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

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

29/1/2007
DATE SIGNATURE

Case No: **18545 / 06**
Date heard: **01 / 12 / 2006**
Date of judgment: **30 / 01 / 2007**

In the matter between:

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| **THE REGISTRAR OF MEDICAL SCHEMES** | Applicant |
| and | |
| **LAZARUS MPANANA LEDWABA N.O.** | 1ST Respondent |
| **ALTA VAN WYK N.O.** | 2ND Respondent |
| **KWAZULU-NATAL MEDICAL SCHEME** | 3RD Respondent |
| **THE MASTER OF THE HIGH COURT** | 4TH Respondent |

## JUDGMENT

**DU PLESSIS J:**

In terms of section 30(1)(e) of the **Medical Schemes Act, 131 of 1998** ("the MSA"), the rules of a medical scheme may provide that members of such a scheme be allocated personal medical savings accounts. The purpose of such a personal medical savings account is to provide a facility for members to set aside funds with which to meet healthcare costs not covered in terms of the scheme's

benefits. Members pay an agreed monthly amount into their respective personal medical savings accounts.

Omnihealth Medical Aid Scheme is a medical scheme registered under the MSA. Its rules provide for the establishment by its members of personal medical savings accounts and most of its members have such accounts. On 29 November 2005 Omnihealth was placed under liquidation. The issue in this application is whether the amounts standing to the credit of members in their personal medical savings accounts constitute an asset of Omnihealth and thus fall into the scheme's insolvent estate.

The applicant, the Registrar of Medical Schemes, contend that the amounts standing to the credit of members in their personal medical savings accounts constitute trust money and that the money does not form part of Omnihealth's insolvent estate. Most of the members who have a personal medical savings account ("PMSA") have on 1 November 2005 become members of KwaZulu-Natal Medical Scheme, the third respondent in this application. The applicant contends that the amounts standing to the credit of those members in their PMSA's must be transferred to the third respondent[1]. (The third respondent was cited for its interest in the application but took no part therein.) Some of Omnihealth's members did not join another medical scheme. In respect of those

[1] Paragraph 8 of Appendix 1 to Omnihealth's rules provides that, should a member be transferred to the membership of another medical scheme that provides for a PMSA, "the balance due to the member must be transferred" to such other scheme within a specified time.

members the applicant contends that the amounts standing to their credit in their PMSA's must be paid out to them[2].

When Omnihealth was liquidated, the Master of the High Court, the fourth respondent, appointed the first and second respondents as the joint liquidators. The Master did not participate in these proceedings. The first and second respondents ("the liquidators") deny that the amounts standing the credit of members in their PMSA's constitute trust money. In any event, the liquidators point out, Omnihealth did not keep the PMSA-money separate from other money at its disposal. It conducted six banking accounts into which it deposited all the money at its disposal without differentiating between PMSA-funds and other funds. Thus, so the liquidators contend, the PMSA-money became the property of the banks in question and upon withdrawal thereof will be the property of the insolvent estate. The members, so the liquidators contend, have no more than concurrent claims for the credit balances in the PMSA's

**Do the credit balances in the PMSA's constitute trust property?**

Being a medical scheme as contemplated in section 1 of the MSA, Omnihealth is also a "financial institution" as defined in section 1 of the **Financial Institutions (Protection of Funds) Act, 28 of 2001** ("the FI Act"). Section 1 of the FI Act defines "trust property" as:

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[2] Paragraph 7 of Appendix 1 to the rules provides that the balance of a PMSA must within a specified time be "refunded" to a member who has terminated membership.

> "any corporeal or incorporeal, movable or immovable asset invested, held, kept in safe custody, controlled, administered or alienated by any person, partnership, company or trust for, or on behalf of, another person, partnership, company or trust, and such other person, partnership, company or trust is hereinafter referred to as the principal".

A registered medical scheme is a body corporate (section 26(1)(a) of the MSA). In terms of section 32 of the MSA, the rules of a medical scheme are binding on the scheme and on its members. The rules constitute the agreement between the scheme and its members (**Joubert *et al*, The Law of South Africa (2nd ed.) Vol. 1,** para. 620).

Omnihealth's rules constitute the written instrument (agreement) under which the scheme received, kept and administered members' PMSA-funds (see, again, section 30(1)(e) of the MSA). Rule 13.5 reads as follows:

> "The balance standing to the credit of a member in terms of an option which provides for personal medical savings accounts shall at all times remain the property of the member."

Appendix 1 to the rules specifically deals with personal medical savings accounts. Paragraph 4 thereof provides that funds "allocated to the member's PMSA shall be available for the exclusive benefit of the member and his/her dependants. Any credit balance in the PMSA at the end of a financial year accumulates for the benefit of the member". In terms of paragraphs 7 and 8 of

Appendix 1, amounts standing to the credit of a member must respectively be refunded to the member when his or her membership is terminated or, when he or she joins another scheme with a PMSA-option, the amount standing to his or her credit must be paid over to the other scheme.

The quoted provisions of Omnihealth's rules leave no doubt that Omnihealth, in the words of the FI Act's definition of "trust property", invested, held, kept in safe custody, controlled (or) administered" the PMSA-funds "for, or on behalf of, another person", namely the relevant member.

The Regulations promulgated under the MSA also leave no doubt that PMSA-funds constitute trust property. Thus, regulation 10(3) of the Regulations promulgated under the MSA provides:

> "Funds deposited in a member's personal medical savings account shall be made available for the exclusive benefit of the member and his or her dependants but not be used to off-set contributions, provided that the medical scheme may use funds in a member's personal medical savings account to off-set debt owed by the member to the medical scheme following that member's termination of membership of the medical scheme."

Regulation 10(4) and (5) provide in terms similar to paragraphs 7 and 8 of Appendix 1 to the rules that credit balances must be paid over to the member on

termination of membership or to another medical scheme if the member joins one with a PMSA-option.

Mr Terblanche, who appeared for the liquidators, contended that if regard is had to the provisions of section 35(9)(c) of the MSA, PMSA-funds couldn't be trust property as defined in the FI Act. Section 35 deals with the financial arrangements of medical schemes, including the minimum assets that such schemes must hold. Section 35(9) provides as follows:

"(9) For the purposes of this Act, the liabilities of a medical scheme shall include—

(a) the amount which the medical scheme estimates will be payable in respect of claims which have been submitted and assessed but not yet paid;

(b) the amount which the medical scheme estimates will become payable in respect of claims which have been incurred but not yet submitted; and

(c) the amount standing to the credit of a member's personal savings account."

Counsel argued as follows: In terms of section 35(9)(c) the amount standing to the credit of a member's personal savings account is a liability of the scheme. From that it follows, the argument went on, that the PMSA-funds must be an asset of the scheme. Counsel sought to underpin the argument by

submitting that, from an accounting point of view, the records of the scheme cannot show the liability without also showing a concomitant asset.

I shall return to the accounting perspective. In law it does not follow, because the amount standing to the credit of a member's personal savings account is regarded as a liability, that the PMSA-funds must be an asset of the scheme. When a trust-creditor hands trust money to the trustee, the former immediately becomes a creditor of the trustee for the amount held in trust. That is so regardless of whether the trustee keeps the trust money in a separate account and does not become the owner thereof (**Fuhri v Geyser NO and Another 1979 (1) SA 747 (NPD)** particularly at p. 749A to 750A).

As regards the argument from an accounting perspective, I am not qualified to express a view as to how the provisions of section 35(9)(c) should be dealt with in the scheme's accounting records[3]. It is sufficient to make two observations. Firstly, accounting records must reflect to the true financial position. Difficulties from an accounting perspective (if such exist in this case) cannot alter the substantive law. Secondly, as Mr Brett for the applicant pointed out, paragraphs (a) and (b) of section 35(9) require items to be regarded as liabilities for purposes of the MSA although they might not ordinarily be reflected as such in accounting records. Even if the argument that trust debts are not ordinarily regarded as liabilities were correct, then such debts are, as the other

[3] The answer probably lies in the provisions of section 4(4) of the FI Act.

items referred to in section 35(9), in terms of section 35(9)(c) regarded as liabilities for purposes of the MSA. That does not mean that for all purposes the nature of a trust debt is altered.

It is concluded that the credit balances in the PMSA's constitute trust property.

**Do the PMSA-funds form part of the Omnihealth's assets?**

Section 4(5) of the FI Act provides:

"Despite anything to the contrary in any law or the common law, trust property invested, held, kept in safe custody, controlled or administered by a financial institution or a nominee company under no circumstances forms part of the assets or funds of the financial institution or such nominee company."

Counsel for the liquidators submitted that, despite this unequivocal provision, the MSA-funds nevertheless fall into Omnihealth's insolvent estate. He developed the argument as follows: Section 4(4) of the FI Act requires of a financial institution to keep trust property separate from its own assets[4]. Omnihealth did not comply with this provision and deposited all funds, including PMSA-funds into six banking accounts without distinguishing between trust funds

[4] Section 4(4) reads as follows: "A financial institution must keep trust property separate from assets belonging to that institution, and must in its books of account clearly indicate the trust property as being property belonging to a specified principal".

and other funds. Accordingly, the PMSA-funds became the property of the relevant banks (**Louw NO and Others v Coetzee and Others 2003 (3) SA 329 (SCA)** at para. 12). The PMSA-funds have thus lost its identity as such.

It is correct that the relevant banks became the owners of the PMSA-funds when the funds were deposited with them. That would have been the position even if the funds had properly been invested in a separate banking account (See the **Louw**-judgment). The fact that the relevant banks are the owners of the PMSA-funds does not mean, however, that, if the funds are withdrawn, Omnihealth somehow becomes the owner thereof. I need not decide whether Omnihealth remained a trustee of the PMSA-funds when it was liquidated. At best for the liquidators the only right they derived from Omnihealth *vis-à-vis* the PMSA-funds is to withdraw it from the bank. Upon doing so, the insolvent estate does not become the owner of the funds, but may only deal with it in accordance with the agreement in terms whereof Omnihealth received the money, that is Omnihealth's rules (See **McEwen, N.O. v Hansa 1968 (1) SA 465 (AD)**, specifically at 471B to 472F). In short, the liquidators do not have propriety rights that Omnihealth never had and could not attain.

I must point out that, although the PMSA-funds were not kept separately, Omnihealth's accounting records clearly show the credit balance standing to the PMSA of each relevant member. Therefore, it is possible to determine exactly

what amount is to be paid over to each member or to the third respondent in respect of each member as the case may be.

It is concluded that the PMSA-funds do not form part of Omnihealth's assets and do not fall into its insolvent estate.

The relief that the applicant sought in its notice of motion is rather wide. Mr Brett accepted that the applicant is not entitled to more than a declaratory order in terms of prayer 1.1 and orders in terms of prayers 2 and 3 of the notice of motion. As regards costs, counsel were agreed that the costs of two counsel should be allowed. Although the applicant initially sought a costs order on the scale as between attorney and own client, I do not regard the liquidators' opposition as unreasonable. They acted in the interests of creditors of the insolvent estate as they saw it. I do not find a basis for awarding costs on a punitive scale.

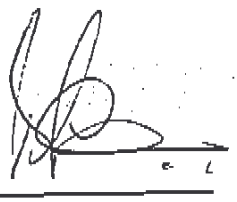
**The following order is made:**

1. It is declared that the funds standing to the credit of the personal medical savings accounts of the erstwhile members of Omnihealth Medical Aid Scheme constitute trust money as defined in section 1 of the Financial Institutions (Protection of Funds) Act, 28 of 2001 read with regulation 10 of the Regulations promulgated under the Medical Schemes Act, 131 of 1998.

2. The first and second respondents are directed forthwith to pay to the third respondent such portion of the personal medical savings account funds, including interest that has accrued thereon, as pertains to the erstwhile members of Omnihealth Medical Aid Scheme who became members of the third respondent on 1 November 2005.

3. The first and second respondents are directed forthwith to pay to erstwhile members of Omnihealth Medical Scheme who did not become members of the third respondent on 1 November 2005, such portion of the personal medical savings account funds, including interest that has accrued thereon, as pertains to such erstwhile members and in the event of the first and second respondents being unable to locate any such erstwhile members within 60 days of the grant of this order, the first and second respondents are directed to pay funds pertaining to such members as are not located into the Guardian's Fund to be administered thereunder.

4. The first and second respondents are ordered to pay the applicant's costs which costs shall include the costs of two counsel.



**B. R. DU PLESSIS**

*Judge of the High Court*

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