the one matter before me.

[2] The second matter before me concerns Dr LS Mokoena & Others versus The Government Employees Medical Scheme, Gems in short. The relevant case number is 3196/2017. The interdictory relief sought in this instance is an order whereby the respondent is compelled to effect payment of all claims which the applicants contemplate submitting to the respondent in the future concerning medical services still to be rendered. The respondent also opposes the second application as well.

[3] Seeing that in both matters the applicants are doctors; the respondent is one and the same medical aid scheme; the medical services in question are the same and the cause of action is the same – the parties agreed that the two matters be consolidated. It made practical sense to me. In view of the consolidation agreement the outcome of this matter of Dr Ramantsi & Another will also apply to the matter of Dr Mokoena & Others.

[4] The respondent is a medical scheme enterprise. Its members are government employees. They and the government contribute to the respondent's medical aid scheme. The respondent's core business is granting financial assistance or medical aid to its members. It pays for medical expenses incurred by its members in connection with health care services rendered to them by health care service providers.

[5] The applicants are medical doctors. They practise medicine in Bloemfontein. They provide health care services. The majority of their patients, as already indicated, are government employees. In other words a huge number of their patients belongs to the respondent. They and their employer contribute to the medical aid scheme established and administered by the respondent.

[6] The applicants and the respondent are parties to an agreement termed, “Gems Network Agreement”. The relationship between the parties is governed by agreement, “anx b”, which was concluded on 1 February 2010 in the case of Dr Ramantsi, read together the provisions of the Medical Schemes Act, 131 of 1998, the statutory regulations and the domestic rules of the respondent. The applicants are required to render health care services to the members of the respondent; to bill them in accordance with the tariff of fees prescribed by the South African Medical Control Council and to submit their valid claims, relative to the health care services rendered, to the respondent for payment.

[7] The respondent is required to interrogate a doctor’s claim in order to ensure that it is procedurally compliant; to scrutinise a doctor’s claim in order to make doubly certain that it is based on a member’s actual medical account, to ensure that the medical treatment as specified on the account was actually rendered by the doctor concerned and to pay to its member or to a doctor as a provider of health care service within thirty days after date on which the doctor’s valid claim was received.
See 59 Medical Schemes Act No 131/1998.

[8] The respondent received a four page document, from an anonymous author – See “anx gg2”. The author alleged that (s)he once worked for the applicants; that they submit irregular claims to medical aid schemes and that Gems, Discovery and Medscheme were the worst defrauded. The document was neither signed nor dated. Needless to say its serious allegations were not verified by way of a confirmatory affidavit. Consequently it had all the hallmarks of an inadmissible hearsay.

[9] The revelations of fraud and irregularity as fully set out in the anonymous document prompted the respondent to take certain steps. The respondent decided to investigate the anonymous claims. Investigators were appointed. Preliminary findings unfavourable to the applicants were made. Explanations were requested from the applicants concerning the adverse preliminary findings.

[10] The applicants were engaged and afforded an opportunity to explain the irregularities and to rebut the claims. They failed to do so. Instead they admitted the irregular claims. For instance they admitted that in additional to claiming a fee for emergency consultation, they also charged a separate fee for ordinary consultation. Such double billing was expressly prohibited by the tariff rules of their medical council. Their admissions corroborated and verified the anonymous whistle-blower’s claims somehow. It tended to give some credence to the anonymous informant’s allegations. On the strength of the adverse outcome of the investigation, the respondent suspended the applicants.

[11] Aggrieved by the suspension, the applicants launched the current proceedings by way of an urgent application. The purpose of the interdictory relief sought was to compel the respondent to honour its obligations towards the applicants as it used to do before the suspension.

[12] The applicants raised a point *in limine*. The essence of the point was that their suspension by the respondent was legally untenable because, as counsel argued, it was based on inadmissible hearsay foundation. In my view the submission cannot be sustained. Since the admissions by the applicants were materially consistent with the anonymous claims, such anonymous allegations were cleansed of all their hearsay blemishes by those admissions. Those admissions enhanced the probative value of the hearsay evidence and they eliminated any potential prejudice which the reception of such anonymous hearsay might otherwise entail. Having considered all the factors as enumerated in sec 3(1)(c) of The Law of Evidence Amendment Act 45 of 1988, I am of the opinion that such anonymous hearsay – "exi gg2" – should be received or admitted in the interest of justice – See **Steyn and Others NNO v Blockpave (Pty) Ltd** 2011 (3) SA 528 (FB) pars 27-30. Viewed from that perspective, it cannot be contended, with conviction, that the suspension of the applicants was irredeemably tarnished or nullified by inadmissible hearsay.

[13] It has now become common cause that the applicants claimed fees based on incorrect tariff codes and that as a result of such irregular practices they received payments to which they were not entitled. A number of irregular claims were identified during the verification

process. The applicants did not dispute that they submitted irregular claims. However, they offered ignorance as an excuse. I deem it unnecessary to consider the substantive merits and demerits of the two versions. The reasons for this will soon become apparent.

[14] The respondent decided to suspend payment of claim's pending further investigation. It is undisputed that the claiming patterns of all the applicants were similar and that the claims they submitted were irregular. The respondent's contractual right to suspend payment is not dependent upon its contractual right to terminate the network agreement. In other words, the respondent is not obliged to first establish its right to terminate the agreement before it can exercise its right to suspend its operation. If this is so, then the applicants are not entitled to a court order, whereby the respondent is compelled to pay all their future claims since the operation of the agreement, from which their right to claim stems, has been put on hold. It would not be proper for me to make a blanket order compelling the respondent to pay all future claims which have not yet been submitted, identified and verified. Such an order would clearly undermine the respondent's contractual right to suspend as well as its discretion to pay either the doctor or the patient.

[15] I cannot indefinitely sanction payment to the applicants of all future claims before the applicants have actually rendered any health care services to specific members of the respondent. It would be absurd to make such an onerous and final order without knowing what such future claims will be all about. Such an order will

effectively deprive the respondent of its rights and obligations to investigate and to interrogate the validity of claims still to be submitted in the future by the applicants. This proposition is untenable.

[16] The relief sought, if it were to be granted, would exacerbate the situation. On their own version, the applicants have submitted irregular claims to the respondent in the past. They have already received payments from the respondent. They were not entitled to those previous payments. Such payment were not due. There was no lawful causa for them. Granting the order would basically be tantamount to licensing the submission of further questionable claims and stripping the respondent of any powers to interrogate such claims in the future.

[17] I have some reservations about the merits of the applicants' case. However, I refrain from deciding the fate of the matter on the merits, notwithstanding my reservations. Now that I have given some background to the dispute. I deem it prudent to deal with the preliminary points raised by the respondent. There were two. The one concerned urgency and the other jurisdiction.

[18] As regards the second point *in limine*, the respondent contends that the court does not have jurisdiction to decide the application. To that point I turn now.

[19] The parties were privy to the network agreement. The dispute resolution provisions are embodied in clause 10 of the network agreement. It provides

"10.1 Should any dispute arise between the Parties in relation to this Agreement, the Parties shall first attempt to resolve the dispute by mediation. The dispute shall be referred to a senior representative of the Scheme and the Doctor who shall attempt to resolve the dispute within 14 (fourteen) days of giving notice of a dispute.

10.2 Should the Parties be unable to resolve the dispute within the above 14 (fourteen) days, such dispute shall then be referred to, and resolved by, arbitration and shall, unless otherwise agreed in writing by the Parties, be held in accordance with the rules of the Arbitration Foundation of South Africa.

10.3 Only after following the above process will the Parties be allowed to approach a court of competent jurisdiction to obtain further relief should a party wish to appeal the decision of the arbitrator."

[20] The respondent contends that the applicant was not supposed to have brought the dispute to this court, as the forum of first instance. The applicants contend that there was no need to follow the avenues of mediation and arbitration because, as the applicants say, there was no dispute as envisaged in clause 10. According to them, any arbitration proceedings would seriously retard the finalisation of the matter. A delay of six months, for instance, would financially prejudice them a great deal and ruine their medical practices. They cannot run their practise for such a long period if the respondent does not regularly pay them in the meantime as in the past.

[21] In **Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another** 2009 (6) BCLR 527 (CC) the court held:

> "The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters."

It was not the case of the applicants that they did not voluntarily made a choice to have any dispute resolved in accordance with the all-inclusive clause 10. They also did not contend that they had mutually determined to exclude the matter from the provisions of the change.

[22] It follows from the above authoritative decision, that an arbitration clause is a binding clause. It cannot be circumvented for flimsy reasons. In view of its binding force, any party who unilaterally disregards the domestic arbitration forum and rushes out to initiate court proceedings, does so at his or her own peril.

[23] The onus is on the party resisting referral of the dispute to a private arbitrator to show good cause why the dispute should not be referred to a private arbitrator for resolution on the arbitration forum in terms of the agreement. The onus is a heavy one and the discretion of a court to refuse arbitration has to be judicially and sparingly exercised, "and only when a very strong case has been

made out" See **Universiteit van Stellenbosch v JA Louw (Edms) Bpk** 1983 (4) SA 321 (A) at 334A.

[24] In their founding affidavit, the applicants have advanced no argument to show why the current dispute was not referred to arbitration in accordance with the mutual choice made by the parties to have the dispute privately resolved by an arbitrator.

During the cause of argument, counsel for the applicants, timidly argued that there was no real dispute to be referred to private arbitration. I was not impressed. The mere fact that the parties differed as to whether clause 10 was applicable or not was, in itself a dispute that triggered the invocation of the arbitration procedure.

[25] The parties, in their wisdom, freely decided that disputes between them should be resolved by way of private arbitration. There was no dispute excempted from private arbitration. Arbitration was the preferred choice of the parties for the resolution of their disputes. There are no special circumstances to justify the circumvention of the dispute resolution mechanism agreed upon. In my view no sound reason was given and I could find no good cause as to why such mechanism should not be respected and implemented.

[26] In the circumstances I am inclined to sustain the objection that the court on whose bench I am sitting lacks jurisdiction to adjudicate the matter. It being the conclusion I have reached, the application falls to be struck off the roll with costs. In view of this conclusion, it becomes unnecessary to deal with the first point *in limine* being the preliminary point relative to the question of urgency.

[27] Accordingly I make the following order:

27.1 The application is struck off.

27.2 The applicants pay the costs.

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MH RAMPAI, J

On behalf of applicants:	Adv WJ Groenewald
Instructed by:	Matsepes Inc Bloemfontein
On behalf of respondent:	Adv PL Uys
Instructed by:	Geldenhuys Malatsi Inc Johannesburg Honey Attorneys Bloemfontein