



THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

Government Employees Medical Scheme and Another v The Public Protector of the Republic of South Africa and Others (1000/2019 and 31514/2018 and 33401/2018) [2020] ZASCA 111 (29 September 2020)

From: The Registrar, Supreme Court of Appeal

Date: 29 August 2020

Status: Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today, the Supreme Court of Appeal (SCA) upheld an appeal against an order of the Gauteng Division of the High Court, Pretoria (the high court) granted in favour of the respondent, the Public Protector of the Republic of South Africa.

The appeal arose for consideration against the following backdrop: The first appellant, is the Government Employees Medical Scheme (GEMS), registered in terms of the Medical Schemes Act 131 of 1998 (the MSA). The second respondent is Mr Ngwato, who sought to be recognised by GEMS as a 'beneficiary' of his deceased spouse. GEMS took the view that Mr Ngwato did not qualify pursuant to GEMS' Rules (the Rules). Aggrieved by GEMS' refusal, Mr Ngwato lodged a complaint in terms of s 47 of the MSA with the Registrar of Medical Schemes (the Registrar). In the meanwhile, following a policy change by GEMS, the rule disqualifying Mr Ngwato had fallen away and Mr Ngwato was furnished with a membership certificate. However, he also contended that he was eligible for a Government Pensions Administration Agency (GPAA) subsidy. The Registrar of Medical Schemes ruled against him. Mr Ngwato then appealed to the Council for Medical Schemes (the Council) in terms of s 48 of the MSA. The Council dismissed his appeal. In terms of s 50 of the MSA, Mr Ngwato had the right of a further appeal to the Appeal Board of the Council. Instead, he lodged a complaint with the Public Protector. GEMS asserted that the Public Protector lacked jurisdiction to investigate Mr Ngwato's complaint. The Public Protector took the view that she was empowered by the Constitution and the Public Protector Act (PPA) to investigate the complaint.

GEMS applied to the high court for an order (the main application) declaring that the Public Protector did not have the statutory authority and/or jurisdiction to pursue the investigation. Whilst that application was pending, the Public Protector issued two subpoenas that were served on the third appellant, Mr Kruger, the legal advisor of GEMS and the second appellant, Dr Guvant Goolab, the Principal Officer of GEMS. The subpoenas required them to appear in person before the Public Protector. The attorney of record for GEMS addressed a letter to the Public Protector seeking an

undertaking that the hearings will be stayed pending finalisation of the main application. The response was to insist on compliance with the subpoena on pain of criminal sanction. Mr Kruger and Dr Goolab felt compelled to approach the high court as a matter of urgency (the urgent application) to be joined as parties to the litigation and for the subpoenas to be suspended pending finalisation of the main application. The Public Protector filed a notice of intention to oppose the urgent application, but failed to file an answering affidavit. The urgent application succeeded before Davis J. Both the main and urgent applications subsequently served before Kubushi J, who dismissed the main application, set aside the order suspending the subpoenas and ordered the costs of both the main and urgent applications to be paid by GEMS, Dr Goolab and Mr Kruger (collectively referred to as the appellants).

The argument on appeal was confined to ss 6(4)(a)(ii), 6(4)(a)(v) and 6(5)(b) of the PPA, which, so it was contended, empowered the Public Protector to investigate Mr Ngwato's complaint. The SCA was not persuaded by the reasons advanced on behalf of the Public Protector as to why it was thought necessary to investigate the complaint. The SCA held that it is manifest that the Public Protector's stubborn and irrational insistence on continuing with her investigation could hold no benefit for the public at large, or for that matter even Mr Ngwato himself. The complaint, which was an isolated one, had in any event become moot. The SCA reasoned that the business of a medical scheme does not appear to encompass the performance of a public or government function or the exercise of a public power. The SCA held that the Public Protector did not have the statutory power to investigate the complaint and that the main application ought to have succeeded before the high court. The SCA emphasised that the Public Protector cannot lawfully embark on an investigation that does not fall within her statutory remit as such an investigation would be unlawful.

The Public Protector appeared not to appreciate the extent to which the appellants' constitutional rights were being affected. The SCA stated that where subpoena powers are granted to a body other than a court, the power should be interpreted restrictively and that the Public Protector's power of subpoena is dependent upon the existence of a valid complaint as contemplated in sections 6(4) and (5) of the PPA. The SCA reasoned that the Public Protector had misconceived her powers in both investigating the complaint and issuing the subpoenas. It was considered by the SCA that the office of the Public Protector falls into the category of a public litigant, upon whom a higher duty is imposed to respect the law. The SCA stated that insisting on compliance with the subpoenas whilst the question of her jurisdiction remained to be determined by the high court, leaves one with the impression that the subpoenas were intended to cow the appellants into submission. And, that there is much to be said for the appellants' argument that for so long as the jurisdiction of the Public Protector remained to be settled by the court in the main application, the coercive subpoena power was invoked in bad faith or with an ulterior purpose or in a manner that abuses the power to subpoena.

In the result, the appeal was upheld. The order of the high court was set aside and replaced by an order: (i) declaring that the Public Protector is not empowered by sections 6(4) or (5) of the PPA to investigate Mr Ngwato's complaint; and, (ii) confirming the interim order setting aside the subpoenas.

The Public Protector was also ordered to pay costs of two counsel in both the high court and on appeal.