IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG : PRETORIA 15/01/2013.

CASE NO: 7878/2010

In the matter between:

DANIEL PIENAAR Applicant

and

EVER IS NOT APP...

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. OK

14/1/13 DATE SIGNATURE

THE COUNCIL FOR MEDICAL SCHEMES Respondent

JUDGEMENT

Coram: RABIE J

1. The applicant is a trustee and the chairman of the Liberty Medical Scheme ("LMS"), 'n medical scheme registered under section 24(1) of the Medical Schemes Act, Act 131 of 1998 ("the Act"). The respondent is the Council for Medical Schemes, established in terms of section 3 of the Act.

2. In the present application the applicant sought a permanent interdict preventing the respondent from making a determination in terms of section 46(1) of the Act

in respect of the applicant pursuant to certain letters addressed by the respondent dated 20 December 2010, 16 February 2011 and 23 June 2011. The respondent has instituted section 46 proceedings which may lead to the removal of the applicant from the board of trustees of the LMS. The present application to this court was thus aimed at interdicting and restraining the respondent from continuing with the section 46 proceedings which the applicant viewed as unlawful and unfair.

3. The respondent is a statutory body entrusted with the responsibility of regulating and controlling medical schemes and their business. The respondent's functions include the obligation to protect the interests of beneficiaries. According to section 3 of the Act the respondent shall, at all times, function in a transparent, responsive and efficient manner. The fifteen members of the respondent are 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. The Chairperson of the respondent is also appointed by the Minister. Section 7 of the Act contains provisions relating to the functions of the respondent and section 8 provides for the powers of the respondent.

4. Section 46 of the Act makes provision for the removal by the Council of a member of the board of trustees of any medical scheme and provides as follows:

"**46. Removal of member of board of trustees.**—(1) The Council may, by notice in writing, remove from office a member of the

board of trustees of a medical scheme if it has sufficient reason to believe that the person concerned is not a fit and proper person to hold the office concerned.

(2) The Council shall, before issuing the notice referred to in subsection (1), furnish such person with full details of all the information the Council has in its possession in regard to any allegations of the member of the board of trustees not being a fit and proper person and to request that person to furnish the Council with his or her comments thereon within 30 days or such further period as the Council may allow.

(3) The Council may not issue the notice referred to in subsection (1) until it has considered the comments, if any, referred to in subsection (2)."

5. In the present instance the respondent informed the applicant that it is invoking the section 46 procedure on the basis of allegations that the applicant was not a fit and proper person to be a member of the board of trustees of LMS. Initially the action of the respondent was aimed at the respondent as well as a certain Mr L Jacques, who was also a member of the board of trustees of LMS. As Mr Jacques had since resigned his position, the further proceedings in terms of section 46, and the application before this court, only relate to the applicant.

6. The first notice to the applicant was contained in a letter dated 20 December 2010. A second notice in terms of section 46 was contained in a letter from the respondent dated 16 February 2011. This second notice referred to further grounds relating to why the applicant was not a fit and proper person to serve on the board of trustees of LMS. A third notice in terms of section 46 was given

to the applicant and Mr Jacques on 23 June 2011. According to this third notice the respondent had again considered the matter and had decided to renew its earlier resolution to proceed against the applicant and Mr Jacques on the grounds set out in the first two notices.

7. The applicant eventually refused to participate in the section 46 proceedings and instead of waiting for the conclusion of such proceedings and possible further internal remedies, should same have become necessary, the applicant proceeded with the present application.

8. It is trite that where an administrative body has a duty imposed on it by statute and disregards important provisions of the statute or is guilty of gross irregularity or clear illegality in the performance of that duty, its proceedings may at common law be set aside by a Court of law on application. See S.A. Medical and Dental Council v McLoughlin, 1948 (2) SA 355 (AD) at p. 392. The provisions of Section 195 of the Constitution, Act 108 of 1996, which relate to public administration, and the provisions of section 33 of the Constitution, enforce and extend the position at common law and the provisions of the Promotion of Administrative Justice Act, Act 3 of 2000, provide for the basic framework and content of, *inter alia*, a review of administrative action.

9. Where the administrative proceedings have, however, not been finalised, such as in the present instance, the court would be less inclined to step into the process and to exercise its reviewing powers. In Brock v SA Medical and Dental Council 1961 (1) SA 319 (C) at p 324 the following was said:

"Now while the common law remedy is not confined to cases where proceedings have been finalised, it is only in rare instances that the Supreme Court will exercise that power to restrain illegalities during the hearing of a matter. In Wahlhaus and Others v Additional Magistrate, Johannesburg and Another, 1959 (3) SA 113 (AD), an application had been made for an order declaring an indictment invalid or alternatively quashing the indictment. It was held that while a Superior Court undoubtedly has the power to intervene, whether by mandamus or otherwise, in unterminated criminal proceedings, it will only do so in rare cases where grave injustice might otherwise result, or where justice might not by other means be attained. The Court specially refrained from defining the ambit of the power and stated that each case must depend upon its own circumstances. Although that case dealt with criminal proceedings before a magistrate's court, in my view it can be applied to review proceedings of a body such as a disciplinary committee. The object underlying this attitude would seem to be to ensure that trials are as far as possible continuous. If proceedings were to be interrupted pending applications to the Supreme Court in respect of alleged irregularities during the proceedings, the conduct of those proceedings could be seriously prejudiced. R v Adams and Others, 1959 (3) SA 753 (AD)." (my underlining)

10. In Van Wyk v Midrand Town Council and Others 1991 (4) SA 185 (W) the applicant applied for an order interdicting the second respondent from continuing a disciplinary investigation prior to the conclusion thereof.

At p188 Lazarus J said the following:

"As to the principles which must be applied in this application, the leading case is the Wahlhaus case, already referred to, where it was held that a Court has the power to interfere with the unterminated course of proceedings in a court below in rare cases where grave injustice might otherwise result or where justice might not by other means be obtained. In general, however, it held that it would hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below and to the fact that redress by means of review or appeal would ordinarily be available. (See too Ismail's case supra.)" (my underlining)

11. It was not disputed by the parties in the matter before this court that the aforesaid principles applied *in casu*.

12. Having regard to the aforesaid principles, it would seem that the factors which the court would consider in deciding whether to exercise its reviewing powers before the administrative process had been concluded, would, *inter alia*, be considerations akin to those applicable to the duty to exhaust domestic remedies prior to approaching the court for relief. Such relevant factors are, *inter alia*, the body that will exercise appellate jurisdiction; the manner in which that jurisdiction is to be exercised, including the ambit of any rehearing on appeal; the powers of the appellate tribunal, including its power to redress or cure wrongs of a reviewable character; and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which the applicant complains. See Lawson v Cape Town Municipality 1982(4) SA 1 (C) at p 6-7.

13. It is necessary to briefly refer to certain background facts of the present matter. LMS is a large medical scheme comprising more than 130 000 members with an annual turnover of around R1,8 billion. During 2010 Mr Jacques was the chairman of the LMS board of trustees and the applicant was one of the remaining seven trustees. During the same period V-Medical Administrators (Pty)Ltd (V-Med), which was a wholly owned subsidiary of Liberty Health Holdings (Liberty Health Holdings), had an administration agreement with LMS. In terms of this agreement V-Med provided LMS with, *inter alia*, administration services.

14. At the time Dr P. Botha was the Chief Executive Officer of Liberty Health Holdings. On 1 October 2010 Dr Botha lodged a complaint with the respondent against the applicant and Mr Jacques. In brief the complaint contained, *inter alia*, the following allegations: Dr Botha stated that he was approached by a certain Mr D. van Rensburg who acted on behalf of the applicant and Mr Jacques in their capacities as trustees of LMS. Mr van Rensburg was involved with companies which compete with LMS and V-Med. According to Dr Botha, Mr van Rensburg stated that he would arrange for the administration agreement between LMS and V-Med to be terminated and to have the administration services rendered by another company who was prepared to pay Mr van Rensburg a fee per member in the event of him succeeding in having the administration agreement terminated and the new administration agreement to be concluded between LMS and this other company. Mr van Rensburg also proposed that a new marketing company be established for LMS and that the

shareholders thereof be Liberty Health Holdings as well as the applicant and Mr Jacques and furthermore an entity in which Mr van Rensburg had an interest.

15. It was thus alleged by Dr Botha that the applicant and Mr Jacques sought to negotiate a deal from which they would benefit personally as the deal consisted of the establishment of a marketing company in which they would hold shares for their personal benefit. This marketing company would provide services to LMS along with V-Med. The accompanying threat was that if the proposal was not acceded to by V-Med, the administration agreement with LMS would be terminated and furthermore that the applicant and Mr Jacques, in their capacities as trustees of LMS, would ensure that the proposed amalgamation of LMS with another medical scheme, also administered by V-Med, namely Spectramed, would be frustrated. This they would have been able to do by using their influence on the other trustees of LMS. V-Med and its holding company, Liberty Health Holdings, were in favour of this amalgamation.

16. The thrust of the complaint against the applicant and Mr Jacques was thus that they had acted in a manner which entails is serious conflict of interest on their part as trustees of LMS.

17. On 7 December 2010 V-Med and the other subsidiary of Liberty Health Holdings brought an urgent application to this court to interdict the applicant and Mr Jacques from participating at any meetings of LMS at which anything in respect of the administration agreement with V-Med were to be discussed. Furthermore, to interdict LMS from implementing its resolution to reduce the

services which V-Med is required to provide to LMS in terms of the administration agreement.

18. On behalf of the respondents in that application it was submitted *in limine* that V-Med and the other subsidiary had no *locus standi* to bring the said application and furthermore that no cause of action was disclosed in the founding papers. The court found, *inter alia*, that the conflict of interest relied upon by the applicants in that application, was not one between the trustees and LMS but between the applicant and Mr Jacques, as trustees, and an outside third party. Furthermore, the duty to avoid a conflict of interest is a duty owed by the trustees to LMS and its members, and not a duty owed to V-Med and the other subsidiary as outside parties. In regard to the submission that no cause of action had been disclosed, the court found, *inter alia*, that the application was premature as no decision had yet been taken by the board of trustees of LMS which was to the detriment of V-Med and the other subsidiary. Furthermore that the application was in effect an attempt to prevent LMS by way of an interdict from terminating the relevant contacts lawfully. The court consequently dismissed the application on the basis of the two points *in limine*.

19. As mentioned above, the first notice to the applicant invoking section 46 was dated 20 December 2010. That related to the issues contained in the complaint of Dr Botha. In the same notice the Registrar of the respondent directed LMS to ensure that the applicant and Mr Jacques not participate in any discussions and/or decisions regarding the complaint and to refrain from engaging in any discussions and/or decisions regarding the administrator or any of its affiliates.

20. The applicant did not make representations as requested in the notice in terms of section 46 but instead made a large number of queries and requests for information. Queries were also made in respect of the respondent's entitlement to issue the directive that the applicant and Mr Jacques should not participate in certain decisions of the board of trustees.

21. On 2 February 2010 the respondent responded quite extensively to the aforesaid requests and queries and also summarised the allegations against the applicant and Mr Jacques. The letter also referred, *inter alia*, to an opinion obtained from senior counsel expressing the view that the applicant and Mr Jacques should not participate in any deliberations or decisions of the board of trustees of LMS relating to the complaints against them or to any dealings between LMS and V-Med in relation to any of the issues which have arisen in the complaint, for, to do so, would constitute a manifest conflict of interest on their part. The letter continued by confirming that the applicant and Mr Jacques had indeed acted in a manner that constituted a conflict of interest in that they had refused to recuse themselves from such deliberations and decisions. Further allegations were made to which it is not necessary to refer.

22. In the correspondence that ensued, the applicant and Mr Jacques asked for further information and eventually filed supplementary submissions.

23. On 16 February 2012 the second notice in terms of section 46 was written to the applicant's then attorney informing him that, pursuant to further information, the respondent had resolved on 14 February 2011 to invoke section 46 against the applicant and Mr Jacques. This notice mainly related to allegations that they

had participated in decisions of the Board of Trustees when they should not have done so, given their interest in the matter. The respondent invited submissions and such were made on 17 March 2011.

24. In subsequent correspondence the applicant questioned the validity of the decision taken on 3 December 2010 which led to the first notice in terms of section 46. According to the respondent the attack by the applicant on the validity of the procedure followed by the respondent, resulted in the respondent deciding, *ex abundanti cautela*, to put the matter beyond doubt and to reconsider the whole matter afresh. In a meeting of the respondent held on 26 May 2011, the respondent considered all the documentation and the issues raised by the applicant and decided to renew its resolution to proceed against the applicant and Mr Jacques in terms of section 46 based on the grounds contained in the earlier notices and letters. The applicant and Mr Jacques was again afforded a period of 30 calendar days to supplement their existing written submissions to the respondent. They were also invited to notify the respondent should they not have all the documents and correspondence considered by the respondent. They were also informed that they would not be afforded the opportunity of leading evidence and of cross-examining Dr Botha but that they would be afforded the opportunity of making oral representations when the respondent considers the matter. This letter also noted the resignation of Mr Jacques as a trustee.

25. On 31 August 2011 the respondent furnished the applicant with all the information that had served before the respondent when it made its decision on 26 May 2011 to issue the notice in terms of section 46.

26. On 18 October 2011 the applicant filed an internal appeal against the section 46 process. At the meeting of the respondent of 27 October 2011 the matter was adjourned at the request of the applicant until the appeal had been heard.

27. I have mentioned above that the applicant did not seek to review the respondent's decisions thus far, and neither did he wait for the conclusion of the section 46 procedure to be concluded before approaching this court.

28. According to the applicant the whole administrative process in terms of section 46 had become both unlawful and unfair and had become tainted to such a degree that it should not be allowed to continue. Numerous grounds were mentioned by the applicant in support of these contentions and it would appear that for all practical purposes each and every possible point relating to the process and the merits of the matter came under attack both in the correspondence leading up to the application and in the application itself. In my view, however, it is not necessary to refer to all these issues herein. I shall refer to the more salient contentions which in effect encompass all the sub categories of the complaints against the actions of the respondent.

29. Firstly, the applicant alleged that the grounds upon which the respondent invoked the section 46 proceedings, were totally unsubstantiated. Secondly, that the respondent remained supine and allowed the applicant to be a trustee whilst engaging in the section 46 proceedings and that this demonstrated the respondent's ulterior motive, irrationality, bias and *mala fides*. Thirdly, that the respondent's failure to provide documentation or information allows for the inference that the respondent is pursuing an agenda on behalf of V-Med.

Fourthly, that Dr Botha utilised the machinery of the respondent to unlawfully prevent LMS from terminating the administration agreement with V-Med and that the respondent willingly and deliberately assisted Dr Botha to try and achieve this end. Furthermore, that the respondent had no power or authorisation to direct that the applicant and Mr Jacques may not participate in any discussions and/or decisions regarding the complaints and regarding V-Med and its affiliate. In this regard the respondent assisted V-Med to achieve its objects when it failed to do so by way of the urgent court interdict referred to above.

30. Regarding the process itself the applicant, *inter alia*, submitted that the respondent failed to hold proper meetings on 3 December 2010 and 16 February 2011 and that, consequently, no lawful decisions were taken by the respondent to invoke the process in terms of section 46 of the Act. It was further submitted that the respondent came in possession of documentation which it obtained through the aforesaid invalid procedures and that it thus possessed the documentation illegally.

31. Regarding the third notice in terms of section 46 the applicant submitted, *inter alia*, that if the respondent had applied an unbiased and objective mind to the matter at its meeting of 26 May 2011, it would have determined that there was no substance in the allegations that the applicant was not a fit and proper person to hold the office of trustee of LMS. In regard to this and all the other decisions the applicant submitted that the decisions of the respondent were based on false and hearsay evidence and that it was furthermore inexplicable that the respondent would proceed after Liberty Health Holdings had indicated

that it no longer wished to proceed with the complaints against the applicant. The applicant accused the respondent of conducting a malicious vendetta against him.

32. With reference to the internal appeal instituted by the applicant it was submitted that the granting of a date for the hearing so far in the future, effectively deprived the applicant of the benefit of this remedy.

33. The applicant further submitted that he was not afforded a proper opportunity to state his case and that he would be prejudiced by the refusal that he may lead oral evidence and conduct cross examination.

34. The applicant furthermore submitted that his good name and reputation had been damaged and that he had no alternative remedy but to approach the court in the manner that he did.

35. Before dealing with the aforesaid issues it is apposite to again refer to the manner in which the court should deal with factual disputes in motion proceedings. In National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) Harms JA said the following at 290 para [26]:

"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the

respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."

36. Regarding the applicant's submission that there is no basis upon which a section 46 procedure can be instituted and that there is no case against the applicant and only hearsay allegations, it should be emphasised that the respondent is the body which should make such decisions and not this court. At this stage of the proceedings the respondent has not even been called upon to decide the merits of the matter as to whether the applicant is a fit and proper person to hold the position of trustee, and the only question that had to be asked in terms of section 46, was whether the respondent had in its possession allegations of the applicant not being a fit and proper person.

37. It is not necessary to make a finding in regard to the nature of the discretion which of the respondent has to exercise at such early stage of the proceedings since it is clear that there are more than sufficient allegations, some of which were supported by documentary evidence, to have concluded that the section 46 proceedings could be invoked in the sense that the applicant could be presented with such information and be requested to respond thereto. An analysis of the factual averments made in support of the complaints against the applicant quite clearly shows that the respondent not only had the right but in

fact an obligation to confront the applicant with the same and to require him to respond thereto.

38. Furthermore, the applicant elected to not address the allegations contained in the section 46 proceedings in his affidavits before this court and did not state his response thereto. The applicant merely relied on conclusions which were not substantiated by any evidence from his side. There is consequently no basis for the submission that this court can find that, based on the contents of the allegations against the applicant, the respondent should be prevented from proceeding with the section 46 proceedings against him.

39. The allegations that the respondent had drawn out the proceedings also have no merit. Much time was spent on correspondence relating to the information which the respondent had in its possession when it decided to invoke the section 46 procedure. Again it is not necessary to analyse each and every event and each and every letter and its contents herein, but on a consideration of all the relevant facts and circumstances there is no merit in any suggestion that the respondent dragged its heels in any manner whatsoever. The appeal instituted by the applicant also contributed much to the time lapse. There is consequently no basis for any inference of ulterior motive, irrationality, bias or *mala fides* on the part of the respondent. The conclusions which the applicant accordingly wishes to draw against the respondent simply have no merit.

40. For the same reasons the allegation that the respondent was pursuing an agenda on behalf of V-Med which is allegedly to be inferred from the alleged failure to provide documentation and information, has to be rejected. In any

event. it is common cause that the applicant is. and has been for some time. in possession of all relevant information and documentation and consequently this issue cannot constitute any support for the present application before this court.

41. The allegations by the applicant that the respondent had an ulterior motive and had colluded with Dr Botha and had acted in a manner which supported Dr Botha's alleged cause. finds no support in the evidence before this court. The allegations against the applicant and the contents of legal opinion obtained by the respondent from senior counsel were such that the respondent could not ignore same and was in fact obliged to invoke the provisions of section 46.

42. Regarding the allegation that the respondent had no authority to direct the applicant and Mr Jacques not to participate in any discussions and/or decisions regarding the complaints and regarding the administration agreement, the Registrar of the respondent explained in his affidavit before this court that it was he who directed LMS not to take any strategic decisions until the section 46 process had been finalised, specifically with regard to any changes to the administration and managed healthcare agreements. He further explained that having regard to the powerful positions which the applicant and Mr Jacques occupied in LMS, Mr Jacques being the chairperson and the applicant being the chairperson of the clinical risk committee as well as the procurement committee which was responsible for agreements with the scheme's suppliers, he held the view that in view of the allegations made in support of the complaints against the applicant and Mr Jacques, they found themselves in conflicted positions and that it would not be possible for LMS to take proper and

valid decisions concerning the issues in respect of which the directive had been issued.

43. The Registrar further explained that in terms of section 6 (2) (a) (iii) of the Financial Institutions (Protection of Funds) Act, Act 28 of 2001, he was empowered to direct a medical scheme to make arrangements to his satisfaction for the discharge of all or part of the scheme's obligations in terms of a law. He further referred to the fact that the legal advice furnished by senior counsel confirmed the view which he held. Senior counsel advised, *inter alia*, that it would be clearly improper for the applicant and Mr Jacques to take any part in any deliberations and decisions of the trustees of LMS in relation to the complaint against them, or in respect of any dealings between the trustees and V-Med in relation to any of the issues which have arisen in the complaint. He advised that such participation would be a manifest conflict of interest on their part. He also advised that the other trustees of LMS should ensure that their colleagues do not participate in the decisions relating to these issues.

44. Having regard to the aforesaid, there was nothing improper or sinister in the directive issued. The Registrar also stated that it was not done at the insistence of Dr Botha and that he did not seek to assist Dr Botha or V-Med or Liberty Health Holdings for any reason whatsoever. Having regard to the legal principles referred to above, this version on behalf of the respondent has to be accepted.

45. Much was made by the applicant in the correspondence between the parties and also during argument of this application of the alleged unlawfulness of the

first two notices in terms of section 46. On behalf of the applicant reference was, *inter alia*, made to the fact that the first notice was decided upon by the respondent by way of a so-called round-robin decision and that a quorum of votes may not have been obtained for purposes of the second notice. On behalf of the respondent it was, *inter alia*, submitted that the fact remains that the respondent took those decisions and that unless and until those decisions had been reviewed and set aside by a court of law, it cannot be ignored. There is merit in this submission of the respondent but in my view it is not necessary to delve further into the issue of the first two notices. This is so because the third notice to the applicant in terms of section 46 caused the first two notices to become academic.

46. The third notice to the applicant was the result of a resolution by the respondent to reconsider the whole matter in the light of all the allegations of unlawfulness that had been made by the applicant and his attorneys in regard to the first two notices and to ensure that the process would be a valid one in all respects. It was further submitted that the third notice, dated 23 June 2011, which encompassed the factors relating to first two notices, is unassailable. I agree with the submissions on behalf of the respondent. The third notice resulted from a full meeting of the respondent on 26 May 2007. All the relevant documentation was considered and the respondent resolved to renew its resolution to proceed against the applicant and Mr Jacques in terms of section 46 of the Act. The applicant was also presented with a further invitation to supplement his written submissions in response to the allegations of his not being a fit and proper person to hold the office of trustee.

47. The fact that the respondent had received representations from the applicant consequent upon the first two notices cannot detract from the validity of the third notice. Similarly, the submission on behalf of the applicant that the respondent had prejudged the matter as a result of what had happened before, has no merit. Section 46 allows for a dual process, *i.e.*, the decision by the Council of the respondent to invoke the process and to furnish the particular member of the board of trustees with the details of the information in regard to any allegations of the trustee not being a fit and proper person and to request that person to furnish the Council with his or her comments thereon. And, secondly, the decision to remove the member of the board of trustees from office, should that be merited. The fact that the Council may have considered the first part of the process on more than one occasion based on information then before it, cannot affect the last decision based on the same facts and principles, especially if the last decision was taken merely to correct a possible earlier procedural wrong. Furthermore, the decision regarding the first step can also not prevent the Council from deciding the issue of whether the person should be removed as a trustee or not.

48. Regarding the third notice the applicant furthermore submitted, *inter alia*, that if the respondent had applied an unbiased and objective mind to the matter at its meeting of 26 May 2011, it would have determined that there was no substance in the allegations that the applicant was not a fit and proper person to hold the office of trustee of LMS. Allegations of hearsay evidence were repeated and much emphasis was placed on the fact that Liberty Health Holdings had indicated that it no longer wished to proceed with the complaints against the

applicant. I have already dealt with the substance and the effect of the allegations against the applicant and no more needs to be said about that. Regarding the attitude of Liberty Health Holdings subsequent to the resignation of Dr Botha, the submission of the applicant that the respondent is conducting a malicious vendetta against him by proceeding with the matter, cannot be sustained. The fact that Liberty Health Holdings may have no objections to the proceedings being terminated, is not dispositive of the section 46 proceedings and is, in fact, irrelevant thereto. The allegations and facts which resulted in the respondent's decision to invoke section 46, have not been withdrawn and thus remain to be considered in terms of the section 46 procedure. It is therefore also not necessary to make a finding in respect of the submission by the respondent that the attitude of Liberty Health Holdings in fact resulted from a settlement reached between the applicant and Mr Jacques, on the one hand, and Liberty Health Holdings and/or V-Med and/or V-med Solutions, on the other hand.

49. Regarding the fact that a rather late date for the hearing of the internal appeal instituted by the applicant had been allocated, I disagree with the allegations made and the inferences drawn by the applicant in this regard against the respondent. The appeal board is appointed in terms of section 50 of the Act and is a body independent of the Council of the respondent. The applicant chose not to join the appeal board in the present proceedings and made no allegations against the appeal board. Consequently no finding can be made that the applicant had been deprived of this internal remedy. As such it is not necessary to consider the further submissions by the respondent that the

legislature could not have intended an appeal under circumstances where the respondent's Council had not yet been granted the opportunity of applying its mind to the allegations against a person and his response thereto.

50. Regarding the applicant's complaint that he was not afforded a proper opportunity to state his case and that he would be prejudiced by the refusal that he may lead oral evidence and conduct cross examination, the respondent submitted that it was not relying on disputed facts for the allegations in respect of the applicant not being a fit and proper person to hold the office of trustee and that there is consequently no need to lead evidence on the facts and to cross-examine witnesses. All that is required, according to the respondent, is that the applicant be afforded the opportunity to state his case in response and to dispute information in writing and/or by way of oral representations.

51. The respondent further stated that to the extent that facts relied upon by the Council are not common cause and the applicant contending that he is entitled to lead evidence and cross-examine witnesses, the proceedings before the appeal board would be the time and place for such to be addressed if necessary. The proceedings before the appeal board specifically allow for the leading of evidence and the cross-examination of witnesses and in fact constitute a complete rehearing of the matter. The appeal board can thus not only cure all wrongs of a reviewable character but also come to a different decision on the merits of the matter. The lodging of an appeal would also suspend the respondent's decision and any decision would therefore not cause any prejudice to the person affected thereby. These considerations are also

relevant in considering whether this court should step in at this stage and terminate the section 46 procedure in respect of the applicant.

52. Despite the opposite views held by the parties in respects of the aforesaid, I find it in any event impossible to conclude what the respondent might decide during future proceedings before it in terms of section 46 regarding such issues. In my view it would all depend on the nature of the proceedings and the manner in which the evidence is eventually presented to the respondent. It would also depend on the contents of the submissions by the applicant. It may very well be that the issue of the leading of evidence and cross-examination becomes irrelevant or it may happen that the respondent or the applicant adopts a different view when the time comes. Whatever the case, any issue that may arise in future should be considered and possibly adjudicated at that point. At this stage of the proceedings it cannot be said that a grave injustice might result, or that justice might not by other means be attained, unless the present proceedings were to be terminated and prevented from proceeding.

53. The applicant's submission that his good name and reputation had been damaged and that he had and will suffer other loss and prejudice, has to be considered against the provisions of the Act and more particularly the obligations and responsibilities of a trustee of a medical scheme and also the provisions of section 46 which are, *inter alia*, aimed at the protection of the medical scheme and its members. When considered in this light, the submissions on behalf of the respondent do not carry sufficient weight to decide the application in the favour of the applicant.

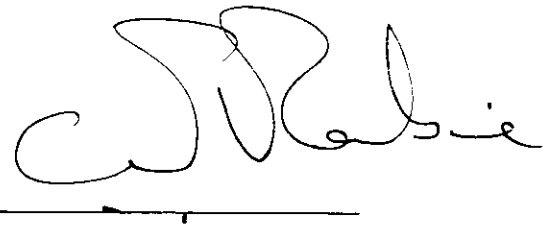
54. The applicant's submission that he has no alternative remedy but to approach the court in the manner that he did, cannot be upheld and I refer to what I have said in this regard above. In fact, with reference to all the facts and circumstances it would not be in the interest of justice to prevent the respondent from complying with its duties in terms of the Act.

55. Having regard to all the allegations and the submissions on behalf of the parties, I hold that, based on the principles set out in the Walhaus, Brock and Van Zyl matters referred to above, the applicant has failed to make out a case that this court should interfere at this stage of the proceedings.

56. As far as costs are concerned there is no reason why costs should not follow the event and why costs should not include the costs of two counsel.

57. In the result the following order is made:

1. The application is dismissed with costs which costs shall include the costs of two counsel.



C.P. RABIE

JUDGE OF THE HIGH COURT

24 December 2012