IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 18491/2015

In the matter between:

THE COUNCIL FOR MEDICAL SCHEMES	First Applicant
THE REGISTRAR FOR MEDICAL SCHEMES	Second Applicant

and

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

04/07/15
DATE

SIGNATURE

BONITAS MEDICAL FUND	Respondent

JUDGMENT

Tuchten J:

1 This is a dispute about the correct interpretation of s 49(1) of the Medical Schemes Act, 131 of 1998 (the MSA). On 10 November 2014 the second applicant (the Registrar)[1], acting under powers conferred on that functionary by s 44(2) of the MSA read with s 2 of the Inspection of Financial Institutions Act, 80 of 1998 (the FIA), issued a written direction (the inspection order) in which he appointed Mr CJ

1 The second applicant is in fact the acting Registrar. Nothing turns on that.

Potgieter as an inspector and instructed Mr Potgieter (the Inspector) to inspect the affairs of the respondent and some 17 other institutions (described in the inspection order as the respondent's "associated institutions").

2 The purpose of the inspection was stated to be to obtain evidence of whether or not certain transactions were irregular and contravened the MSA. The Inspector was instructed to report his findings to the Registrar.

3 The powers conferred by the Registrar on the Inspector were contained in an annexure A attached to the inspection decision. They were to exercise any of the powers stipulated in the MSA and in the FIA and in particular to perform acts in relation to the respondent and the alleged associates which amount to searches within the premises of these institutions and to retain and seize documents, including those which might be needed for criminal or other proceedings.

4 On 24 November 2014, the Inspector visited the premises of the respondent and gave its representative a copy of the inspection order. He asked the respondent for a great deal of documentary information. The Inspector gave the respondent until 12 December 2014 to provide the information. By letter dated 11 December 2014, the respondent

undertook immediately to provide what was "readily available" and to provide the balance of the material sought by the second working week of January 2015. The respondent then proceeded to query the need for any inspection at all and sought certain information from the Registrar.

5 The response from the Registrar did not satisfy the respondent and by notice of appeal dated 24 December 2014, the respondent delivered what it described as a notice of appeal in terms of s 49(1) of the MSA. The appeal was stated to be directed to the first applicant (the Council) and to be against the decision of the Registrar to order the inspection which I have described.

6 This led to certain abortive or inconclusive litigation between the parties. I shall not describe the background to the current application because the sole question for my consideration is whether an appeal to the Council lay at all against the decision of the Registrar embodied in the inspection order. I received submissions from counsel for the respondent regarding the legality of the decision and rights of the respondent which had allegedly been infringed by the inspection order. I shall not deal with these submissions in depth because I do not think that they take the matter very much further. I shall accept that the inspection order had the potential to infringe the respondent's

rights and that the notional possibility exists that the inspection decision may be illegal. But none of that, in my view, really matters for present purposes.

7 The question is not whether, if the respondent's rights have been infringed or the inspection order is illegal, the respondent should have a remedy. If that is the case, it self-evidently should. Nor is the question whether s 49(1) passes constitutional muster. No such constitutional challenge is before me. The question is whether s 49((1) of the MSA, having regard to the language used and seen in its context which includes the purpose for which the measure was enacted, confers a right of appeal on the respondent to the Council against the inspection order.

8 To decide this question I have to interpret s 49(1) of the MSA. Section 49 reads:

> (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 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.
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> (3) The Registrar or any other person who lodges an appeal in terms of subsection (1) may in person or through a representative appear before the Council and tender evidence or submit any argument or explanation to the Council in support of the decision which is the subject of the appeal.

9 The inspection order was made, as I have said, under a power conferred on the Registrar by ss 44(1) to (3) of the MSA. These provisions read:

> (1) A medical scheme shall, at the written request of the Registrar, or during an inspection of the affairs of a medical scheme, by the Registrar or such other person authorised by him or her, produce at any place where it carries on business, its books, documents and annual financial statements in order to enable the Registrar or such other person authorised by him or her to obtain any information relating to the medical scheme required in connection with the administration of this Act.
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> (2) The Registrar, or such other person authorised by him or her, shall in addition to the powers and duties conferred or imposed upon him or her by this Act, have all the powers and duties conferred or imposed upon an inspector appointed under section 2 of the Inspection of Financial Institutions Act, 1984 (Act 38

of 1984), as if he or she has been appointed an inspector under that Act.

(3) Any reference in this Act to an inspection made under this section shall also be construed as a reference to an inspection made under the Inspection of Financial Institutions Act, 1984.

(4) The Registrar may order an inspection in terms of this section-

(a) if he or she is of the opinion that such an inspection will provide evidence of any irregularity or of non-compliance with this Act by any person; or

(b) for purposes of routine monitoring of compliance with this Act by a medical scheme or any other person.

10 Act 38 of 1984 (the old Inspection Act) was however repealed by s 13 of the FIA. Counsel on both sides argued the matter on the basis that the reference to the old Inspection Act in the MSA should be read as if it were a reference to the FIA.

11 The question to be decided actually reduces to this: is a decision by the registrar to order an inspection a decision for the purposes of s 49(1)?

12 The modern approach to the interpretation of documents, including statutory provisions, has been authoritatively set out in a number of cases decided in the Supreme Court of Appeal. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA

paras 18 and 25-26, the SCA set out how a court should interpret documents, whether contractual or statutory or otherwise:[2]

> 18 The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the

2 In the quotations which follow, I have omitted references to footnotes.

one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

...

[25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or

> sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.
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> [26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.

13 In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 6 SA 520 SCA para 16, the court held:

> *Chartered Accountants (SA) v Securefin Ltd and Another* and *Natal Joint Municipal Pension Fund v Endumeni Municipality* ... make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic

uncertainty but are fundamental to the process of interpretation from the outset.

14 In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 2 SA 494 SCA para 12, the court held in relation to the interpretation of a provision in a contract:

> Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.

15 In *Commissioner, South African Revenue Service v Bosch and Another* 2015 2 SA 174 SCA para 9, the court held in relation to the interpretation of a provision in an income tax statute:

> The words of the section provide the starting point and are considered in the light of their context, the apparent purpose of the provision and any relevant background material. There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of

> that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions ... .

16 Among the purposes of the MSA as expressed in its long title are to control certain activities of medical schemes and to protect the interests of members of medical schemes. The respondent is a medical scheme as contemplated by the MSA. The concept of medical scheme is not defined in the MSA but in order for an entity lawfully to operate at all, it must be registered.[3] A scheme so registered becomes a body corporate. It must enact a set of rules, which must also be registered.[4] A scheme assumes liability for and guarantees the benefits offered to its members and their dependants under its rules.

3 Section 22 read with s 24 of the MSA

4 Section 24(3) of the MSA

17 A medical scheme must at all times maintain its business in a financially sound condition and must have unencumbered assets which on any day are not less than its aggregate liabilities. A medical scheme is restricted in the manner in which it may invest its assets.[5] Every medical scheme must appoint at least one auditor who, in addition to the other duties to which an auditor is subject must certify in relation to every return or statement which he or she is required under the MSA to examine, that the return or statement in question complies with the requirements of the MSA.[6]

18 Medical schemes are of great importance in the lives of many people in this country. The benefits provided by schemes are essentially related to medical treatment of members and their dependents. In return for a subscription, a scheme provides access to medical services at no cost or a reduced cost as contemplated in the rules of the scheme. It is of the utmost importance that schemes are, and are seen to be, well run and operate without irregularities. The lives and well being of members of schemes and their dependants literally depend on this. A medical scheme is at bottom simply a mechanism whereby the contributions of members are gathered in a fund and then paid out to finance medical treatments for those same members

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5 Section 35 of the MSA

6 Section36(8) of the MSA

and, of course, the administration of the medical scheme. All the money in a medical scheme has as its source the contributions of those members. The only other source of revenue of a medical scheme which comes to mind is the returns on investments made by medical schemes of members' contributions not immediately needed for medical treatments or administration costs.

19 The MSA has instituted a regulatory scheme to ensure that the purposes of the MSA are achieved. At the apex of this regulatory scheme stands the Council. The Council consists of up to 15 members appointed by the Minister of Health, taking into account the interests of members and of medical schemes, expertise in law, accounting, medicine, actuarial sciences, economics and consumer affairs.[7] The Council is required by law to meet at least four times a year. Special meetings may be convened in certain circumstances. Its resolutions must be taken by majority vote.[8]

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7 Section 4(1) of the MSA

8 Section 10 of the MSA

20 The functions and powers of the Council[9] are, with one exception, broadly those of a board of directors of a company. The exception, contained in s 7(d), is that the Council must investigate complaints and settle disputes in relation to the affairs of medical schemes as provided for in the MSA.

21 The Registrar is the executive officer of the Council and manages the Council's affairs. The Registrar must act in accordance with the MSA and the policy of the Council and supervises the staff of the Council.[10] The Registrar is afforded wide regulatory powers under the MSA.[11] Among those powers are, as I have mentioned, the power to inspect medical schemes. The Registrar may exercise the powers conferred on him or her either personally or through inspectors. Those powers are broadened by the conferment by reference on the Registrar of the powers conferred on the functionary (also called a registrar) who is the executive officer of the Financial Services Board (the FSB registrar) as defined in s 1 of the FIA.

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9 Sections 7 and 8 of the MSA

10 Sections 18(2),(3) and (5) of the MSA

11 Chapter 9 of the MSA

22 The powers of inspection of the FSB registrar were described in *Platinum Asset Management (Pty) Ltd v Financial Services Board and Another; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others.*[12] Quoting from *Mistry v Interim Medical and Dental Council,*[13] the court in *Platinum* pointed out that in the case of any regulated enterprise, the proprietor's expectation of privacy with respect to premises, equipment, materials and records must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of an effective regime of regulation. The greater the potential hazards to the public, the less invasive the inspection. People involved in such undertakings must be taken to know from the outset that their activities will be monitored. If they are licensed to function in a competitive environment, they accept as a condition of their licence that they will adhere to the same reasonable controls as are applicable to their competitors. Persons who choose to engage in a pervasively regulated business and to accept a license do so with the knowledge that their business and records will be subject to effective inspection. As was the case with the financial institution under scrutiny in *Platinum*, the Registrar has the power under s 44(4) of the MSA to

[12] 2006 4 SA 73 W

[13] 1998 4 SA 1127 CC para27

order an inspection both where irregularities are suspected and for routine purposes.

23 To return to the question: is the decision to order an inspection a "decision" for the purposes of s 49(1)? Counsel addressed arguments to me on the ordinary meanings of the words *decision* and *beslissing* (the equivalent word used in the Afrikaans text). I do not derive much guidance from this debate. The words in question *might* grammatically encompass an inspection order. But the question is which meaning is appropriate and for that purpose, in my view, precedent and the principles of construction in the line of cases culminating for the present in *CSARS v Bosch, supra*, provide the answer.

24 In *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another,*[14] the SCA found that a decision by the Competition Commission to refer to the Competition Tribunal complaints regarding prohibited competition practices was not an administrative decision. The court adopted the reasoning in a judgment of the Competition Tribunal in *Norvatis SA (Pty) Ltd and Others v Competition Commission and Others.*[15] The court held that the function of the

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14 2003 3 SA 64 SCA

15 CT22/CR/B/Jun 01, 2.7.2001

commission was investigative and not subject to review, save in cases of ill-faith, oppression, vexation or the like.

25 In this Division, there are a number of decisions which bear upon the point. In *Herbert Porter & Co Ltd and Another v Johannesburg Stock Exchange*,[16] the court observed, with reference to the work *Words and Phrases Legally Defined*,[17] that the word *decision* implies the exercise of judicial determination as the final and definite result of examining a question. In *Kruger v the Master and Another no; Ex Parte Kruger*,[18] the court found, in review proceedings under s 151 of the Insolvency Act, 24 of 1936, with reference to the *Shorter Oxford English Dictionary*, that the word *decision* did not mean any resolution or expression of will whatsoever and therefore did not embrace the exercise of a power of the Master not to recommend the rehabilitation of an insolvent. In *Strauss and Others v the Master and Others NNO*,[19] a decision not to provide a person required to testify at an insolvency enquiry under the insolvency law with certain information before he testified was held not to have those attributes of finality and invasiveness of rights which permitted a review and that the applicant was not, for the purposes of s 151 of the Insolvency Act a person

[16] 1974 4 SA 781 W 794

[17] Vol 2 at 33

[18] 1982 1 SA 754 W 757D

[19] 2001 1 SA 649 T

aggrieved because no right of the applicant had by the ruling been infringed or invaded. In *Nedbank Ltd v Master of the High Court Witwatersrand Local Division and Others*,[20] the court found that the institution of an enquiry pursuant to s 417 of the Companies Act, 61 of 1973, was purely investigative and therefore not subject to review.[21]

26 The weight of authority within this Division is therefore that not every expression of will by a functionary will constitute a decision; and that an expression of will setting in motion investigative procedures will (at the lowest) often not constitute a decision in this context. The context and purpose of the measure in question must therefore be examined to determine whether, on a proper interpretation of that measure, the expression of will under scrutiny constitutes a decision.

27 If the interpretation advanced by counsel for the respondent were correct, it would mean that a medical scheme could prevent the Registrar or his inspector from even entering the premises of the scheme by the simple means of producing a notice of appeal. That would, following the regime submitted by counsel for the respondent, require either that the appeal be considered at one of the relatively

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20 2009 3 SA 403 W

21 In *Firstrand Bank Ltd (T/a Rand Merchant Bank) and Another v Master of the High Court, Cape Town, and Others* 2014 2 SA 527 WCC, *Nedbank Ltd v Master of the High Court Witwatersrand Local Division and Others* was not followed.

infrequent scheduled meetings of the Council or that a special meeting of the Council would have to be convened. It is highly unlikely that such an appeal would be disposed of with any expedition. The members of the Council, in the main probably legal lay persons, might be expected to consider and deal with complex issues of procedural and constitutional law. And the matter would not necessarily end after the Council had pronounced on the validity or probity of the inspection decision. Section 50 of the MSA provides for a further appeal from the Council to a body called the Appeal Board. The Appeal Board is also vested with the power to summon witnesses and take evidence on oath. And after that, of course, the aggrieved medical scheme could take any one or all of the three administrative organs I have mentioned to court. It is not unreasonable to conclude that a determined medical scheme could, on this hypothesis, delay any inspection for a number of years, by which time evidence could be destroyed or lost, recollections become vague and witnesses unavailable. If the interpretation submitted on behalf of the respondent is correct, the power conferred in regard to both inspections for suspected irregularities and routine inspections would be severely attenuated.

28 There is a complete absence of any provisions in the MSA to mitigate the mischief which, on such an interpretation, would inevitably result from the employment by a medical scheme of the supposed right of appeal. The Registrar would (leaving aside *Anton Piller* relief) only be able to gather the evidence and preserve it against the eventuality that the medical scheme might be unsuccessful in its appeal or appeals if he were then entitled to approach the court for relief under s 51. This is because the effect of s 49(2) would be, if the inspection decision is subject to appeal under s 49(1), to stop the inspection in its tracks until after the appeal had been determined. However, counsel for the respondent submitted that the power of the Registrar to approach the court under s 51 would mitigate the undesirable consequences which would otherwise flow from the construction proposed by them.

29 Section 51 reads:

> (1) The Registrar may, with the concurrence of the Council, in regard to any medical scheme apply to the High Court for an order contemplated in paragraph (*b*), (*c*), (*d*) or (*e*) of subsection (5) if the Registrar is of the opinion that it is in the interest of beneficiaries or because material irregularities have come to his or her notice.
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> (2) A medical scheme may, in regard to itself, apply to the High Court for an order contemplated in paragraph (*b*), (*d*) or (*e*) of subsection (5), if the

medical scheme is of the opinion that it is desirable, because the medical scheme is not in a sound financial condition or for any other reason that such an order be made in regard to the medical scheme: Provided that a medical scheme shall not make such an application except by leave of the High Court and the court of appeal shall not grant such leave unless the medical scheme has given security to an amount specified in the Rules of the High Court for the payment of such costs.

(3) Any member or one or more creditors of a medical scheme may make an application to the High Court for an order in terms of paragraph (*b*), (*d*) or (*e*) of subsection (5), and the proviso to subsection (2) shall apply in regard to such an application.

(4) If an application to the High Court in terms of subsection (3) is made by a person other than the Registrar -

(*a*) it shall not be heard unless a copy of the notice of motion and of all accompanying affidavits and other documents filed in support of the application are also lodged with the Registrar at least 15 days, or such shorter period as the High Court may allow on good cause shown, before the application is set down for hearing; and

(*b*) the Registrar may, if he or she is of the opinion that the application is contrary to the interest of the beneficiaries of the medical scheme concerned, make application to join the application as a party and file affidavits and other documents in opposition to the application.

(5) Upon any application in terms of the preceding subsections, the High Court may—

(*a*) refuse the application;

(*b*) order that an investigation be made and may issue such directions regarding such investigation as the High Court may deem desirable;

(*c*) order that the rules of the medical scheme relating to the appointment, powers, remuneration and removal from office of any officer, or relating to such other matter as the High Court may regard appropriate, be altered in a manner to be specified in such order;

(*d*) order that the medical scheme be placed under judicial management in terms of section 52; or

(*e*) order that the whole or any part of the business of the medical scheme be wound-up in terms of section 53.

(6) The High Court shall, in exercising its discretion under subsection (5), consider the equitable interests of the members and of any other person who has rendered or who intends to render financial assistance to the medical scheme, and, subject to such considerations as aforesaid, shall make such order as it deems most advantageous to the members.

(7) When a High Court has made an order under paragraph (*b*) of subsection (5) in regard to a medical scheme, it may at any time thereafter make an order under paragraph (*c*), (*d*) or (*e*) of that subsection in regard to that medical scheme, and when a High Court has made an order under paragraph (*d*) of subsection (5) in regard to the medical scheme, it may at any time thereafter make an order under paragraph (*e*) of that subsection in regard to that medical scheme.

(8) Notwithstanding anything to the contrary contained in the rules of a medical scheme, an order of the High Court made under paragraph (*c*) of subsection (5) shall take effect as from the date specified for that

purpose in the order, or if no date has been so specified, as from the date of the order, and thereupon the said rules shall be deemed to have been amended in the manner specified by the High Court.

(9) Unless the High Court otherwise orders, the costs of the Registrar in or in connection with an application in terms of this section, shall be paid by the medical scheme and shall be a first charge upon the assets of such medical scheme.

30 To my mind, s 51 cannot be used in the way suggested by counsel for the respondent. The construction advanced implies that if the Registrar were dissatisfied by the noting of an appeal, the Registrar could use s 51 to obtain an order from a court that *despite* the noting of an appeal, the inspection should go ahead. That, in its turn, would render the supposed benefit of a right of appeal against an inspection order illusory. I think that the construction advanced by counsel for the respondent would therefore lead to absurdities.

31 Furthermore, it is entirely at variance with the inspection regime created by the MSA that the Registrar should, if resistance on the part of a medical scheme to the inspection be encountered or anticipated, have to go to court to obtain an inspection order. That would render the inspection regime unwieldy and could result in a situation in which the Registrar could not even be confident that his decision to carry out

a routine inspection would be implemented without a court order against a multiplicity of medical schemes.

32 An interpretation that the inspection order is not subject to appeal under s 49(1) would not leave an aggrieved medical scheme without a remedy. It could, as explained in *Simelane, supra*, bring what is now described as a review for legality or proceed under the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) if an inspection order is subject to review under PAJA (something I need not decide). There would be no unwieldiness in the inspection regime if the burden were cast on an aggrieved medical scheme rather than the Registrar to approach the court for relief . A review court has wide powers to do what is just and equitable and could in its order balance any consideration of urgency and the need to preserve evidence against the rights of the medical scheme said to have been infringed.

33 Inspections against the will of participants in regulated industries are the rule rather than the exception in our statute book. I have already referred to financial institutions. *Mistry, supra*, reflects that this is the case too in relation to medical practitioners. I invited counsel to refer me to any statutory provision, ignoring for the moment the MSA, which permits an industry participant to stifle inspections by its regulator until after an administrative appeal. Counsel were unable to do so. I

therefore find that the general policy in our law in this regard is (always subject, as every exercise of public power is, to reviews for legality) that such inspections should go ahead rather than be stifled by administrative appeal procedures. The present case, relating as it does to matters of great importance to members and their contributions, seems to me *a fortiori* as a matter of policy to require that the inspection go ahead.

34 For these reasons, I prefer the construction that the inspection decision is not subject to appeal under s 49(1) of the MSA. Counsel for the applicants asked for costs. I think that this is a case in which the *Biowatch*[22] principle should be applied: as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs unless there are circumstances, such as frivolousness or vexatiousness, which justify a departure from this rule. The respondents seem to me in good faith to have advanced a contention which although in my view wrong, was arguable. The conclusion to which I have come settles the issue for the entire industry. As I have not had the benefit of argument, I shall provide in the order for the parties to revisit the question of costs, if so minded.

22 *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 6 SA 232 CC para 21

35 I make the following order:

1 It is declared that the second applicant's decision dated 10 November 2014 to order an inspection into the affairs of the respondent in terms of s 44(4)(a) of the Medical Schemes Act, 131 of 1998, is not a decision that is appealable in terms of the provisions of s 49 of the same Act.

2 There will be no order as to costs; provided, however, that any party may on notice to all other parties delivered within 10 days of the date on which this order is handed down, set the costs order down for reconsideration by the court. If no such notice is delivered, the costs order will, upon the effluxion of the period of ten days, become final.

NB Tuchten
Judge of the High Court
4 July 2015

For the applicants:
Adv MC Maritz SC
Instructed by Savage Jooste and Adams Inc
Pretoria

For the respondent:
Adv EC Labuschagne SC and Adv K Schubart
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