



IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
(REPUBLIC OF SOUTH AFRICA)

Case number: 70018/10  
Date: ~~7~~ November 2011

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|-----------------------------------------|--------------------|
| DELETE WHICHEVER IS NOT APPLICABLE      |                    |
| (1) REPORTABLE: YES/NO                  |                    |
| (2) OF INTEREST TO OTHER JUDGES: YES/NO |                    |
| (3) REVISED                             |                    |
| 2/11/2011                               | <i>[Signature]</i> |
| DATE                                    | SIGNATURE          |

In the matter between:

**THE BOARD OF HEALTH CARE FUNDERS OF THE** First Applicant  
**SOUTHERN AFRICA (ASSOCIATION INCORPORATED**  
**UNDER SECTION 21 OF THE COMPANIES ACT, 61 OF 1973)**

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

and

**THE COUNCIL FOR MEDICAL SCHEMES** First Respondent

**THE MINISTER OF HEALTH** Second Respondent

**SOUTH AFRICAN PRIVATE PRACTITIONERS FORUM** Third Respondent

**PHARMACEUTICAL SOCIETY OF SOUTH AFRICA** Fourth Respondent

**UNITED SOUTH AFRICAN PHARMACIES** Fifth Respondent

**MEDI-CLINIC SOUTHERN AFRICA LTD** Sixth Respondent

**HOSPITAL ASSOCIATION OF SOUTH AFRICA LTD** Seventh Respondent

**ER24 EMS (PTY) LTD** Eighth Respondent

**NATIONAL RENAL CARE (PTY) LTD** Ninth Respondent

**PHARMAPLAN (PTY) LTD** Tenth Respondent

**B.BRAUN ATIVUM (PTY) LTD** Eleventh Respondent

MULTIPLE SCLEROSIS SOUTH AFRICA  
SOUTH AFRICAN MEDICAL ASSOCIATION

Twelfth  
Thirteenth

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JUDGMENT

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Pretorius J

- [1] The applicant filed and served an amended notice of motion and supplementary affidavit after initially approaching the court on 1 December 2010 on an urgent basis. The matter was removed from the roll by agreement between all the parties on 1 December 2010 and the costs were reserved. Currently the applicants request the court to issue a declaratory order on the interpretation of the words "pay in full" in regulation 8(1) of the General Regulations made pursuant to the Medical Schemes Act, 131 of 1998 (the "Act"). The requests by all the parties to intervene as interested parties were granted by the court as it was clear that they are all role players in the medical industry and have a direct and substantial interest in the litigation.
- [2] Two *amici curiae* also filed and served papers. From the outset the applicants contended that all parties who wanted to intervene should be permitted to do so to assist the court to come to a just decision. All parties were joined without opposition from the applicants and, in the case of the *amici curiae*, without opposition from either the applicants or the respondents.

[3] SAMWUMED, the second applicant, was granted an order to intervene in an application dated 4 April 2011 – four months after the initial application was launched. The second applicant makes common cause with the first applicant.

[4] The second respondent has not filed any opposing affidavit and was not represented in the proceedings on 1 December 2010 or in the present proceedings. This court regards it as a neutral factor and will not make any deductions from this in favour of or to the prejudice of any of the applicants or respondents.

[5] Thirteen respondents filed and served papers opposing the application and were represented in court, joined by Counsel for the *amicus curiae*.

[6] The applicants contended that the court has to decide three issues:

1. The first applicant's entitlement to institute proceedings for declaratory relief;
2. The interest and *locus standi* of the intervening respondents in opposing the relief sought by the applicants;
3. The meaning of the words "pay in full" in regulation 8(1) of the General Regulations which were promulgated in terms of section 67 of the Act.

[7] The first respondent, supported by the other respondents, raised three points *in limine*. The court decided to hear the application in its entirety and to deal

with all the points *in limine* and if necessary, the question of law and factual questions in the judgment.

[8] Subsequent to the matter being heard on 22 and 23 September 2011, and judgment being reserved, counsel for the applicants applied to have the recent judgment of the Supreme Court of Appeal in **Registrar of Medical Schemes and Another v Suremed Medical Scheme (201/11) [2011] ZASCA 173 (29 September 2011)** to be submitted and considered by the court. All the respondents indicated that it should not be received by the court as it is irrelevant to the issue in the present matter.

[9] The court decided to accept the authority and to consider it. It was submitted to court, with the letters of the respondents' attorneys attached as well as the comment by the attorneys for the *amici curiae*. A note was sent to all parties and they were invited to comment.

[10] The applicants however did not only place the case before the court, but made submissions as to why the court should consider it. The case dealt with the amalgamation of medical schemes and the Supreme Court of Appeal confirmed the judgment of the court *a quo* that no amalgamation or transfer can take place without an agreement between the parties, that is the medical aid schemes, concerned. I was requested to take particular cognizance of paragraph 17 of the judgment.

[11] The first respondent responded and once more reiterated that the case is irrelevant and deals with section 63 (11) and regulation 7 and has no relation to the interpretation of regulation 8.

[12] The first respondent was joined in this by the third, fourth, fifth, seventh, eighth and ninth respondents who also indicated to the court that the decision was irrelevant to the present proceedings for the same reasons.

Background:

[13] Regulation 8 has been in force since 1 January 2000. The current problem was caused on 11 November 2008, according to the applicant, when the Appeal Board decided two cases on appeal which was referred by the Appeal Committee in terms of section 50 of the Act (Kara – and Samwumed matters). The Appeal Committee and the Appeal Board had pursuant to these two decisions interpreted the words “pay in full” in regulation 8 to mean that the medical scheme must make full payment of a service providers’ invoice in respect of the costs of providing health care services for Prescribed Minimum Benefits (PMB) without taking the rules of the medical scheme into consideration in any complaints they dealt with.

[14] The definition of PMB’s is:

*“Prescribed minimum benefits’ means the benefits contemplated in section 29(1)(o) of the Act, and consist of the provision of the diagnosis, treatment and care costs of-*

- (a) *The Diagnosis and Treatment Pairs listed in Annexure A, subject to any limitations specified in Annexure A; and*
- (b) *Any emergency condition."*

[15] Section 29(1)(o) of the Medical Schemes Act provides:

*"29 Matters for which rules shall provide*

*(1) The Registrar shall not register a medical scheme under section 24, and no medical scheme shall carry on any business, unless provision is made in its rules for the following matters:*

*...*

*(o) The scope and level of minimum benefits that are to be available to beneficiaries as may be prescribed."*

[16] Section 7 of the Medical Schemes Act sets out the functions of the first respondent as follows:

*"7 Functions of Council*

*(1) The functions of the Council shall be to-*

*(a) protect the interests of the beneficiaries at all times;*

*(b) control and co-ordinate the functioning of medical schemes in a manner that is complementary with the national health policy;*

*(c) make recommendations to the Minister on criteria for the measurement of quality and outcomes of the relevant health services provided for by medical schemes, and such other services as the Council may from time to time determine;*

***(d) investigate complaints and settle disputes in relation to the affairs of medical schemes as provided for in this Act;***

*(e) collect and disseminate information about private health care;*

*(f) make rules, not inconsistent with the provisions of this Act for the purpose of the performance of its functions and the exercise of its powers;*

*(g) advise the Minister on any matter concerning medical schemes; and*

*(h) perform any other functions conferred on the Council by the Minister or by this Act.” (Court’s emphasis)*

[17] After these two decisions, the Kara- and Samwumed decisions were decided Dr Pearmain, an employee of the applicant, distributed an opinion in July 2009 in which she set out her reasons for her finding that “pay in full” in terms of regulation 8(1) means payment according to the rules of the medical scheme.

- [18] The Kara- and Samwumed decisions by the Appeal Board were not challenged according to the first respondent and presently medical aid schemes are bound to this authority, and have to pay in full according to service providers' invoices.
- [19] A month later, on 28 August 2009 the first respondent issued circular 24/2009 which declared that the council was bound by the decisions in the Kara - and **Samwumed** matters and that "pay in full" means payment according to the service providers' invoice.
- [20] Circular 37 of 2009 was issued on 15 December 2009 which noted that not all medical schemes were making full payment per the service provider's invoice in respect of PMB conditions. The medical schemes were advised to comply with the Act and the regulations to avoid incurring penalties for non-compliance.
- [21] On 25 February 2009 Circular 9 of 2010 was issued to note the willingness of stakeholders to collaborate with the first respondent to improve compliance with the Act and the Regulations to ensure delivery of PMB's in a sustainable manner. A PMB task team was thereafter established to set down a **framework** to achieve full compliance by all stakeholders in respect of the costs of PMB conditions.



[22] On 31 July 2010 the PMB task team produced a "Code of Conduct in respect of PMB benefits." The task team was to remain in existence after producing the Code of Conduct as it could not reach consensus *inter alia* as to the meaning of regulation 8(1) and the meaning of what "pay in full" means in said regulation 8(1). The PMB task team was to advise "on possible amendments to the PMB regulations."

[23] The applicants contend that "pay in full" should mean "pay in full according to the rules of the medical scheme" and not "pay in full as per invoice."

First point *in limine*:

Non-joinder of the Medical Schemes:

[24] The first respondent raised as a first point *in limine* that all the medical schemes that are registered in terms of the Act would be directly affected by this court's judgment and should have been joined.

[25] As the three points *in limine* are interrelated and intertwined the court will deal with each point and make a ruling as to whether the first applicant has *locus standi* or a legal interest or whether section 19(1)(a)(iii) of the Supreme Court Act is applicable to grant the first applicant *locus standi*. I will also consider whether section 38 of the Constitution is applicable as the applicants' submit in their heads of argument.

[26] The first respondent submitted that the non-joinder of all the medical schemes renders the application fatally defective. The applicants' argument in this regard is that the first respondent represents all the registered medical schemes and therefore it was not necessary to join all the registered medical schemes. This submission cannot be entertained as it was the applicants' duty to join all the interested parties who would be affected by the court's decision. The first respondent is a representative of the Medical Schemes and will not be directly influenced by a judgment of this court. The court has to agree that all medical schemes should have been joined as the judgment will have a direct impact on all the medical aid schemes.

The lack of *locus standi*:

[27] The applicants rely on **Ex parte Nell 1963 (1) 754 AD** as authority to prove *locus standi*. A declaratory order was sought in terms of section 19(1)(c) of Act 59 of 1959 and Steyn CJ held at p 758 H:

*"Die vereiste wat die wetgewer uitdruklik vir die verleende diskresionêre bevoegdheid stel, is 'n **bestaande, toekomstige of voorwaardelike reg of verpligting, en 'n belanghebbende aansoeker** wat verlang dat die reg of verpligting ondersoek en bepaal word."* (Court's emphasis)

and at p 760:

*"Omdat dit nie die funksie van Hof is om adviserend op te tree nie, en dit nouliks die bedoeling van die Wetgewer kon gewees het om met hierdie bepaling daarin 'n verandering aan te bring, **moet wel as***

*vereiste gestel word dat daar belanghebbendes is vir wie die verklarende bevel bindend sal wees.*" (Court's emphasis)

[28] The first Applicant alleged that it is:

*"...the major representative organization of medical schemes registered in terms of the Act and also represents medical scheme administrators; BHF **"represents 75 medical schemes and 7 medical scheme administrators"***

and:

*"...main objective is to engage with government and other organisations in order to contribute to the formulation of policy, where necessary, on behalf of the entire medical scheme industry."*

and:

*"...as it is a **representative organization of medical schemes and provides guidance to the medical scheme and administrators with regard to statutory enactments, the obligation as well as the right of medical schemes and the prevailing health policy.**"* (Court's emphasis)

[29] According to the applicants they represent 75 medical aid schemes and seven medical administrators. Apart from these allegations the applicants further maintain that certain medical schemes and administrators have indicated their support for the application. The members' affidavits who support the application were annexed to the applicants' supplementary founding affidavit. The following medical schemes and administrators support the application

according to the affidavits and annexures: Medscheme Holdings (Pty) Ltd, Samwumed (2<sup>nd</sup> applicant), Fedhealth Medical Scheme, Compcare Wellness Medical Scheme, Goodhope Medical Aid Society, PG Bison Medical Aid Society, IBM (SA) Medical Scheme, Grintek Electronics Medical Aid Scheme, Building & Construction Industry Medical Aid Fund, Universal Healthcare Administrators (Pty) Ltd, Optimum Medical Scheme, LA- Health Medical Scheme, Umvuzo Health Medical Scheme, Sechaba Medical Solutions (Pty) Ltd, Sizwe Medical Fund, Topmed Medical Scheme.

- [30] The heading of the forms signed by representatives of abovementioned medical aid schemes and attached to the supplementary affidavit reads:

*"Membership Meeting 26<sup>th</sup> November 2010*

*I support the BHF seeking a declaratory order around regulation 8."*

- [31] Furthermore the applicants maintain that as the first applicant is such a prominent role player due to being on the first respondent's distribution list to receive circulars and as the first applicant was allowed to participate in the Prescribed Minimum Benefit task team that these facts confer *locus standi* the first applicant to launch this application on behalf of the medical aid schemes.

- [32] The main complaint by the first respondent, supported by the twelve other respondents, is that the first applicant has no direct and substantial interest as the judgment as such will not have an impact on the first applicant. Although the first applicant contends that it represents 75 registered medical aid

schemes, and therefore has *locus standi*, the court must find that this cannot be true. The first applicant saw fit to have the second applicant, who is a registered medical scheme, joined. Furthermore only 15 registered medical schemes, in the founding and supplementary founding affidavit, confirm that a declaratory order must be sought.

[33] Had the first applicant been so sure that it is representing all 73 medical aid schemes, then it begs the question as to why the second applicant had to be joined and why confirmation of the 15 members had been sought. If the first applicant represented all 75 members as submitted, it would not have been necessary to join the second applicant or to obtain affidavits and signatures of 15 members of the first applicant. The only conclusion the court can draw from these facts is that the first applicant does not represent 75 members, but only the 15 members mentioned in the papers.

[34] The first applicant further conceded that it does not represent all the medical aid schemes and medical aid administrators in South Africa. The first applicant's application is lacking in allegations and proof that it has any mandate to litigate on behalf of its' members. The affidavits and annexures do not grant the first applicant the mandate to litigate on their behalf. The affidavit attached to the supplementary founding affidavit by Mr. Andre Meyer on behalf of Medscheme is an example of the supporting affidavits which sets out:

"... it was considered appropriate that the Applicant, as a representative organisation acting on behalf of the majority of Medical Schemes of, inter alia, South Africa, should seek the relief sought in the application as the objective of **BHF is to engage with Government and other organizations to influence policy, where necessary, on behalf of the entire Medical Scheme's industry.**"

(Court's emphasis)

[35] In **Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O)** the Bench came to the conclusion that "a direct and substantial interest" is:

"... an interest in the right which is the subject-matter of the litigation and... **an interest not merely a financial interest which is only an indirect interest in such litigation.**" (Court's emphasis)

[36] In **Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A)** Botha AR found at p 534:

"In die omstandighede van die huidige saak is dit veral die vereiste van 'n direkte belang wat op die voorgrond staan. **Wat dit betref, is die beoordeling van die vraag of 'n litigant se belang by die geding kwalifiseer as 'n direkte belang, dan wel of dit te ver verwyderd is, altyd afhanklik van die besondere feite van elke afsonderlike geval, en geen vaste of algemeen geldende reëls kan neergeleë word vir die beantwoording van die vraag nie** (sien bv *Dalrymple and Others v Colonial Treasurer* 1910 TS 372 per Wessels R op 390 in

*fine, en vgl Director of Education, Transvaal v McCagie and Others 1918 AD 616 per Juta Wn AR op 627). Vorige beslissings kan behulp same algemene riglyne vir bepaalde soort gevalle aandui, maar meestal het dit weinig nut om die besondere feite van een geval te vergelyk met dié van 'n ander."* (Court's emphasis)

[37] In **United Watch & Diamond Co v Disa Hotels 1972 (4) SA 409 (C)** Corbett J held at p 415:

*"... it is generally accepted that **what is required is a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the Court.**"* (Court's emphasis)

[38] In **PE Bosman Transport Works Committee & Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 801 (TPD)** Eloff J found at 804 B – C:

*"It is well settled that, in order to justify its participation in a suit such as the present, **a party such as second applicant has to show that it has a direct and substantial interest in the subject-matter and outcome of the application.**"* (Court's emphasis)

[39] Corbett J in **United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C)** quoted with approval the view expressed in **Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O)** and then found at 415 H:

*"This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division... and it is **generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court** (See Henri Viljoen's case *supra* at 167)."* (Court's emphasis)

[40] The Act and Regulations refer to medical schemes in South Africa. It is clear that should the court decide the merits of the application and give a judgment it will impact on all medical schemes and not only have an impact on the second applicant and the fifteen medical schemes who purportedly support the application.

[41] The averments by the representatives of the medical schemes that the objective is to engage Government and other organizations to influence policy cannot confer *locus standi* on the first applicant and does not sustain this application.

[42] In **Milani & Another v South African Medical & Dental Council and Another 1990 (1) SA 899 (T)** the court endorsed the decision of the **Henry Viljoen** case (*supra*) and Eloff DJP found at 902H – 903A:

*"The applicants have to show a legal interest in the interpretation of the rule and its validity. Milani does not say, nor can he, that rule 9*



*impinges on his right to carry out his profession as he thinks fit. His right to associate with registered medical practitioners as he wishes is beyond question, and no one doubts the right of the board to request a registered medical practitioner to assume a teaching post in a Technicon, training persons for qualification in associated professions. The only persons who may, if these rights are exercised, fall foul of rule 9, are the medical practitioners involved. The rights which Milani and the board therefore wish the Court to enquire into are not their rights, but those of registered medical practitioners. **In a sense the present case is a representative suit. All that the applicants can really complain of is the practical consequences of a disciplinary regime which has no bearing on them but indirectly affects them.*** (Court's emphasis)

[43] The present case can be classified as a representative case, but not all the medical schemes are joined and it has not been launched as a representative case. Therefore the necessity for the first applicant to join the second applicant to cure the *locus standi* issue. In the **Milani case** the court found:

*"The fact that the applicants are in a practical sense affected by these rules does not give them adequate locus standi."*

[44] As far back as **SA Mutual Life Assurance Society v Durban City Council 1948(1) SA 1 (N)** it was already decided that a declarator cannot affect the rights of persons who had not been joined.

[45] It is clear that even the medical schemes regard the first applicant as a body which purpose is *“to engage with Government and other organisations to influence policy, where necessary.”* That can never give the first applicant *locus standi* as it is clear it is not the purpose of the first applicant. It has to engage with Government which means engagement with the second respondent who mandated the Regulations. The first applicant had a meeting with the second respondent on 18 October 2010 to try and resolve the interpretation of regulation 8, which has not been done up to now. No explanation is given as to why this course of action was not pursued.

[46] It is not enough for the first applicant to allege that it provides guidance to its members or that the first respondent regards the first applicant as a stakeholder and prominent role player by involving the first applicant in certain of its activities.

[47] The Act and Regulations have a binding force on the medical schemes and not on the first applicant. The first applicant will not be affected in any way by a declaratory order by this court, but may only have an indirect interest in the declaratory order as to the effect of the interpretation of regulation 8(1) will have on its' members.

[48] The first applicant argues that the jurisdictional requirements is that the applicant must be an interested person as found in the **Milani case (supra)**.

In **Asmal v Asmal & Others 1991 (4) SA 262 NPD** at 265 G-I Hugo J held:

*"A declarator requires some legitimate interest in the subject-matter. Section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959 provides that a declarator may be sought in respect of any existing, future or contingent right. **These rights must, however, it seems to me, attach to the applicant (plaintiff) and not be a declaration of someone else's rights, in this case the executors'.**" (Court's emphasis)*

[49] The first applicant did not allege that it has a legal interest in the subject matter of the present application which will be prejudicially affected by a judgment of this court. The court cannot find that the first applicant as representative of the medical schemes will be prejudicially affected by a judgment, but its' members may be prejudicially affected and should have instituted the application for a declaratory order.

Non – compliance with section 19(1)(a)(iii) of the Supreme Court Act, 59 of 1959:

[50] This section sets out:

*"(1) (a) A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of*

*which it may according to law take cognizance, and shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have power-*

...

*(iii) in its discretion, **and at the instance of any interested person**, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon determination."*

(Court's emphasis)

[51] In **Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd** 1933 AD 87 at 101 Wessels CJ held:

*"[B]y our law any person can bring an action to vindicate a right which he possesses (interesse) whatever that right may be and whether he suffers special damage or not, **provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have.**"* (Court's emphasis)

[52] The applicants have to demonstrate that they have an interest in existing, future or contingent rights. In **Lawson & Kirk (Pty) Ltd v Phil Morkel Ltd** 1953 (3) SA 324 AD Schreiner JA decided at p 332 D-E:

***"And unless there is a concrete dispute between parties who are before the Court, so that the declaratory order will provide a rule binding upon them, such an order cannot properly be granted under***

**the section"** (Court's emphasis)

[53] The first respondent alleges that the applicants are requesting the court to provide guidance as to the correct interpretation of Regulation 8(1). I must agree with the respondents that a court does not give legal advice. If the applicants seek a declaratory order on a question of law the party seeking the order must have a legal interest which will be prejudicially affected by a declaratory order made in terms of section 19 (1)(a)(iii) of the Supreme Court Act.

[54] In **Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others 2004 (4) SA 397 LCC** at par 8 Gildenhuys AJ held:

*"[8] In general, a declaratory order may be sought where there is a clear dispute or uncertainty about the validity or the effect of administrative action. The power of this Court to grant declaratory orders under the Restitution Act is subject to restrictions. The following are relevant to this case. **First, the application must be at the instance of a person who is 'interested' in the question of law which is at issue in the case. Secondly, all persons on whom the order will have a binding effect must be cited.** Lastly, the Court must, by exercising a discretion, be satisfied that it is desirable to grant the order. **The Court's discretion on whether or not to grant an order sets in only after the other requirements for such an order have been met.**"* (Court's emphasis)

and at par 9:

***[9] An 'interested person' entitled to apply for a declaratory order is a person who has a direct and real interest in the question of law enquired into. Corbett J (as he then was) stated in United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another in respect of a High Court's power to make a declaratory order:***

*'(I)t is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court . . .'*

***The legal interest enquired into must attach to the applicant itself. The Court will not make a declaration of someone else's interests.*** (Court's emphasis)

[55] According to the first applicant a dispute of long duration exists between the first applicant and the first respondent, the medical schemes and administrators that should be resolved by a declarator by the court. The Pearmain opinion cannot create a dispute between the first applicant, the medical schemes, the administrators and the first respondent.

[56] The first applicant interacted with the second respondent as to obtain clarity as to what "payment in full" means, but the second respondent has not decided on the issue and now the first applicant requests the court to decide the matter.

[57] Dr Pearmain, who is employed by the first applicant, expressed an opinion as to the meaning of “payment in full” pertaining to medical schemes, but that can never be seen to have created a dispute. Her opinion was requested by her employer and her opinion could not create a dispute between the applicants and the respondents.

[58] The contradiction by the first applicant as to whether a real dispute exists or not must be taken into consideration as well. The first applicant cannot have it both ways, either there is a real dispute or no dispute exists.

[59] The thirteenth respondent attacked the *locus standi* of the first applicant, arguing that the first applicant has an indirect or derivative interest in the application and not a direct legal interest. The fact that some of the applicant's members may suffer prejudice if payment is made in terms of Regulation 8, does not accord the applicant a legal interest in this application.

[60] If the court considers the wording of section 19(1)(a)(iii) of the Supreme Court Act, 59 of 1959 the court has to find that the first applicant does not have a real interest in the outcome of this application as no legal interest has been proved which can prejudicially affect the first applicant. It may affect the registered medical schemes, but that does not confer a legal interest on the first applicant representing only 15 of the medical aid schemes and seven medical scheme administrators. This point *in limine* must be upheld.

Section 38 of the Bill of Rights:

[61] The applicants only placed reliance on section 38 of the Bill of Rights of the Constitution in their heads of argument. No mention was made of the Constitution in any of the voluminous papers filed by the applicants that they will rely on the first respondent breaching their constitutional rights according to section 38 of the Constitution.

[62] Section 38 of the Constitution provides:

*"38. Enforcement of rights*

*Anyone listed in this section has the right to approach a competent court, **alleging that a right in the Bill of Rights has been infringed or threatened**, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -*

- a. anyone acting in their own interest;*
- b. anyone acting on behalf of another person who cannot act in their own name;*
- c. anyone acting as a member of, or in the interest of, a group or class of persons;*
- d. anyone acting in the public interest; and*



- e. *an association acting in the interest of its members.*" (Court's emphasis)

[63] The first applicant failed to allege in the founding papers that an infringement of a right in the Bill of Rights had taken place and even goes so far as to conclude

*"...[e]ven if it is advanced that there is currently no existing dispute between [BHF] and the [Council] pertaining to the interpretation of Regulation 8(1), the members of [BHF] and the [Council] pertaining to the interpretation of Regulation 8(1), the members of [BHF] are severely prejudiced by such interpretation as is given by the [Council]..."* (Court's emphasis)

It is quite clear that the first applicant is uncertain whether there is an existing dispute between the first applicant and the first respondent. Furthermore the first applicant is not requesting the court to declare Regulation 8 (1) null and void. There is thus no constitutional challenge, but a request for the court to issue a declaratory order as to the interpretation of the words in Regulation 8(1).

[64] The court was referred to **Coetzee v Comitis and Others 2001 (1) SA 1254 CPD**, as well as **Beukes v Transitional Local Council and Another 1996 (3) SA 467 (W)**, but it is clear that these authorities refer to Constitutional

challenges which the applicant conceded is not the case in this application and the court cannot follow them in the present circumstances.

[65] Although the applicants did not rely on section 38 of the Constitution in their founding papers, the court cannot ignore the fact that the Constitution has had an impact on the position of *locus standi* in common law.

[66] In **Ferreira v Levin (Supra)** Chaskalson P found in regard to genuine disputes in para 164:

*"[164] The objection to constitutional challenges brought by persons who have only a hypothetical or academic interest in the outcome of the litigation is referred to in Zantsi v Council of State, Ciskei, and Others. The principal reasons for this objection are that in an adversarial system decisions are best made when there is a genuine dispute in which each party has an interest to protect. There is moreover the need to conserve scarce judicial resources and to apply them to real and not hypothetical disputes. The United States Courts also have regard to 'the proper role of the Courts in a democratic society' which is to settle concrete disputes, and to the need to prevent Courts from being drawn into unnecessary conflict with co-ordinate branches of government."* (Court's emphasis)

[67] In **Ferreira v Levin NO 1996 (1) SA 984 CC** O'Regan J explained in para 229:

*"[229] There can be little doubt that s 7(4) provides for a generous and expanded approach to standing in the constitutional context. The categories of persons who are granted standing to seek relief are far broader than our common law has ever permitted. In this respect, I agree with Chaskalson P (at paras [165]-[166]). This expanded approach to standing is quite appropriate for constitutional litigation.*

[68] The first applicant concedes that it does not explicitly aver the infringement of a right in the Bill of Rights. The declaration by the first applicant that it is a **dispute** in terms of section 34 of the Bill of Rights is in contrast to the averment that "there is currently no existing dispute between BHF and the Council pertaining to the interpretation of Regulation 8(1)" The applicants do not request the court to declare Regulation 8(1) null and void. The court finds that section 38 of the Constitution is not applicable and the applicants cannot rely on it.

The *locus standi* of the second applicant:

[69] The fact that the second applicant has been joined cannot confer *locus standi* on the first applicant.

[70] The first applicant set out the legal position in its' heads of argument:

*"If an applicant for certain relief has no locus standi to claim that relief, then an application by a third party to intervene as a co-applicant cannot succeed because Rule 10(1) contemplates that persons joined in an action should each have a claim and that the right to relief of the person proposing to join depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted would arise on each action."*

[71] If the court finds the first applicant has no *locus standi*, then the result is that the second applicant has no *locus standi* and cannot succeed in the application on its own, as none of the other medical aid schemes or administrators have been joined.

[72] The court finds that for the reasons set out above regarding the three points *in limine* and the fact that the court finds section 38 of the Constitution not applicable that the first applicant and therefore the second applicant does not have *locus standi* in this application.

[73] An application to strike out certain paragraphs in the first applicant's replying affidavit dated 4 April 2011. Due to the court's finding in regard to the three points *in limine*, it is not necessary to deal with this application.

[74] The same applies to the decision of **Registrar of Medical Schemes and Another v Suremed Medical (*supra*)**

[75] The court deems it unnecessary to decide whether this case is relevant, having regard to the court's findings on *locus standi*.

Costs:

[76] The application was initially before court on 1 December 2010 on a semi-urgent basis. It was removed from the roll and costs reserved by agreement between the parties. The only parties not requesting costs at this stage are the *amicus curiae*.

[77] The rule is that costs should follow the result and I cannot find any reason why it should not apply in this instance and why the reserved costs of 1 December 2010 should not form part of the costs order granted in the present application.

[78] The following order is made:

1. The application is dismissed with costs;
2. The applicant to pay:
  - 2.1 The costs of the first respondent, including:
    - 2.1.1 the costs of 1 December 2010;
    - 2.1.2 the costs of two counsel;
  - 2.2 The costs of the third, fourth and fifth respondents, including the costs of two counsel including:

- 2.2.1 the costs of the application for leave to intervene and including the costs of two counsel;
- 2.2.2 the costs of one counsel relating to the proceedings relating to part A of the application;
- 2.3 The costs of the sixth respondent including:
  - 2.3.1 the costs of 1 December 2010;
  - 2.3.2 the costs of two counsel;
- 2.4 The costs of the seventh, eighth and ninth respondent:
  - 2.4.1 the costs of 1 December 2010;
  - 2.4.2 including the costs of two counsel;
- 2.5 The costs of the tenth, eleventh, twelfth respondents including:
  - 2.5.1 the cost of two counsel and;
  - 2.5.2 including the costs of the application to intervene and
  - 2.5.3 including the costs of 1 December 2010;
- 2.6 The costs of the thirteenth respondent including the costs of 1 December 2010.



C PRETORIUS  
JUDGE OF THE HIGH COURT

Case number : 70018/2010  
Date of case : 22 September 2011

|                                                                                |                                     |
|--------------------------------------------------------------------------------|-------------------------------------|
| Counsel for Applicant                                                          | : Adv S Joubert SC                  |
|                                                                                | : Adv I Ellis                       |
| Attorney for Applicant                                                         | : Friedland Hart Solomon & Nicolson |
| Counsel for 1 <sup>st</sup> Respondent                                         | : Adv MC Maritz SC                  |
|                                                                                | : Adv AJ Lapan                      |
| Attorney for 1 <sup>st</sup> Respondent                                        | : VFV Mseleku                       |
| Counsel for 3 <sup>rd</sup> , 4 <sup>th</sup> & 5 <sup>th</sup> Respondent     | : Adv A Cockrell SC                 |
|                                                                                | : Adv F Ismail                      |
| Attorney for 3 <sup>rd</sup> , 4 <sup>th</sup> & 5 <sup>th</sup> Respondent    | : Webber Wentzel                    |
| Counsel for 6 <sup>th</sup> Respondent                                         | : Adv G Budlender SC                |
|                                                                                | : Adv D Borgström                   |
| Attorney for 6 <sup>th</sup> Respondent                                        | : Cliffe Dekker Hofmeyr             |
| Counsel for 7 <sup>th</sup> , 8 <sup>th</sup> & 9 <sup>th</sup> Respondent     | : Adv BE Leech SC                   |
|                                                                                | : Adv K Pillay                      |
| Attorney for 7 <sup>th</sup> , 8 <sup>th</sup> & 9 <sup>th</sup> Respondent    | : Werksmans                         |
| Counsel for 10 <sup>th</sup> , 11 <sup>th</sup> & 12 <sup>th</sup> Respondent  | : Adv R Michau SC                   |
|                                                                                | : Adv I Joubert                     |
| Attorney for 10 <sup>th</sup> , 11 <sup>th</sup> & 12 <sup>th</sup> Respondent | : Dr Samantha Gregory               |
| Counsel for 13 <sup>th</sup> Respondent                                        | : Adv TP Krüger                     |
| Attorney for 13 <sup>th</sup> Respondent                                       | : Macrobert                         |
| Counsel for <i>Amicus Curiae</i>                                               | : Adv AC Botha                      |
| Attorney for <i>Amicus Curiae</i>                                              | : Erasmus de Klerk                  |