



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

28/3/2017

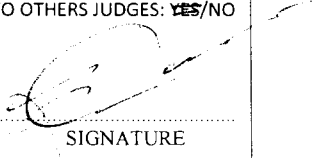
CASE NO: 10387/2017

In the matter between:

GENESIS MEDICAL SCHEME

Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHERS JUDGES: YES /NO
(3)	REVISED 1
28/3/2017	
DATE	SIGNATURE

THE COUNCIL FOR MEDICAL SCHEMES

1st Respondent

THE REGISTRAR OF MEDICAL SCHEMES

2nd Respondent

JUDGMENT

DAVIS, AJ:

[1] NATURE OF THE APPLICATION:

This is an urgent application wherein the Applicant ("*Genesis*"), a medical scheme conducting its business in accordance with the Medical Schemes Act, No. 131 of 1998, ("*the Act*") claims an order whereby the First

Respondent, being the Council for Medical Schemes (the “CMS”), be directed to remove a number of statements from its website “... *within 24 hours of the granting of this order*”. The Second Respondent is the Registrar of Medical Schemes (the “Registrar”). No relief is claimed against the Second Respondent but both Respondents opposed the application. At the hearing of the matter the papers, together with heads of argument, comprised some 300 pages and both parties were represented by senior and junior counsel.

[2] **RELIEF CLAIMED:**

In its notice of motion, apart from claiming that the matter be heard as one of urgency, the Applicant claims the following relief:

“2. *That pending the final determination of this application, at which the Applicant will seek a final order in terms of paragraphs 2.1 to 2.4 below, alternatively, pending the determination of an action to be institution by the Applicant against the First Respondent for damages within 30 days of the granting of this order, the First Respondent be directed to remove the under-mentioned statements from its website within 24 hours of the granting of this order:*

2.1 *A number of contraventions by medical schemes of Regulation 8 of the regulations published under the MSA have been committed by the Applicant and have resulted in its members being exposed financially.*

- 2.2 *The Applicant adopts an approach in respect of the application of Regulation 8 relating to prescribed minimum benefits ('PMB's') in response to claims of its members which is in conflict with the law and with its own scheme rules, being that it is entitled to decline the funding of treatment of PMB conditions if such treatment was rendered at a private hospital.*
- 2.3 *That the Applicant continues, despite the judgment of the Supreme Court of Appeal in the matter of The Council for Medical Schemes v Genesis Medical Scheme, to disregard that decision and that it 'still declines funding members' accounts for services rendered at private hospitals';*
- 2.4 *The Applicant's conduct after the delivery of the said judgment shows a persistent disregard for the law and for the judgment of the Supreme Court of Appeal.*
3. *Directing the First Respondent to pay the costs of this application alternatively that the costs of this application be reserved for determination at the final hearing of this application."*

[3] **THE FINALITY OF THE RELIEF CLAIMED:**

- 3.1 It is not exactly understood what the Applicant meant by its persistent referral in paragraphs 2 and 3 of the notice of motion with the words "at the final determination of this application". Once the application was set down on the roll and once it was heard, albeit on the urgent court roll and after all the papers had been filed by the respective

parties, any judgment on the merits would be a “*final determination of the application*”. Unless the matter was struck from the roll or an interim order was granted pending the institution of an action (as claimed in the alternative) it appears that from the outset final relief was claimed.

- 3.2 Mr Maritz SC who appeared for the Respondents together with Ms Lapan also referred the court to the judgments in **Hix Network and Technologies v System Publishers (Pty) Ltd** 1997(1) SA 391 (AD) and **Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd** 1968(2) SA 528 (CPD). In the lastmentioned judgment Corbett J (as he then was) stated the following (at 529G-530A):

*“On the other hand Mr Friedman who appeared on behalf of the Respondent argued that the approach laid down in regard to temporary or interim interdicts was not appropriate in this particular case because in effect the court was being asked to grant a final interdict. He submitted therefore that the proper approach should be that indicated in a Full Bench decision of this court in the case of the **Stellenbosch Farmers’ Winery v Stellenvale Winery** 1957(4) SA 234 (C) at p. 235 where it was indicated that, where there is a dispute as to the facts, a final interdict should only be granted in notice of motion proceedings if the facts as stated by the Respondents together with the admitted facts in the Applicant’s affidavits justify such an order. It seems to me that Mr Friedman’s argument in regard to this aspect of the matter is the correct one. This approach was also followed in **BHT Water Treatment (Pty)***

Ltd v Lesley and Another 1993(1) SA 47 (WLD) which emphasises that a court should look at the substance rather than the form of the relief sought. The substance of what the Applicant seeks is a removal of the statements published by the Respondent and a cessation thereof. That relief is final and the matter should therefore be approached as if a permanent interdict is applied for."

- 3.3 With reference to Setlogelo v Setlogelo 1914 AD 221 at 227 and applying the abovementioned principles to Genesis' application, it appears that for Genesis to succeed, it must satisfy the trite requirements of a permanent interdict namely: (a) a clear right which is being threatened, (b) an injury actually committed or reasonably apprehended and (c) the absence of similar protection by any other remedy. Even if Genesis would not be able to show a clear right required for a final interdict, it might conceivably still be granted an interim interdict if it could show (a) a *prima facie* right, (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted (c) that the balance of convenience favours the granting of this interim interdict and (d) that it has no other satisfactory remedy.
- 3.4 With reference to the judgment in Hix Network and Technologies *supra* at 399A, to the requisites for an interim interdict must be added the fact that the remedy is a discretionary remedy and that the court has a wide discretion.

3.5 Having stated the above, Genesis has a right not to be defamed and the continued publication of defamatory material would therefore commit an injury or lead to the apprehension of the continuation of an injury. The analysis should therefore be whether the Respondents have defamed Genesis and have no justification for having made the alleged offending statements and whether they should be permanently interdicted in the fashion claimed by Genesis.

[4] **THE APPLICABLE PRINCIPLES OF THE LAW OF DEFAMATION:**

4.1 Genesis as a trading corporation is entitled to claim protection from defamatory statements which may injure its reputation as a business (and to claim for general and actual damages caused thereby). See **Caxton v Reeva Foreman (Pty) Ltd** 1990(3) SA 547 (A) and **Financial Mail (Pty) Ltd v Sage Holdings Ltd** 1993(2) SA 451 (A).

4.2 For purposes of the above, Genesis must prove the publication of a defamatory statement. See **International Tobacco Company SA Ltd v United Tobacco Company South Ltd (4)** 1955(2) SA 40 (W). Apart from Genesis' allegation that the statements were defamatory, it is a question of law whether the words complained of are reasonably capable of conveying to the reasonable reader a meaning which defames Genesis. See the cases cited by the learned author Harms in **Amler's Precedents of Pleadings** (7th Edition) at 163.

4.3 Falsity of a statement is not a matter to be alleged or proved by a person alleged to have been aggrieved by the defamatory statements but a defendant may however justify his statements by alleging and proving its truthfulness and that its publication was in the public interest.

4.4 Although a claimant relying on a claim for defamation must allege *animus iniuriandi* there is a presumption that the publication of a defamatory statement was *animo iniuriandi* and the publisher then bears the onus of alleging and proving the absence of the intent to defame. See **SAUK v O'Malley** 1977(3) SA 394 (A) at 403 and **Brett v Schultz** 1982(3) SA 286 (SE) at 292.

4.5 In addition to the denial of *animus iniuriandi*, the various defences open to the Respondents in this matter are the denial of wrongfulness, truth and publication in public interest, fair comment and qualified privilege. See **Neethling v Du Preez, Neethling v The Weekly Mail** 1994(1) SA 708 (A) at 769-780, **Delta Motor Corporation (Pty) Ltd v Van der Merwe** 2004(6) SA 185 (SCA), **Van der Berg v Coopers & Lybrand Trust (Pty) Ltd** 2001(2) SA 242 (SCA) and **Herselman NO v Botha** 1994(1) SA 28 (A).

[5] Upon a reading of paragraphs 2.1 to 2.4 of the Applicant's notice or motion as quoted above, and from a reading of the papers, it is clear that the interpretation of the Supreme Court of Appeal judgment ("the SCA

judgment") in the most recent spate of litigation between the parties is both pertinent and germane to Genesis' current approach to claims of its members and to the Respondents' view of Genesis' conduct as contained in their publications. In fact, one of the principal allegations is that Genesis disregards the SCA judgment. This is also the basis of a counter-application by the Respondents wherein they allege that Genesis had acted in contempt of the SCA judgment. The counter-application was not pursued in the urgent court.

[6] **THE SCA JUDGMENT:**

The judgment of the Supreme Court of Appeal referred to in paragraph 2.3 of the Applicant's notice of motion is that reported as **Council for Medical Aid Schemes and Another v Genesis Medical Scheme and Others** 2016(1) SA 429 (SCA). The relevant aspects of this judgment are the following:

6.1 Under Section 20 of the Act a medical scheme may not carry on business as such unless it is registered under Section 24. In turn, Section 29 provides that the Registrar shall not register a medical scheme and that no medical scheme may carry on such business unless its rules make provision for a number of specific matters. In particular Section 29(1)(o) and (p) provide that the rules must make provision for:

- “(o) The scope and level of minimum benefits that are to be available to beneficiaries as may be prescribed;*
- (p) No limitation shall apply to the reimbursement of any relevant health service obtained by a member from a public hospital where this service complies with the general scope and level as contemplated in paragraph (o) and may not be different from the entitlement in terms of the service available to a public hospital patient.”*

6.2 The minimum benefits referred to in Section 29(1)(o) are those prescribed in Regulations 7 and 8 of the Regulations promulgated in terms of Section 67 of the Act by the Minister of Health in Government Notice R1262 of 20 October 1999 and amended from time to time thereafter. The particulars of Regulations 7 and 8 are quoted in the SCA judgment. Regulation 7 defines the “*prescribed minimum benefits*” (“PMB”) and pertains to the provision of the diagnosis, treatment and care costs of diagnosis and treatment pairs listed in Annexure “A” to the regulations and any emergency medical condition.

6.3 Regulation 8 in turn provides that, subject to the provisions of that regulation, any benefit option that is offered by a medical scheme must pay in full without co-payment or the use of deductibles, the diagnosis, treatment and care costs of the PMB conditions.

6.4 Regulation 8(2) provides as follows:

“Subject to Section 29(1)(p) of the Act, the rules of a medical scheme may, in respect of any benefit option, provide that –

- (a) the diagnosis, treatment and care costs of a prescribed minimum benefit condition will only be paid in full by the medical scheme if those services are obtained from a designated service provider in respect of that condition; and*
- (b) a co-payment or deductible, the quantum of which is specified in the rules of the medical scheme may be imposed on a member if that member or his or her dependent obtains such services from a provider other than a designated service provider provided that no co-payment or deductible is payable by a member if the service was involuntarily obtained from a provider other than a designated service provider.”*

6.5 Regarding the abovementioned statutory regime, the SCA found that Genesis would be liable to pay in full the prescribed minimum benefits payable irrespective of whether the diagnosis, treatment and care costs were incurred at a private or public medical facility *“subject of course to the provisions of Regulation 8(2) and the proviso thereto as read with Regulation 8(3) which would limit its liability to the costs that would have been charged had such treatment been obtained from a ‘designated service provider’ (DSP)”*.

6.6 It is further clear from the SCA judgment that there has been some tension between Genesis and the CMS regarding the appointment of

DSP's since 2006 (the SCA refers to the parties being at "loggerheads"). The upshot of the dispute was that the Genesis did not consider itself compelled to appoint DSP's and that it was free, in terms of its rules, to thereby contract with its members. The argument went further that, once the rules have been approved by the Registrar, the relationship between the scheme and its members was governed solely by the rules and that this trumped the provisions of the Act and the Regulations.

6.7 In paragraphs 37 to 42 of the SCA judgment, the learned judges of appeal found against Genesis. It was held that the limited liability argued for by Genesis went against the wording and purpose of the PMB provisions which required and intended medical schemes to "pay *in full*" the costs of treatment of PMB conditions, whether obtained from public or private hospitals. An underlying purpose of the provisions, namely to ease the pressure on public resources, would also be defeated if medical schemes were allowed to escape liability when treatment was obtained at a private hospital. Genesis' argument that its members, by accepting its rules waived their benefits was wrong in the context of public-interest legislation. Genesis could not evade its statutory obligations by prescribing rules that had a contrary effect.

6.8 The SCA then concluded as follows:

“44. Simply put, the law obliges medical schemes to pay the costs of treating PMB conditions in full and that is what Genesis must do. Genesis had the opportunity to appoint DSP's. It could even have concluded agreements with the public sector as its DSP, which would not have been offensive if the Registrar was satisfied that there was a clear agreement between it and the relevant public health authorities. But it failed to appoint DSP's either in the private or public sector. Consequently, as a result of its own failure in that regard, the ameliorating provisions of Regulation 8(2) are not available to it and it became obliged to pay in full ... “ for treatment in respect of PMB conditions.

[7] **GENESIS' CURRENT POSITION:**

7.1 The intention of the legislature regarding the payment of the costs of treatment of PMB conditions by a medical scheme has been found in the SCA judgment to be the following:

“[38] Section 29(1)(o) and Regulation 8 which, read together, require a medical scheme to 'pay in full' the costs of treatment of PMB conditions at a scope and level as may be prescribed were clearly designed to ensure that members would not be obliged to bear the costs of providing such treatment. They make no mention of a medical scheme being obliged to do so only in the event

of the treatment being obtained from the public sector. Indeed, the entire tenor of the legislation is to the contrary effect, the provisions referring to DSP's clearly indicating that private sector treatment was envisaged – such provisions allowing a medical scheme to select DSP's with whom it may reach agreement on charges beneficial to it and thereby to limit its exposure to liability under Regulation 8(2).

[39] *In the circumstances the Minister, in specifying the table of PMB's and the allowable treatment for such conditions, clearly intended to ensure that members of medical schemes would enjoy cover in relation to those specific medical conditions and encourage them to seek treatment in either private or public hospitals. That objective would be defeated by a medical scheme only providing for cover or the treatment of PMB's if obtained from the public sector, thereby effectively shifting the cost of treating PMB's from medical schemes to the state. That is precisely what Genesis has attempted to do by not appointing DSP's. Instead of providing an option for its members to obtain treatment for PMB's in the private sector, it seeks to oblige its members to obtain treatment for those conditions in state institutions at little or no cost to itself."*

7.2 On 11 March 2016, being scant four months after the SCA judgment, Genesis circulated a notice to its members in which they were advised of the selection of public or state hospitals as designated service providers. This, Genesis says, it is entitled to do as their

current rules (with effect from 1 January 2008) reads *inter alia* that it pays “100% of actual cost in respect of benefits defined as PMB’s in the Act ... when obtained from a public or state hospital or designated service provider”. Genesis argues that its selection of public and state hospitals as DSP’s allows it to avoid the criticism expressed against its prior conduct by the Supreme Court of Appeal and places it outside the judgment thereof.

- 7.3 On 22 March 2016, Genesis submitted a proposed rule amendment to the Registrar. It is to the effect that its selection of all public hospitals in South Africa as its DSP’s be recorded in its rules.
- 7.4 Its proposed rule amendment was rejected by the Registrar in a letter dated 16 May 2016. The grounds of rejection were stated to be that:

“... although it is the prerogative of the scheme to select the public sector as a DSP, the scheme must first provide the Registrar with evidence that there is a ‘clear agreement’ between Genesis and the relevant public hospital. Accordingly, the scheme is not entitled to select every hospital in the public sector as a DSP without concluding an appropriate agreement with each public hospital. In the absence of such agreements, the state cannot be listed as a DSP in the rules of the scheme. It is unfair to expect members to find out which state facilities can accommodate them in the absence of a list of specific hospitals that they can go to and with whom the state has an arrangement.”

7.5 On 6 June 2016 Genesis lodged its appeal in terms of Section 49 of the Act and is still awaiting the judgment from the Appeal Committee. In a supplementary practice note Genesis however now argues that the proposed rule amendment which is the subject of the appeal was unnecessary and was introduced by it “ ... *simply to clear up any possible confusion ...*” . It persists in its argument that given its rules as presently formulated, Genesis was required to do no more than select a DSP in compliance with Regulation 7 which it has done by selecting public and state hospitals.

7.6 Although Genesis’ selection of public rather than private healthcare providers as DSP’s appears to run contrary to the SCA judgment set out in paragraphs [38] and [39] thereof, it does appear from the judgment itself that Genesis might well be entitled to select DSP’s from the public sector. This can be inferred from paragraph [44] of the SCA judgment quoted above where the learned judges of appeal stated that:

“... Genesis ... could even have concluded agreements with the public sector as its DSP which would not have been offensive if the Registrar was satisfied that there was a clear agreement between it and the relevant public health authorities.”

7.7 What must immediately be clear is that while the SCA appears to have left the door open for Genesis to select healthcare providers in the

public sector as its DSP's, the conclusion of agreements with such DSP's was stated as a *proviso* (with reference to D L Perman, **The Law of Medical Schemes in South Africa**, par. 7.2). However, Genesis, in extensive argument, which argument it also said served before the Appeal Committee referred to in paragraph 7.5 above, holds the view that it is not necessary to enter into an agreement with the public sector as Regulation 7 does not require such an agreement and that this requirement was not an issue before the SCA in the abovementioned judgment. It further argues that, in the case of the use of a state hospital as a DSP, the tariffs charged by that institution for any service are governed by the uniform patient fee schedule published by the Minister based on the National Health Act of 2003. It further argues that this schedule provides sufficient certainty as to the tariffs at which services are rendered and that it is therefore not necessary to have "*clear agreements*" as would be the requirement with private sector DSP's. Having regard to the conclusions which I reached as set out hereunder and so as not to pre-judge the decision of the Appeal Committee or undermine the pending process before it, I shall refrain from making a determination in this regard. The question that still remains though is whether the Respondents have defamed Genesis and whether Genesis is entitled to the relief claimed.

[8] **EVALUATION OF THE STATEMENTS AND THE PUBLICATION THEREOF:**

8.1 The statements complained of by Genesis in its notice of motion were distilled from two publications. The first was part of a Powerpoint presentation contained in the Respondents' annual report made by the CMS during October and November 2016 in the course of presenting its 2015/2016 annual report to the public. The second was an article made available to the public by publication on the CMS website on 17 January 2017.

8.2 The portion of the article containing references to Genesis is the following:

“Most contraventions of Regulation 8 which resulted in members being exposed financially related to complaints against the Genesis Medical Scheme. The view held by Genesis Medical Scheme, which I must hasten to state was not founded in law nor in the scheme rules, was that it was entitled to decline funding the treatment of PMB conditions if such treatment was rendered at a private hospital/facility. The fact that this incorrect interpretation of the legislation was finally resolved by our courts in the matter between the Council for Medical Schemes v Genesis Medical Scheme (2015) SCA 161 (16 November 2015) does not provide any comfort to both the regulator and members of Genesis Medical Scheme as the scheme continues to disregard the court pronouncement and still declines funding members' accounts for services rendered at private hospitals. In this

regard, all complaints received after the court judgment, which shows persistent disregard of the law and the Supreme Court of Appeal judgment were monitored and escalated to the Compliance and Investigation unit and Legal Services for corrective action to be taken against Genesis Medical Scheme.”

- 8.3 Proceeding (in similar fashion as Heher J (as he then was) did in the court *a quo* in the **Hix Network and Technologies**-matter referred to above) on the assumption that the statements complained of could *per se* be defamatory, I now proceed to analyse the remainder of the issues pertaining to defamation in the present circumstances.
- 8.4 Whilst it might be defamatory to allege that a medical scheme is acting contrary to statutory provisions, such allegation would not attract liability if it is true and publication of the statement is in the public interest. Having regard to the statements already expressed in the SCA judgment and the fact that the legislation involved “... *is clearly a matter involving public interest and in respect of which public policy requires compliance by medical schemes ...*” then the publication of particulars of offending conduct would be in the public interest.
- 8.5 The comments regarding the contraventions of Regulation 8 referred to in the first paragraph of the above-quoted portion of the article and which predates the SCA judgment were clearly true and based on those contraventions the SCA held against Genesis.

- 8.6 Subsequent to the SCA judgment, the CMS has received some further seven complaints. Its deponent states that Genesis responds to the CMS in respect of these claims in each instance in virtually identical fashion. A copy of Genesis' response to one of the complaints has been annexed to the answering affidavit. It is referred to by the Respondents as a "*dissertation*" and I agree: the response in small font runs to some 53 pages.
- 8.7 Genesis' attitude to the SCA judgment as set out in the response is that it disagrees with the SCA judgment insofar as the judgment obliges Genesis to enter into an agreement with public sector healthcare providers as its current selected DSP's. Despite Genesis' arguments as to why this is so, their attitude clearly conflicts with the SCA judgment and in particular paragraph [44] thereof as quoted above.
- 8.8 Genesis' attitude regarding its own rules and the amendments thereto are itself either contradictory or at the least confusing. In its principal argument in the application in the urgent court it relied on the refusal of its rule amendment still being subject to an appeal process whilst in its later argument it submitted that it did not even need to have its rules amended.
- 8.9 Genesis' attitude that it need not have done anything more than select all public and state hospitals as its DSP's, and that it is entitled

to do so irrespective of the views of the Respondents or those expressed in the SCA judgment is further apparent from its own statements in the aforesaid “dissertation”, extracts of which are the following:

8.9.1 *“Members of medical schemes are entitled to certainty and in this regard they cannot be left in doubt as to whether the terms of their contract are set out in the Act, the Rules or a combination of both. Such a situation would be absurd as members would never be able to easily identify when the Act applied or when the Rules applied”* (this statement was made with reference to the SCA judgment in **Sechaba Medical Solutions and Others v William Sekete and Others** (216/2014) [2015] ZASCA 8).

8.9.2 *“The intention of the lawmakers is clear: Members are only entitled to the benefits contained in the Rules and to the extent provided in the Rules. As will be submitted later in this answer, legitimate benefits must be reimbursed in full to the limits provided in the Rules and nothing more.”*

8.9.3 In dealing with paragraph [38] of the SCA judgment:

“With respect to the court, Section 29(1)(o) read with Regulation 8 to the Act does not make any mention of a medical scheme being obliged to bear the cost of treatment only in the public sector. This obligation is clearly and expressly provided for at Section 29(1)(p) of the Act. Moreover, the provisions of Section 29(1)(q) of the Act similarly express clear provisions for the reimbursement of ANY benefit (and this must sensibly

include PMB) according to a scale or tariff. It is just not reasonable for the court to completely ignore the clear intention of the lawmakers in regard to the liability of medical schemes to reimburse the claims of members.”

8.9.4 *“Having regard to what is set above, the issue of Regulation 8 having any bearing on this matter is laid to rest: the SCA has ruled decidedly on the issue. The dictum in **Moodley** as confirmed by the SCA in its most recent judgment, makes it clear that the Act trumps the Regulations and the Regulations cannot be used to interpret the Act. Moreover, the SCA in **Joubert** did not at any time overturn the dicta in either **Secahaba** or **Omnihealth**. The provisions of the Act trump the Regulations and the Act provides that members are entitled to the reimbursement of claims to the limits prescribes by the Rules. The SCA in **Joubert** did not state that Genesis must pay the account of the providers: in fact the entire matter before the court was whether Genesis was entitled to refuse to pay for an external prosthesis. The issue of Regulation 8 was not before the court and so the judge’s remarks were at best obiter.”*

8.10 Whilst Genesis is correct that the SCA judgment did not expressly deal with the issue as to whether the selection of public sector healthcare providers would circumvent the intention of the legislature and also did not expressly have to deal with the issue of whether a mere selection of a DSP without an agreement with it would suffice or satisfy the intention of the legislature, the implication of the SCA judgment even if only expressed in *obiter* fashion, is clearly an

expression on the state of the law which is not shared by Genesis. The statements published by the First Respondent as summarised in paragraphs 2.1, 2.2, 2.3 and 2.4 of the notice of motion (with the exclusion of the allegation of non-compliance with Genesis' own scheme rules) are therefore factually correct: Genesis, both expressly and by conduct, disagrees with the SCA judgment and in particular the *proviso* stated in paragraph [44] thereof.

- 8.11 The statement that members of Genesis have been left financially exposed and may in future still be financially exposed regarding payment of PMB treatment in private hospitals by Genesis is therefore also correct.
- 8.12 The publications were therefore true and in the public interest.
- 8.13 Even if I am wrong in the abovementioned assessment and even if Genesis' arguments in their present application and as set out in their "*dissertation*" to the CMS pertaining to the complaints might in future prevail, then it is clear that the Respondents had the duty to inform members of the public who are or may become members or beneficiaries of Genesis as to what extent they are or may be exposed financially in respect of the funding of PMB conditions. The publications were also made on the CMS website and therefore published for access to brokers in medical aid services or members of the public who had a specific interest in such matters. Clearly

such persons had a duty or right to receive information regarding the conduct of a certain medical scheme or the manner in which it applies its rules. The test of whether the defence of a qualified privilege has been met is an objective one to be judged by the standard of the reasonable person having regard to the relationship between the parties and the surrounding circumstances. I find that this test has been met by the Respondents. See Van der Berg v Coopers & Lybrand Trust (Pty) Ltd 2001(2) SA 242 (SCA).

- 8.14 In addition to the above defence, the Respondents denied having published the statements with the intent to defame Genesis. The answering affidavit deposed to on behalf of the First Respondent has been made by the Acting Registrar as Acting Chief Executive of CMS. In it he more than once expressly denies any malice or intention to defame. Despite criticism levelled against him by Genesis regarding a press statement and an incorrect reference therein to having “*summonsed*” Genesis to a meeting, the fact is that a meeting had been called for between him and Genesis which never took place. Genesis also argued that the court should not accept the *ipse dixit* of the Respondents regarding their denial of intention to defame. If one has regard however to the manner in which the statements were published, the tenor of the article as quoted above and the fact that the Respondents have escalated the complaints regarding Genesis’ conduct to its Compliance and Investigation Unit

and Legal Services Department and the manner in which the Respondents have dealt with the issue, the facts clearly paint more a picture of concern for members of the public and compliance with statutory provisions than a picture of malice. On a balance of probabilities I find that the presumption of publication *animo iniuriandi* has sufficiently been refuted by the Respondents.

[9] **SUMMARY:**

Upon a *conspectus* of all the allegations set out in the various affidavits delivered together with the arguments presented, both orally and in writing I conclude as follows:

- 9.1 Genesis contends that its selection of public health services providers as its DSP's in respect of PMB expenses (without any specific agreements with such DSP's) is perfectly valid and not in conflict with the SCA judgment. It further contends that it need not have applied for an amendment of its rules, despite having done so.
- 9.2 The statements published by the Respondents to the effect that the above conduct of Genesis is in conflict with the law as expressed in the SCA judgment are not defamatory as they are either true and in the public interest **alternatively** were made without malice by the Respondents who had a duty to make users or prospective users of Genesis' products aware of Genesis' position, stance and conduct.

9.3 Genesis has therefore failed to establish either a clear right entitling it to a final interdict or even a *prima facie* right entitling it to a temporary interdict and neither has it satisfied the other requirements for such an interdict. Even if the requirements of an interim interdict had been established, I find, on the facts and circumstances as set out above, that this is a proper case where the court's discretion should be exercised in favour of the Respondents.

[10] Apart from the considerations that costs should generally follow the success of a matter, I also took into account the following time-line regarding the issue of reserved costs:

10.1 23 January 2017 – Genesis says it became aware of the publication of the article referred to above.

10.2 25 January 2017 – Genesis sent a letter of demand to the Respondents.

10.3 27 January 2017 – The deadline stated in the letter of demand.

10.4 31 January 2017 – Genesis instructs its legal team to prepare papers.

10.5 3 February 2017 – Genesis' papers were "*ready for service*".

10.6 10 February 2017 – Genesis became aware of the publication of the PowerPoint presentation made at the end of 2016.

10.7 14 February 2017 – The urgent application is launched.

10.8 16 February 2017 – The Respondents are required to indicate their opposition.

10.9 20 February 2017 – The Respondents were required to deliver their answering affidavits.

10.10 24 February 2017 – The Respondents delivered their answering affidavits.

10.11 28 February 2017 – The matter was removed from the roll and costs were reserved.

10.12 3 March 2017 – The replying affidavits were delivered.

Despite Genesis' protestations to the contrary, it appears that Genesis had chosen to litigate at a far more leisurely pace than that which it afforded the Respondents and this was the primary reason for the papers not having been timeously ready and the matter having been removed from the previous urgent roll and costs having been reserved. I find no reason why these costs should not also follow the event.

[11] **ORDER:**

In the premises the following order is made:

1. The application is dismissed with costs, including the costs attendant upon the employment of both senior and junior counsel.



N DAVIS
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	16 March 2016
Judgment delivered:	27 March 2016
Counsel for Applicant:	W Luderitz SC C T Vetter
Attorneys for Applicant:	Clyde & Company c/o Weavind & Weavind Attorneys
Counsel for Respondents:	M Maritz SC A J Lapan
Attorneys for Respondents:	Norton Rose Fullbright SA Inc. c/o MacIntosh Cross & Farquharson



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SUPPLEMENTARY ORDER

DAVIS, AJ:

1. In terms of Rule 42 the court *mero motu* adds the following to the order granted on 28 March 2017:

“...including the costs reserved on 2 March 2017.”

A handwritten signature in black ink, consisting of a large, stylized 'N' followed by a horizontal line and a few trailing strokes.

N DAVIS
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	16 March 2016
Judgment delivered:	27 March 2016
Counsel for Applicant:	W Luderitz SC C T Vetter
Attorneys for Applicant:	Clyde & Company c/o Weavind & Weavind Attorneys
Counsel for Respondents:	M Maritz SC A J Lapan
Attorneys for Respondents:	Norton Rose Fullbright SA Inc. c/o MacIntosh Cross & Farquharson