



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

CASE NO:007377/2022

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHERS JUDGES: YES/NO  
(3) REVISED

2023/10/13

In the matter between:

REGISTRAR OF MEDICAL SCHEMES  
COUNCIL FOR MEDICAL SCHEMES  
and

NETCARE PLUS (PTY) LTD  
DISCOVERY HEALTH (PTY) LTD

FIRST APPLICANT  
SECOND APPLICANT

FIRST RESPONDENT  
SECOND RESPONDENT

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JUDGMENT

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MOTHA J

*Introduction*

[1] Stripped down to its essentials, this matter's *fons et origo* is whether the Council and Registrar of Medical Schemes may bring an application which is the

subject matter of an internal appeal before the self-same Council in terms of section 49 (1) of the Medical Scheme Act No 131 of 1998 ("the MSA").

[2] If this hurdle, which is dispositive of the matter, is overcome, the Applicants seek the following orders:

2.1 The declaration "that the First Respondent is undertaking the business of a medical scheme as defined in section 1 of the Medical Schemes Act No. 131 of 1998 ("the MSA) by offering pre-paid vouchers to members of the public for the purchase of healthcare services offered by healthcare providers identified as "NetcarePlus Partners".

2.2 Interdicting and restraining the First Respondent from offering the pre-paid vouchers to members of the public for the purchase of healthcare services offered by healthcare providers identified as "NetcarePlus Partners".<sup>1</sup>

2.3 The declaration "that the Second Respondent is undertaking the business of a medical scheme as defined in section 1 of the MSA relative to its pre-paid healthcare payment system launched by the Second Respondent and directed at members of the public in the formal employment sector.

2.4 Interdicting and restraining the Second Respondent from operating its prepaid healthcare payment system launched by the Second Respondent and directed at members of the public in the formal employment sector."<sup>2</sup>

### *The parties and MSA*

[3] The First and Second Applicants, namely: the Registrar of Medical Schemes ("the Registrar") and Council for Medical Schemes ("the CMS") respectively, are organs of state established in terms of the MSA. The First Applicant is appointed in term of section 18 of the MSA, which reads as follows:

"Appointment of Registrar and Deputy Registrar of Medical Schemes.—

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<sup>1</sup> Notice of motion 01-2.

<sup>2</sup> Supra 01-3.

(1) the Minister shall, after consultation with the Council, appoint a Registrar and one or more Deputy Registrars of Medical Schemes.

(2) The Registrar shall be the executive officer of the Council and shall manage the affairs of the Council.”<sup>3</sup>

[4] The Second Applicant is the CMS, a juristic person duly established in terms of section 3 of the MSA, which reads:

“Establishment of Council for Medical Schemes.-

(1) There is hereby established a juristic person called the Council for Medical Schemes.

(2) The Council shall be entitled to sue and be sued, to acquire, possess and alienate moveable and immovable property and to acquire rights and incur liabilities.”<sup>4</sup>

[5] The First Respondent is NetcarePlus (Proprietary) Limited, a private company duly incorporated in accordance with the company laws of the Republic of South Africa.<sup>5</sup>

[6] The Second Respondent is Discovery Health (Proprietary limited), a private company duly incorporated in accordance with the company laws of the Republic of South Africa.<sup>6</sup>

[7] To fully get the lay of the land, it is paramount to refer to the most relevant MSA sections pertinent to this matter.

7.1 Upon her or his appointment, the Registrar of Medical Schemes is imbued with powers in terms of Chapter 9 of the MSA. Included in those powers is section 45, which reads:

“The Registrar may, by notice in writing, require any person who he or she has reason to suspect is carrying on the business of a medical scheme which is not

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<sup>3</sup> Section 18 of the Medical Schemes Act.

<sup>4</sup> Supra section 3.

<sup>5</sup> Founding affidavit para 7.

<sup>6</sup> Supra para 8.

registered to transmit to him or her, within a period stated in such notice, a copy of the rules, if any, under which such person is operating and such other information as he or she may require.”<sup>7</sup>

7.2 In terms of section 7 of the Act, the Council shall, *inter alia*, control and coordinate the function of medical schemes in a manner that is complementary with the National Health policy and investigate complaints and settle disputes in relation to the affairs of a medical scheme.

7.3 Section 18 (3), whose role will soon become apparent, reads:

“The Registrar shall act in accordance with the provisions of this Act and the policy and directions of the Council.”<sup>8</sup>

7.4 In terms of section 20 (1), “...No person shall carry on the business of a medical scheme unless that person is registered as a medical scheme under section 24.”<sup>9</sup>

7.5 Any person who contravenes the provisions of the Act, as contemplated in terms of section 66, shall, subject to subsection (2), be guilty of an offence “and liable on conviction to a fine or to imprisonment for a period not exceeding five years or both a fine and imprisonment.”<sup>10</sup>

7.6 Following a decision of or ruling by the Registrar, any aggrieved person may make use of section 49 which contemplates, under subsections (1) and (2), the following:

“Appeal against decision of Registrar.- (1) Any person who is aggrieved by any decision of the Registrar under a power conferred or a duty imposed upon him or her by or under this Act, excluding a decision that has been made with the concurrence of the Council, may within 30 days after the date on which such

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<sup>7</sup> Supra section 42-46.

<sup>8</sup> Supra.

<sup>9</sup> Supra.

<sup>10</sup> Supra.

decision was given, appeal against such decision to the Council and the Council may make such order on the appeal as it may deem just.

- (2) The operation of any decision which is the subject of an appeal under subsection (1) shall be suspended pending the decision of the Council on such appeal.”<sup>11</sup>

7.7 Furthermore, under section 50 of the MSA, the Act provides that: “There is hereby established an Appeal Board, consisting of three persons appointed by the Minister, of who-

(a) one shall be a person appointed on account of his or her knowledge of the law, who shall be the chairperson; and

(b) two shall be persons appointed on account of their knowledge of medical schemes.

(2) The Registrar shall designate a staff member to act as secretary of the Appeal Board.

(3) Any person aggrieved by a decision of the Registrar acting with the concurrence of the Council or by a decision of the Council under a power conferred or a duty imposed upon it by or under this Act, may within a period of 60 days after the date on which such decision was given and upon payment to the Registrar of the prescribed fee, appeal against such decision to the Appeal Board.”<sup>12</sup>

### *Issues and facts*

[8] Having sketched the salient sections of the MSA, it bears mentioning that this matter pivots around the First and Second Respondents' launch, on the market, of the general practitioner's voucher and prepaid health products, respectively. Pursuant to some engagements with the parties about these products, the Registrar (first Applicant) penned letters to First Respondent on 11 December 2020 and Second Respondent on 10 December 2020 and 31 January 2022.

[9] At paragraph 3, the letter sent to the First Respondent read:

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<sup>11</sup> Supra.

<sup>12</sup> Supra.

"After evaluating all the information before us, this Office is of the view that the Netcare Plus (Pty) Ltd ("Netcare Plus") as the provider of these vouchers is conducting the business of a medical scheme, as per the amended definition of the business of a medical scheme, effective 1 April 2017"<sup>13</sup>

[10] Finally, the letter concluded that:

"You are therefore directed in terms of section 20 (1) of the MSA to cease conducting the business of medical scheme with immediate effect."<sup>14</sup>

[11] The letter sent to the Second Respondent stated:

"This Office is of the view that Discovery Health as the provider of this prepaid healthcare system is conducting the business of a medical scheme, as per the amended definition of the business of a medical scheme, effective 1 April 2017."<sup>15</sup>

[12] At paragraph 6, It further stated the following:

"You are therefore directed in terms of section 20 (1) of the MS Act to cease conducting the business of a medical scheme with immediate effect."<sup>16</sup>

[13] On 31 January 2022, the Registrar dispatched another letter to the Second Respondent stating, *inter alia*, the following:

"Accordingly, Discovery Health is in contravention of the MS Act, as section 20 (1) of the MS Act provides that no person shall carry on the business of a medical scheme unless that person is registered as a medical scheme under section 24."<sup>17</sup>

[14] Following these rulings, both the First and Second Respondents appealed the decisions of the Registrar in terms of section 49 (1) of the MSA.

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<sup>13</sup> Letter to Dr Friedland CEO of Netcare Group para 3.

<sup>14</sup> Supra para 9.

<sup>15</sup> Letter to Dr R Noah CEO of discovery Health (Pty) LTD para 2.

<sup>16</sup> Supra.

<sup>17</sup> Letter to Dr Noah CEO of Discovery Health para 7.

[15] The Applicants, *in medias res*, approached this court for the declaratory and interdictory reliefs.

[16] The facts are largely common cause. It would be otiose to deviate from the facts and dates agreed upon by the parties, namely:

#### PARTIES' CONSOLIDATED CHRONOLOGY

| Date             | Event                                                                                                                                                                                                                                                                                                                          |
|------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>2020</b>      |                                                                                                                                                                                                                                                                                                                                |
| 4 July 2020      | NetcarePlus launched the General Practitioner ("GP") voucher product.                                                                                                                                                                                                                                                          |
| 19 August 2020   | A written notice from the Registrar of Medical Schemes (" <b>the Registrar</b> ") is sent to Netcare Plus regarding a suspected contravention of section 20(1) of the Medical Schemes Act, 1998 (the " <b>MSA</b> ") and requesting information in terms of section 45 of the MSA (" <b>Netcare Plus section 45 notice</b> "). |
| 25 August 2020   | NetcarePlus through its attorneys of record, responded to the section 45 notice.                                                                                                                                                                                                                                               |
| 8 December 2020  | Discovery Health launches its prepaid health product.                                                                                                                                                                                                                                                                          |
| 10 December 2020 | The Registrar issues his purported directive ordering Discovery Health to cease conducting the business of a medical scheme with immediate effect (" <b>the Registrar's 2020 decision</b> ").                                                                                                                                  |
| 11 December 2020 | The Registrar communicated his decision in a Ruling finding that NetcarePlus was conducting the " <i>business of a medical scheme</i> ".                                                                                                                                                                                       |
| 15 December 2020 | NetcarePlus requested information from the Registrar regarding the decision undertaken, in order to comprehend its rationale.                                                                                                                                                                                                  |
| 18 December 2020 | Discovery Health lodges an appeal against the Registrar's 2020 decision in terms of section 49 of the MSA (" <b>the first appeal</b> ").                                                                                                                                                                                       |
| 19 December 2020 | NetcarePlus lodges an appeal in terms of section 49 of the MSA (" <b>section 49 appeal</b> ")                                                                                                                                                                                                                                  |
| <b>2021</b>      |                                                                                                                                                                                                                                                                                                                                |
| 26 March 2021    | Netcare Plus files its heads of argument in the section 49 appeal.                                                                                                                                                                                                                                                             |

|                   |                                                                                                                                                                                                                                                                                          |
|-------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 26 March 2021     | Discovery Health files its heads of argument, index and paginated papers in the first appeal for the purposes of Appeal Committee Hearing.                                                                                                                                               |
| March to May 2021 | ENS and the Registrar's attorneys engage to try and resolve matters and proceed timeously with the first appeal.                                                                                                                                                                         |
| 3 May 2021        | The date on which the Registrar's heads of argument in the first appeal were due, but never filed.                                                                                                                                                                                       |
| 5 May 2021        | The Registrar concedes that his 2020 decision regarding Discovery is vitiated by procedural unfairness and undertakes to withdraw the direction with immediate effect. The Registrar requests that the first appeal be withdrawn.                                                        |
| 25 August 2021    | The Registrar initiates an enquiry in terms of section 45 of the MSA in relation to Discovery Health.                                                                                                                                                                                    |
|                   | Discovery Health submits its response to the section 45 enquiry to the Registrar.                                                                                                                                                                                                        |
| 24 September 2021 | Discovery Health submits its response to the section 45 enquiry to the Registrar.                                                                                                                                                                                                        |
| <b>2022</b>       |                                                                                                                                                                                                                                                                                          |
| 31 January 2022   | The Registrar directs Discovery Health to cease conducting the business of a medical scheme by 28 February 2022 ( <b>"the Registrar's 2022 decision"</b> ).                                                                                                                              |
| 10 February 2022  | Discovery Health addresses a letter to the Registrar advising that it is not in agreement with the finding that the Discovery Pre-Paid Health Product constitutes doing the business of a medical scheme.<br>Discovery Health launches its appeal against the Registrar's 2022 decision. |
| 16 February 2022  | ENS email to Council Secretariat asking when the appeal will be heard.                                                                                                                                                                                                                   |
| 3 June 2022       | Further ENS email to Council Secretariat asking when the appeal will be heard.                                                                                                                                                                                                           |
| 13 June 2022      | Further ENS email to Council Secretariat asking when the appeal will be heard.                                                                                                                                                                                                           |

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|-------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 14 June 2022      | ENS is advised by the Appeals Committee Secretariat that the appeal is expected to be heard in November 2022.                                                                                                                              |
| 19 July 2022      | The applicants launch their application for interdictory and declaratory relief against NetcarePlus as the first respondent and Discovery as the second respondent. The document was filed electronically on Court Online on 25 July 2022. |
| 15 August 2022    | Netcare files its Notice of intention to oppose.                                                                                                                                                                                           |
| 22 August 2022    | ENS writes to the applicants' attorneys requesting the application be withdrawn.                                                                                                                                                           |
| 22 August 2022    | Discovery files its notice of intention to oppose.                                                                                                                                                                                         |
| 25 August 2022    | The applicants' attorneys of record refuse to withdraw the application.                                                                                                                                                                    |
| 29 August 2022    | Applicants' attorneys of record file Directive Compliance.                                                                                                                                                                                 |
| 5 September 2022  | NetcarePlus files its answering affidavit.                                                                                                                                                                                                 |
| 12 September 2022 | Discovery files its answering affidavit.                                                                                                                                                                                                   |
| 23 September 2022 | The applicants file their replying affidavit to Netcare Plus's answering affidavit.                                                                                                                                                        |
| 30 September 2022 | The applicants file their replying affidavit to Discovery's answering affidavit.                                                                                                                                                           |
| 31 October 2022   | The applicants file heads of argument                                                                                                                                                                                                      |
| 30 November 2022  | NetcarePlus files heads of argument.                                                                                                                                                                                                       |
| 30 November 2022  | Discovery files heads of argument.                                                                                                                                                                                                         |

### *The law*

[17] As telescoped at the commencement of this matter, the issue is about exhausting internal remedies before approaching the court for relief. In this regard

section 7 (2) of Promotion of Administrative Justice Act 3 of 2000 (PAJA) takes pride of place. The section reads:

“(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

[18] Dealing with section 7 (2) (c), the Supreme Court of Appeal in *Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape and Another v Hans Ulrich Plotz NO and Another*<sup>18</sup> stated the following:

“[20] It is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for a review, unless exempted from doing so by way of a successful application under s7(2) (c ) PAJA. The person seeking exemption must satisfy the court, that it is in the interest of justice that the exemption be given.”

[19] In the matter of *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)*<sup>19</sup> the court held:

[35] “Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

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<sup>18</sup> [2017] ZASCA 175.

<sup>19</sup> 2010 (4) SA 327 (CC)

[36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a 'fair' procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action. In *Bato Star*, O'Regan J held that –

'a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decisionmaker.'

Once an administrative task is completed, it is then for the court to perform its review responsibility, to ensure that the administrative action or decision has been performed or taken in compliance with the relevant constitutional and other legal standards.

[37] Internal administrative remedies may require specialised knowledge which may be of a technical and/or practical nature. The same holds true for fact-intensive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record."<sup>20</sup>

[20] In the matter of *Maswanganyi v Road Accident Fund*<sup>21</sup> the court held:

"Even where there is a power of review, as is the case with uncompleted proceedings in a magistrates' court, there is long-standing authority that such proceedings will not

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<sup>20</sup> Supra para 35-37.

<sup>21</sup> 2019 (5) SA 407 (SCA).

ordinarily be reviewed by the High Court until they have run their full course, at which stage an appeal.”<sup>22</sup>

### *Submissions by the Applicant’s counsel and Discussion*

[21] Commencing his argument, he submits that the Applicants are seeking to stop the contravention of MSA by way of both the declaratory and interdictory reliefs. The submission is that there is a growing concern that these schemes are proliferating. Having avers that Applicants are functionaries whose existence is derived from the MSA, counsel submits that they do not want to proceed with the internal appeal process. To the extent that the Respondents mount an argument of failure to exhaust internal remedies, he submits that they rely on section 7 (2) (c) exemption in terms of PAJA. In the founding affidavit, Applicants argue that, firstly, there are exceptional circumstances; and, secondly, that it is in the interest of justice that the exemption be granted.<sup>23</sup>

[22] When the court enquired if they were not jettisoning the MSA, counsel submits that they are not. It is noteworthy that he remarks that the Respondents rightfully exercised their rights in terms of section 49 (1) of the MSA. Therefore, the Applicants do not quibble with this. To quote his *ipsissima verba*: “I would have done the same thing. No criticism of that.” The question is, he continues: “can the regulator skip the appeal and come directly to court?” Drawing the court’s attention to section 49 (2) of the MSA, he laments that the violation of the MSA will continue during the appeal process.

[23] Following the court’s comment that the legislature deemed it meet to deal with the registrar’s rulings in terms of section 49 (2), he rhetorically enquires for how long this conduct was going to continue? This point is eminently raised in the heads of argument, where the following is stated:

“If the First and Second Applicants were to await the outcome of the appeal lodged by the Respondents in terms of section 49 of the MSA and thereafter await the whole appeal

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<sup>22</sup> Supra para 22

<sup>23</sup> Founding affidavit para 72 to 77.

process in terms of section 50 of the MSA the products offered by the Respondents to members of the public would proliferate and would cause great hardship to the buying public and would be contrary to the interests of justice. In any event, the applied processes under sections 49 and 50 of the MSA would result in this matter ending up serving before this court.”<sup>24</sup>

[24] When the court points to the issue of the separation of powers, he submits that there is authority for abandoning the MSA process; because it will take too long whilst the illegality continues. With vim, he submits that appeals take years while the impugned conduct continues. He refers to the matter of *Compcare Wellness Medical Scheme v Registrar of Medical Schemes and Others*,<sup>25</sup> particularly where the court said:

“Source of jurisdiction: the PAJA or the principle of legality

[13] The two major ‘pathways’ to the review of administrative-type actions are s6 of the PAJA and the principle of legality. The PAJA applies generally to the review of administrative action as that term is defined in it. The principle of legality applies when an exercise of public power does not fall within the PAJA’s definition of administrative action. It is necessary to determine which of these pathways to review applies because that decision determines the basis for the court’s review jurisdiction. That decision should not, generally speaking, be avoided.”

[25] The Applicants’ reliance on PAJA is misplaced. PAJA, being the expression of section 33 of the Constitution, deals with the administrative action which adversely affects the rights of any person. For starters, the Applicants are not bringing a review application, in this instance, they are not only the administrative body that made the decision, but also the body that is responsible to hear the appeal. They are not the aggrieved party. Secondly, the MSA does not provide for this cause of action. Thirdly, the Respondents are the aggrieved parties who have selected to lodge an appeal in terms of the MSA. Therefore, the application for an exemption in terms of section 7 (2) (c) of PAJA cannot lie in the Applicants’ mouths. Furthermore, it gets worse since, in terms of section 49(1), the Second Applicant is charged with the responsibility of dealing with the appeal.

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<sup>24</sup> Applicant’s heads of argument para 64.

<sup>25</sup> 2021 (1) SA 15 (SCA).

[26] Counsel submits that they are bringing this application in terms of section 38(d) of the Constitution. Furthermore, he submits that the Regulator is acting in the interest of the public, as was stated in *Compicare Wellness Medical Scheme*, at para 16:

"In the founding affidavit, the Registrar stated that he and the Council 'regulate medical schemes in the public interest' and that they had brought the application 'in the public interest, as envisaged by section 38(d) of the Constitution'. He then stated:

'16.1 As I indicate below, the decision of the Appeal Board directs the Registrar to perform conduct that is ultra vires. I respectfully submit that it is in the public interest that a decision requiring the Registrar to act unlawfully should be set aside on review.

16.2 Furthermore, the Registrar is acting in the interests of the public in light of the provisions of section 23(1)(c) of the Act which contemplates the possibility of a proposed name change causing harm to the public."

[27] The Applicants cannot find refuge in *Compicare Wellness Medical Scheme's* matter as *Compicare* dealt with a review of the decision of the Appeal Board. Therefore, the parties had gone through the appeal in terms of the MSA.

[28] To fortify their submission that they can bring the declaratory and interdictory reliefs, counsel refers to *Guardrisk Insurance Company Ltd v Registrar of the Medical Schemes*.<sup>26</sup> Certainly, the Council and Registrar are entitled to institute proceedings to enforce the provisions of legislation for which they are responsible by seeking appropriate relief which, *inter alia*, includes declaratory and interdictory relief, if appropriate. In *casu*, it is not appropriate to proceed in this manner. Acting correctly within their powers, the applicants chosen to use the MSA.

[29] *Guardrisk* is no authority for forsaking internal remedies and riding roughshod over the rights of the Respondents. In *Gcaba v Minister for Safety and Security and others*<sup>27</sup> the court held:

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<sup>26</sup> 2008 (4) SA 620 (SCA).

<sup>27</sup> 2010 (1) SA 238 (CC).

“... Once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasised in *Chirwa* by both Skweyiya J and Ngcobo J.

Following from the previous points, forum-shopping by litigants is not desirable. Once a litigant has chosen a particular cause of action and system of remedies (for example, the structures provided for by the LRA) she or he should not be allowed to abandon that cause as soon as a negative decision or event is encountered.”<sup>28</sup>

[30] The final submission is that this court has an inherent jurisdiction to deal with these matters based on the interest of justice and in the interest of the public. It is neither, I think, in the interest of justice to deny the respondents their internal rights of appeal nor is it in the public interest to ignore the provisions of the MSA. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*<sup>29</sup> courts are cautioned against attributing to themselves superior wisdom. The administrative tasks must be completed first.

[31] Upon the court’s enquiry about what occasioned the Second Respondent’s failure to deal with the appeal expeditiously, especially when the section 49 (1) appeal was due to be heard in November 2022, he submits that he held no instruction in that regard. This court is left in the dark about the reasons for the inordinate delay or failure to proceed with the appeal. This is fundamental and goes to the heart of the Applicants’ case. The kernel of their case is that it takes years to hear these appeals. However, the progress of these appeals is entirely in their hands.

[32] He submits that there is section 50 appeal after section 49 appeal. As mentioned, *supra*, section 50 appeal envisages a process involving a triumvirate composed of two experts in the field of medical schemes and a person with the knowledge of the law, such as a retired judge. Surely, skipping this process impoverishes the court of the informative input from experts in the field. As pointed out *supra*, the court in *Koyabe* makes this point abundantly clear. The argument that the matter will eventually come to this court is a nonstarter and must be stated to be

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<sup>28</sup> *Supra* para 56–57; also see *Competition Commission of South Africa v Telkom SA LTD and Others* (623/2009) [2009] ZASCA 155, para 36–38.

<sup>29</sup> 2004 (4) SA 490 (CC).

rejected. Taken to its logical conclusion, it means Applicants might as well skip this court and approach the Constitutional Court as the matter will end up there.

*Submissions by both the Respondents' Counsel and discussion*

[33] Confirming the court's concern that the Applicants are jettisoning the MSA, the First Respondent's counsel submits that the Applicants are not bringing a review application and cannot ask this court to recast the MSA.

[34] The gist of his submission is that sections 49 (1) and 50 confer substantive rights to the Respondents. Having recognized the Respondents' rights to launch an appeal in terms of section 49 (1) of MSA, the Applicants cannot ask this court to obliterate those rights. Absent the challenge to sections 49 and 50 of the Constitutional Court, this court, under the doctrine of separation of powers, cannot ignore the MSA, let alone set it aside.

[35] Going for the jugular, he submits that it has taken over 30 months for the Second Respondent to hear the appeal, despite Applicants having filed their heads of argument. As already stated, the Applicants' counsel proffered no explanation for the delay, and neither is it dealt with in the papers. I agree with the submission that they abdicated their responsibility to comply with section 18 of MSA.

[36] In a similar vein, the Second Respondent's counsel submits that section 49 does not only confer a right to appeal the Registrar's decision, but it also suspends his or her decision pending the decision of the council on appeal. In *Cotty and Others v Registrar, Council for Medical Schemes and Others*<sup>30</sup> the court held that the Registrar's decision remains suspended pending the appeal to the appeal board in terms of section 50 appeal.

[37] Therefore, this application deprives the Applicants of their statutory rights and eventually their right to review the decision. Having made submissions on the ground already covered, he reminded the court that on 14 June 2022, after their letter dated

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<sup>30</sup> 2021 (4) SA 466 (GP) 487-488.

13 June 2022, the Second Respondent's Secretariat advised that the appeal was expected to be heard in November 2022. Instead of hearing the appeal, the Applicants brought this application on 19 July 2022.

### Conclusion

[38] This court's point of departure is that it should be cognizance of the source of the MSA. The MSA emanates from the provisions of section 27 of the Constitution. Indeed, the Constitution places an obligation on the state to make reasonable legislation to progressively realize social economic rights including access to healthcare in the interest of members of the public.

[39] Respecting the principle of subsidiarity, this court is constrained to confine itself to the MSA. On numerous occasions the constitutional court has emphasized the importance of maintaining comity with the principle of separation of powers, for example in the matters of *International Trade Administration Commission v SCAW South Africa limited*<sup>31</sup> and *Electronic Media Limited and Others v Etv*.<sup>32</sup>

[40] As aptly stated in the Applicant's heads of argument that:

"...As a functionary that derives his power from the MSA, as section 18 (3) provides, the First Applicant may not exercise powers that are not conferred by the MSA."<sup>33</sup>

[41] The jettison of section 49 (1) of the MSA flies in the face of the statutory framework and is self-evidently undesirable for the same application to proceed before two fora. Furthermore, it increases the prospects of conflicting decisions, which will

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<sup>31</sup> 2012 (4) SA 618 (CC) at para 95 "Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of powers implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that concerned branches of government exercise their authority within the bounds of the Constitution."

<sup>32</sup> 2017 (9) BCLR (CC) para 1 "Ours is a constitutional democracy, not a judiciocracy. And in consonance with the principle of separation of powers, the national legislative authority of the Republic is vested in Parliament[1] whereas the judicial and the executive authority of the Republic repose in the Judiciary[2] and the Executive[3] respectively. Each arm enjoys functional independence in the exercise of its powers. Alive to this arrangement, all three must always caution themselves against intruding into the constitutionally-assigned operational space of the others, save where the encroachment is unavoidable and constitutionally permissible."

<sup>33</sup> The Applicant's heads of argument para 62.

create uncertainty. This court must decline the invitation to usurp the administration function of an organ of state. The Applicants have failed to make out a case for exemption and their application is flawed. The matter must proceed before section 49 (1) appeal and these applications must be dismissed.

### *Costs*

[42] On 22 August 2022, the Second Respondent wrote a letter to the First Applicant's attorneys, which reads as follows:

"3. In these circumstances, we do not understand your client's conduct in instituting the High Court application under case number 2022-007377 ("the application"). The application seeks relief that is the subject matter of our client's appeal, and thus appears to cut across the internal statutory remedy that is available to our client, and which our client has followed. If your client were of the view that the hearing of the appeal ought to be urgently finalised, they should have taken the necessary steps to set up their appeal down for hearing urgently.

4. We are advised that it is highly unlikely that the parties will secure a date for the hearing of the application before the hearing of the appeal.

5. We are therefore instructed to invite your clients to withdraw the application against our client by close of business on Friday, 26 August 2022. If we receive a notice of withdrawal of the application before close of business on Friday, 26 August 2022, our client will bear its own costs in respect of the application, without admitting that there is any obligation on our client to do so.

6. In the event that we do not receive a notice of withdrawal of the application, our client will raise these facts by way of an in limine response to the application and will bring the contents of this letter to the attention of the Court. Our client will also seek a punitive costs order against your clients."<sup>34</sup>

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<sup>34</sup> ENSafrica letter to Seanego Attorneys Incorporated dated 22 August 2022 paras 3-6.

[43] The issue of cost-efficiency is mentioned in *Cotty*.<sup>35</sup> On this issue the court held that:

“The purpose of section 50 is to provide a quick, cost-effective, and efficient remedy to medical schemes and their members. That purpose would be undermined by an interpretation which would require that within the efficient remedy contemplated, it is necessary to first implement and then reverse the decision concerned. The need for parties to then have to bring a costly application (a cost to the medical scheme and the member) to stay such proceedings would also be contrary to that objective.”<sup>36</sup>

[44] Confronting the issue of cost frontally, the court in *Koyabe*, stated that even though courts play an important role in providing litigants with access to justice, it cannot be denied that internal remedies are cost-effective and readily available.<sup>37</sup>

[45] It is trite that, as a rule, successful parties should have their costs.<sup>38</sup> The Applicants have visited unnecessary costs on the Respondents. These applications are akin to being vexatious. The Respondents had readied themselves right up to preparing heads of argument for the matter to be heard on section 49 (1) appeal. Now, they must embark on this court battle. It is undesirable to be put to battle on two different fora. Litigation is costly, counsel do not come cheap.

[46] Our courts have recognised the values of *Ubuntu*.<sup>39</sup> This concept is important on many fronts. It should be given the prominence it deserves even in the issues of costs. Where is *Ubuntu* when an organ of state puts parties, who only sin was to comply with the law, through costly legal action. I do not see the reason why the Respondent should be out of pocket. In exercising my true discretion, informed by the values of *Ubuntu* and weighing up all the facts, I am persuaded a punitive costs order is justified.

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<sup>35</sup> Supra note 30.

<sup>36</sup> Supra para para 75.

<sup>37</sup> Supra note 19 para 35.

<sup>38</sup> *Ferreira v Levin No and others* 1996 (2) SA 621 (CC).

<sup>39</sup> *S v Makwanyane and another* 1995(2) SACR 1.

*Order*

[47] In the result, I make the following order:

1. The applications are dismissed.
2. The Applicants are jointly and severally liable for the costs of the First and Second Respondents on an attorney and client scale the one paying the other to be absolved, including the costs of two counsel.



**M. P. MOTH**

**JUDGE OF THE HIGH COURT, PRETORIA**

Date of hearing: 30 August 2023

Date of judgement: 13 October 2023

**APPEARANCES:**

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