REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 35254/2012

DATE: 28 MAY 2013

REPORTABLE

OF INTEREST TO OTHER JUDGES

In the matter between:

COUNCIL FOR MEDICAL SCHEMES	First Applicant
THE REGISTRAR OF MEDICAL SHEMES	Second Applicant
HENNIN ROBERT	Third Applicant
and	
LIBERTY MEDICAL SCHEME	First Respondent
MKHIZE, BOYCE MACKESON	Second Respondent

JUDGMENT

KATHREE-SETILOANE. J:

[1] This matter concerns the question of whether a trustee, who resigns from a board of trustees of a medical scheme, is entitled to a golden handshake in the form of a restraint of trade and lost opportunity payment, where the rules of the medical scheme do not expressly provide for the payment of such remuneration to a trustee.

[2] The First Applicant is the Council for Medical Schemes ("the Council"), established in terms of s 3(1) of the Medical Schemes Act, 131 of 1998. Its primary role is to regulate the medical schemes industry. The Second Applicant is the Registrar of Medical Schemes ("the Registrar), and the Third Applicant is Mr Robert Henning, a member of the First Respondent, Liberty Medical Scheme ("the Scheme"). The Second Respondent is Mr Boyce Mackeson Mkhize ("Mkhize"), an erstwhile trustee of the Scheme. He resigned as a

trustee of the Scheme during May 2011.

[3] Pursuant to Mkhize's resignation from the Board, on 20 May 2011, a so called termination and restraint agreement ("the termination and restraint agreement") was concluded between the Scheme and Mkhize, in terms of which the Scheme paid Mkhize R700 000, 00 in consideration of a restraint of trade covenant in favour of the Scheme, and R962 500, 00 in consideration of his resignation with effect from 19 May 2011.

[4] The Applicants seek to set aside the termination and restraint agreement on the basis that the Board of Trustees of the Scheme ("the Board") acted *ultra vires* the Medical Schemes Act and the Rules of the Scheme ("the Rules"). They also seek an order declaring Mkhize liable to the Scheme for disgorgement of profit in the sum of R1 622 500, 00 and, an order directing him to pay the said amount back to the Scheme.

Circumstances leading up to the termination and restraint agreement

[5] The Scheme came into existence on 1 January 2010, as a result of the amalgamation between Liberty Health Medical Scheme and Medicover Medical Scheme. As a result of the amalgamation, the Board which consisted of ten trustees (five from each Board) had to be reduced to seven by the annual general meeting to be held in 2011. The Rules of the Scheme provided for the reduction in the number of Board members in clauses 18.1.4 to 18.1.6 which read:

> *"18.1.4 The number of Board members will reduce from ten to no more than eight by the Annual General Meeting to be held in 2010. The number of Board members will further reduce to no more than seven by the Annual General Meeting to be held in 2011.*
>
> *18.1.5 The Board members shall endeavour to secure the voluntary resignation of members of the Board in order to reduce their number in accordance with clause 18.1.4.*
>
> *18.1.6 In the event of the Board failing to secure the voluntary resignation of members of the Board as contemplated in 18.1.4 then in such an event, the Board shall decide on which members of the Board are to be removed to bring the total of trustees to the number stipulated in clause 18.1.4 by secret ballot. The members of the Board with the highest number of votes shall be removed from the Board*..."

[6] Mkhize was a member of the Board of the Scheme after the amalgamation. Mkhize, it seems, adopted the stance that his term of office as trustee would only end in June 2012, but because the then Chairman of the Board, Larry Jacques' term of office had come to an end, there was no need for the Board to invoke the provisions of Rule 18.1.6 to vote on the removal of a member from the Board. In an effort to obtain certainty on the question of when Mkhize's term of office as trustee terminated, the Board obtained counsels' opinion

which concluded that Mkhize's term of office as trustee would expire in June 2011. The Board, however, elected not to invoke Rule 18.1.6 and, instead, concluded the termination and restraint agreement with Mkhize, on 20 May 2011, in terms of which Mkhize resigned *inter alia* on condition that the Scheme would procure the written withdrawal of a complaint lodged against him, with the Council, by a member of the Scheme and, in consideration for his resignation, the Scheme undertook to pay Mkhize an amount of R962 500, 00 and, in consideration for a restraint of trade covenant, the Scheme undertook to pay Mkhize a further sum of R700 000,00. It is common cause that, pursuant to the conclusion of the termination and restraint agreement, the Scheme paid Mkhize the amount of R1 622 500, 00. The motivation for the transaction is recorded in the preamble to the termination and restraint agreement, which reads:

> "*3.1 The medical scheme industry is an extremely competitive industry and as* **a** *result the Scheme is in the process of considering amalgamation with possible suitors in terms of the provisions of Section 63 of the MSA.*
>
> *3.2 One of the thorniest issues which inevitable leads to difficulties about amalgamation is that a proposed amalgamation must of necessity result in some of the Trustees of existing Boards of Trustees of the amalgamating Schemes agreeing to step down. This is required to downsize the Board of Trustees of the amalgamated Scheme to a manageable size.*
>
> *3.3 In the interest of the Scheme, discussions were commenced with some of the trustees as regards the possibility of them stepping down from office so as to avert a legal dispute regarding the composition of the Board of Trustees as contemplated in the Exposition Document of the amalgamation between the Scheme and Medicover Medical Scheme ("Medicover[1]") as well as subsequent rule amendments to give effect thereto.* "

[7] On becoming aware of the payment, which the Scheme made to Mkhize pursuant to the termination and restraint agreement, the Council wrote to the Scheme, on 20 September 2011, indicating that the payments to Mkhize were illegal, and enquiring about the steps that the Scheme proposed taking to recover the monies so paid. The Scheme replied by letter, dated 10 October 2011, indicating that it was not prepared to recover the monies from Mkhize. The Council then wrote to Mkhize, on 14 December 2011, demanding repayment of the monies to the Scheme. Mkhize replied by letter, dated 9 January 2012, stating that there was no basis to demand repayment of the monies which the Scheme had paid to him.

The Authority of the Attorney to Act on behalf of the Applicants

[9] Prior to determining whether the termination and restraint agreement was concluded *ultra vires* the Rules of the Scheme, I must turn to the question of the authority and *locus standi* of the Applicants to bring this

application. The Respondents challenge the authority of Savage, Jooste and Adams Inc ("SJA Inc") to act on behalf of the Applicants in terms of Rule 7(1) of the Uniform Rules of Court. The Applicants' attorney, Mr Marius van Staden, a director of SJA inc, states on affidavit that the application in this matter was served on the Scheme on 22 June 2012, and the Scheme's purported notice in terms of Rule 7 was served on the Applicants on 16 July 2012; sixteen court days after it had come to the First Respondent's notice that SJA Inc was acting on behalf of the Applicants in this matter.

[10] Rule 7(1) of the Uniform Rules of Court provides that subject to the provisions of sub-rules 2 and 3 a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it had come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised to act. The Applicants served a Rule 30(2) notice on the Scheme, pointing out that it did not have the Court's leave, in terms of Rule 7(1), to dispute the authority of SJA Inc to act, on behalf of the Applicants, sixteen days after it had come to its notice that SJA Inc are so acting, and that its purported Rule 7(1) notice constituted an irregular step. The Scheme's attorneys responded by email, dated 13 August 2012, indicating, *inter alia,* that the Scheme "*has no alternative but to file a formal application under Rule* 7 *which will be served...shortly."*

[11] Needless to say no application under Rule 7 was filed seeking leave from the Court, on good cause shown, to challenge the authority of SJA Inc to act on behalf of the Applicants, outside the prescribed period as provided for in Rule 7(1). I am of the view that the Scheme is disallowed, in the absence of such an application, from challenging the authority of SJA inc, to act on behalf of the Applicants, sixteen days after this had come to its notice. The Scheme's remedy was to challenge the authority of SJA Inc, to act on behalf of the Applicants, by filing a Rule 7(1) notice within ten days after it had come to its notice that they were so acting, alternatively by seeking leave of the Court on good cause shown - and not to raise the challenge during argument[1]. The Scheme has, however, failed to file a Rule 7(1) notice timeously, nor has it brought an application, seeking leave from the Court on good cause shown, to challenge the authority of SJA Inc to act on behalf of the Applicants outside the prescribed time period provided for in Rule 7(1). The Respondents' challenge to the authority of SJA Inc to act on behalf of the Applicants must accordingly fail.

Locus Standi of the Applicants

[12] The Respondents also challenge the *locus standi* of the Applicants. I, however, find their challenge to the Applicants' *locus standi* to be manifestly unfounded for the following reasons. The Council is obliged in terms of s 7(a) of the Medical Schemes Act to "*protect the interests of beneficiaries at all times"*. *"Beneficiary"* is defined in s 1 of the Medical Schemes Act to mean "*member or a dependant of a member of a medical scheme"*. In discharging its obligation to protect the interests of the Scheme's beneficiaries, the

Council is empowered by s 8(k) of the Medical Schemes Act to "*in general, take any appropriate steps which it deems necessary or expedient to perform its functions in accordance with the provisions of this Act. "* Those steps would include the launching of this application.

[13] In so far as the Registrar's *locus standi* is concerned, he has the right and obligation to bring this application in terms of s 6(1) of the Financial Institutions (Protection of Funds) Act, 28 of 2001 ("the Protection of Funds Act"), which permits the Registrar to institute proceedings in respect of "*institutions*Section 6(1) of the Protection of Funds Act provides:

> " *The registrar may institute proceedings in the High Court having jurisdiction in order to-*
>
> *(a) Discharge any duty or responsibility imposed on the registrar in terms of any law;*
>
> *(b) Compel any institution to comply with any law or to cease contravening a law;*
>
> *(c) Compel any institution to comply with a iawful request, directive or instruction made, issued or given by the registrar under a law; or*
>
> *(d) Obtain a declaratory order on any point of law relating to any law or the business of an institution. "*

[14] The Applicants submit that both the Scheme and Mkhize are "*institutions"* for the purposes of s 6 (1) of the Protection of Funds Act; the Scheme by virtue of being a *"financial institution"* under s 1 of the of the Protection of Funds Act which, amongst other things, defines "*financial institution"* to mean "*any medical scheme contemplated in section 1 of the Medical Schemes Act, 1998 (Act 31 of 1998)''*, and Mkhize by virtue of being a trustee who manages the affairs of the Scheme. The word "*institution"* for purposes of s 6 of the Protection of Funds Act is defined in s 1 of the Medical Schemes Act to mean:

> "*(a) a financial institution;*
>
> *(b) any person, partnership, company or trust in which, or in the business of which a financial institution or an unregistered person has or had a direct or indirect interest;*
>
> *(c) any person, partnership, company or trust which has or had a direct or indirect interest in a financial institution or unregistered person, or in the business of a financial institution or an unregistered person;*
>
> *(d) a participating employer in a pension fund organisation;*

(e) any person, partnership, company or trust that controls, manages or administers the affairs or part of the affairs of a financial institution or an unregistered person; or

(f) any unregistered person. "

[15] In my view, the Applicants' reliance on s 1(e) of the definition of "*institution" to* found the standing of the Registrar to institute proceedings against Mkhize is misplaced because at 20 June 2012, when the proceedings against Mkhize were instituted, he was not a trustee who managed or controlled the affairs of the Scheme. Section 1(e) of the Protection of Funds Act clearly contemplates the Registrar instituting proceedings against a person who, at the time of institution of such proceedings, controlled, managed or administered the affairs of a medical scheme. The Registrar would, nevertheless, have standing under s 1(c) of the Protection of Funds Act, which defines "*institution"* to also mean "*any person, partnership, company or trust which has or had a direct or indirect interest in a financial institution or unregistered person, or in the business of a financial institution or an unregistered person."* As a trustee of the Scheme, until his resignation on 20 June 2011, Mkhize most certainly had a direct interest in the Scheme.

[16] The Medical Schemes Act and the Protection of Funds Act clearly afford both the Council and the Registrar the requisite *iocus standi* to bring this application against Mkhize and the Scheme. Both the Council and the Registrar also have a right, in a representative capacity, to act on behalf of, and in the interest of beneficiaries of the Scheme. Indeed, the Council did request the Scheme to recover the monies from Mkhize. However, upon the Scheme's refusal to do so, the Registrar and the Council are entitled to approach the High Court to compel compliance with that request under s 6(1) (c) of the Protection of Funds Act.

[17] Similarly, the Third Applicant's standing to bring this application cannot be seriously challenged. As a member of the Scheme he stands to be prejudiced if the alleged unlawful payments by the Scheme to Mkhize are allowed to stand. It is no secret that the Third Respondent was joined as an applicant in these proceedings in order to bolster the *locus standi* of the Council and the Registrar, and that the Council is funding the litigation on behalf of the Third Applicant. In as much as the Respondents contend that it is wholly inapposite for a regulatory body, such as the Council, to be funding the litigation of an individual member against the Scheme, I find nothing improper with the funding arrangement, particularly because the relief which the Applicants seek is aimed at protecting the interests of the beneficiaries of the Scheme. Accordingly, I find that the Applicants have *locus standi* to approach this Court for the relief claimed against both the Scheme and Mkhize.

Agreement and Payment are *ultra vires* the Rules

[18] I now turn to the question of whether the Board acted beyond the scope of its powers under the Rules of

the Scheme. The Applicants' principal contention is that the Scheme has acted *ultra vires* the Schemes Rules by entering into the termination and restraint agreement with Mkhize and making payment to him pursuant thereto, in order to secure his resignation from the Board. The Scheme denies that the Board acted *ultra vires* the Scheme's Rules. It contends that the termination and restraint agreement was concluded in very specific circumstances that gave rise to acrimony and a severe breakdown in relations between trustees on the Board, as a result of outside interference and litigation by the Scheme's administrator, V-Med, shortly after the cessation of the Scheme's amalgamation negotiations with Spectramed. V-Med, who was also Spectramed's administrator at the time, was concerned that as a result of the cessation of the amalgamation discussions between the Scheme and Spectramed, the Scheme would terminate the administration agreement with V-Med. Mkhize and the Registrar supported V-Med against the Scheme. This, according to the Scheme, damaged the relations between members of the Board and Mkhize, and had the potential to threaten and disrupt the effective and efficient functioning of the Board to the detriment of the Scheme and its members.

[19] The Scheme contends that central to the acrimony amongst Board members was the dispute between Jacques, the then Chairman of the Scheme, and Mkhize as to the termination dates of their respective terms of office. In view of the acrimonious relations on the Board at the time, and the recalcitrant stance adopted by both Mkhize and Jacques, the Board took the view that a vote in terms of Rule 18.1.6 was highly undesirable, as it would have inevitably led to expensive and damaging litigation. In an attempt to seek certainty on the terms of office of both Mkhize and Jacques, the Scheme requested counsel's opinion but both Jacques and Mkhize disagreed with the opinion. The Board, however, took the view that the resolution of the dispute between Mkhize and Jacques could only be achieved if both of them resigned from the Board. It, therefore, resolved to procure their resignation from the Board, after obtaining counsels' opinion on the question of the legality of making a restraint of trade payment to both Jacques and Mkhize. The opinion concluded that the payment of a restraint fee to a trustee who resigns, in circumstances where it is "necessary and deserving", is neither precluded by the provisions of the Medical Schemes Act nor the Rules of the Scheme. The Scheme submits, on the basis of the legal opinion, that Mkhize clearly fell within the category of "necessary and deserving" as he is highly qualified and experienced - and should he so choose -would have little difficulty in becoming a trustee of another medical scheme. Accordingly, the Scheme contends that not only was the resignation of the Mkhize necessary to achieve the necessary reduction of the number of trustees on the Board, but it was important for the Board to achieve this amicably, in order to avoid further litigation and ensure harmonious relations on the Board. The Scheme implores the Court, in this regard, to view the termination and restraint agreement as a "compromise agreement", with which the Court should not interfere.

[20] Moreover, the Scheme contends that it was necessary to properly manage the termination of relations with Mkhize, in order to prevent him from disclosing the Scheme's confidential information to the its competitors, since Mkhize's duties as a trustee exposed him to financial information, strategy, business

modules, know-how and other confidential information of the Scheme. It points out, in this regard, that in view of the competitive nature of the medical scheme industry, medical schemes constantly seek to augment and enhance their membership base by employing a variety of business and marketing strategies, know-how, and business modules to remain competitive, and that if Mkhize, who is in possession of highly confidential and commercially lucrative information concerning the Scheme's affairs, was left unrestrained he could very well tender his services to, amongst others, competing medical schemes or medical scheme administrators. The Scheme goes on to contend that although not expressly defined in the termination and restraint agreement, the confidential information that the Scheme needed to protect included, *inter alia*, its distribution strategies (which are unique and highly confidential), its amalgamation and growth strategies, details regarding current and future claims and the details and contents of the Scheme's third party contracts. Accordingly, it argues that like other commercial companies, it is fully entitled, and indeed obliged, to protect itself from potential disclosure of its confidential information by way of a restraint of trade.

[21] Mkhize, in his answering affidavit, justifies the payments to him on the basis that, at the date on which the termination and restraint agreement was concluded, there was no obligation on him to resign as a trustee of the Scheme. However, the amalgamation would not have happened smoothly and would have resulted in an unmanageable board of trustees if he did not step down. Therefore, in order to ensure that the Scheme achieved its objective of having a manageable board of trustees, he agreed to resign on the terms contained in the "settlement agreement", and that he would not have resigned if the terms contained in the "settlement agreement" or some other favourable terms were not agreed upon. He goes on to state that the amount of R962 500,00 was paid to him as compensation for leaving office in circumstances where he otherwise would not have left office, and where he could still have been re-elected for another term of office, which would not have been in the interests of the Scheme. He says that he finds nothing legally or morally wrong with the arrangement, because if he had not offered to resign as a trustee, he would have continued to be entitled to receiving a monthly payment from the Scheme in his capacity as trustee. In respect to the restraint payment, Mkhize states that he was not prepared to be restrained in the manner contemplated in the "settlement agreement" without first being compensated for it.

[22] The Respondents submit that the Court must decide the matter on the allegations made in the First and Second Respondents' answering affidavits, because the Council, which seeks final relief in the application, has failed to dispute certain core allegations in reply. I am unable to agree with this contention. Whether or not the Applicants had disputed each and every allegation, as set out in the First and Second Respondents' respective answering affidavits, is immaterial to the determination of the principal issue in this matter, namely whether the Board acted *ultra vires* the Scheme's Rules in concluding the termination and restraint agreement with Mkhize, and paying him pursuant thereto. On consideration of this question, the Court need only have regard to the termination and restraint agreement, which deals fully and adequately with the

rationale and motivation for the Scheme having entered into the "special arrangement" with Mkhize. All facts incidental to the rationale for the agreement as detailed therein, such as the possible merger between the Scheme and Spectramed, or the divisive role which V-Med, Mhkize and the Registrar took in that regard, is simply irrelevant to the determination of the issues in this matter. I am, therefore, not inclined to decide the matter on the First and Second Respondents' respective versions.

[23] The status of the Rules of the Scheme is central to the question of whether the Board acted *ultra vires* the Rules. The Rules of a medical scheme are equivalent to the terms of a reciprocal contract between the medical scheme and its members[2]. Section 32 of the Medical Schemes Act provides that the Rules of a medical scheme and any amendment thereof *"shall be binding on the medical scheme concerned, its members, officers... •*. The rules of a medical scheme, furthermore, prescribe the extent of, and demarcate, the powers and authority of the board of trustees of the medical scheme. The powers of the Board, in the current matter, derive solely from the Medical Schemes Act and the Rules of the Scheme. The Board does not have the power to act outside the ambit and confines of the Scheme's Rules or the Medical Schemes Act. Proper compliance with the Rules of the Scheme and the Medical Schemes Act is, therefore, vital.

[24] Although Rule 18 of the Rules of the Scheme provides for the governance of the Scheme by a board of trustees; the reduction of the Board to no more than seven members by the annual general meeting to be held in 2011; and the mechanism to achieve the downsizing, it is silent on the question of procuring the voluntary resignation of a trustee against payment of any amount of money. Whilst Rule 18.1.5 of the Rules of the Scheme clearly envisages the voluntary resignation of a trustee, it cannot, in my view, be interpreted to mean the procurement of a resignation against payment of a sum of money. Such an interpretation would simply not give effect to the plain meaning of the expression "voluntary resignation". Furthermore, the mechanism of a secret ballot, as provided for in Rule 18.1.6, for reducing the number of Board members in the event of the Board failing to secure the voluntary resignation of members of the Board, clearly does not provide for any compensation to be paid to a trustee who, as a result of the result of the ballot, is required to step down as a trustee of the Scheme.

[25] Since the Board is bound by the Rules of the Scheme, it was required, in terms thereof, to procure the voluntary resignation of Mkhize and, failing which, it was obliged to invoke the mechanism of a secret ballot as provided for in Rule 18.1.6. The Scheme was, therefore, obliged to hold a ballot once it became clear that Mkhize was not prepared to resign voluntarily. It was a dereliction of duty -indeed, a subversion of its obligations - for the Board to disregard the Rules of the Scheme in favour of an arrangement, which was neither authorised nor contemplated in the Rules. Yet that is precisely what the Scheme did. In May 2011, a month before the termination of Mkhize's tenure as trustee, the Scheme concluded the termination and restraint agreement with Mkhize, pursuant to which Mkhize would resign as trustee and be paid the amount

of R1 622 500, 00. Astonishingly, the Scheme followed this approach despite sound legal advice that Mkhize's term of office would expire in a month's time, in June 2011. In my view, the correct and prudent approach to have adopted in the circumstances, was for the Scheme to simply wait for that period to run out - and a reduction of the number of trustees on the Board would have been automatically achieved.

[26] There is a distinction between the removal of a trustee in the ordinary course, which the Scheme could do under Rule 18.1.5, and his removal in terms of Rule 18.1.6 of the Rules of the Scheme. The latter is a transition mechanism by which the reduction of trustees would be achieved. In neither case, however, is there a provision for compensating the outgoing trustee. Similarly, a trustee is entitled, in the ordinary course, to resign from the Scheme by giving notice in terms of Rule 18.3. It is not suggested that, in that event, the trustee should be compensated for what he would have been entitled to if he had chosen not to resign. Thus should a trustee resign, after being persuaded to do so under Rule 18.1.5, it would be unreasonable to expect payment for agreeing to resign as the justification for the payment must necessarily, in both instances, be the same namely, the opportunity cost entailed by a resignation. But there is no general principle that a trustee must be reimbursed for future earnings forgone pursuant to a resignation. On the contrary, the reverse is the position. Similarly, the removal of a trustee by the way of a vote under Rule 18.1.6 would not entitle the trustee to compensation for a lost opportunity. To insist otherwise would be absurd since there can be no opportunity costs if a person becomes a trustee knowing full well that he can be removed in terms of Rule 18.1.6. That person takes into the bargain a possible removal as a result of the amalgamation. In other words, Mkhize cannot assert, as he does, that he expected not to be removed. Such an expectation is unreasonable in the circumstances.

Remuneration of trustees under the common law

[27] Underlying the differences between the parties in this case is their different conceptions of the remuneration that a trustee is entitled to receive. Seemingly, the Scheme considers the trusteeship of a medical scheme as equivalent to that of a directorship of a company, with all the perks and benefits pertaining thereto. It is only on that basis that talk of opportunity costs and restraint payments can make sense.

But this, in my view, is a fundamental misconception of a medical scheme trusteeship, as medical schemes are non-profit entities and not for-profit companies and, unlike company directors, trustees are democratically elected by the members of the scheme. Consistent with this notion of a trusteeship, at common law a trustee is only entitled:[3]

> *"[T]o be indemnified out of the trust property for expenses properly incurred in the course of administration and to remuneration for services as provided for in the trust instrument, or if no such*

provision is made, to a reasonable remuneration. A trustee is not entitled to make a profit from the administration of the trust, whether directly, and must account to the trust for any such profit. "

[28] The common law is clear - a trustee is entitled to be reimbursed or compensated for expenses properly incurred in the course of administration of the trust, and to remuneration for services rendered as provided for in the trust instrument. The common law is, however, silent on the question of remunerating a trustee for lost opportunity or a restraint of trade fee on resignation because such payments are not in the general scheme of a trustee痴 relationship and duties to a trust. Since, payments for lost opportunity and restraint of trade do not constitute payments for expenses properly incurred in the administration of the trust and, for services rendered, they would be impermissible under the common law. Hence, to the extent that payments such as these provide a trustee with a gain or an advantage, they may be considered to be tantamount to making a profit which is impermissible under the common law[4] - since the trustee is not paid for services rendered or expenses properly incurred - but is rather compensated for resigning as a trustee and, for being restrained from joining or disclosing confidential information to another scheme. Presuming that such payments were permissible under the common law, then a trustee could disburden herself of her fiduciary duties, by the simple device of resignation, and insist that she will only assume those duties again once she is paid a restraint of trade fee. Such an arrangement could never be countenanced, because the interests of that trustee would conflict with her fiduciary duties. The *dictum* of the Australian High Court in *Breen* y *Williams*[5] pertinently describes why this approach is wrong in principle:

> "*The law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the implications of the biblical injunction that '[n]o man can serve two masters' (Matt 6:24). Duty and self- interest, like God and Mammon, make inconsistent calls on the faithful. "*

[29] Therefore, once the element of profit is introduced into a trustee's remuneration - whatever its shape or form - the trustee is expected to heed two masters. This is contrary to the principle that a trustee may not place herself in a position in which her personal interests may conflict with her duty to act in the interests of the trust It is primarily for this reason that a trustee is not permitted, under the common law, to make a profit from the administration of a trust, whether directly or indirectly, and must account to the trust for any such profits.

Remuneration of trustees under the Scheme's Rules

[30] Turning then to the treatment of the remuneration, which a trustee would be entitled to receive under the Rules of the Scheme. Rule 18.17 provides that members of the Board may be reimbursed for all reasonable expenses and disbursements incurred in, and professional fees arising from, the performance of their duties as trustees. The Respondents contend that Council's reliance upon the provisions of Rule 18.17 is mis-directed

because Rule 18.17 only deals with payments in respect of expenses, disbursements and professional fees, and not with payments in respect of remuneration. This contention, in my view, is unsustainable for the following reasons. The payment of professional fees, to a trustee, for work performed as provided for under Rule 18.17 is synonymous with the payment of remuneration to a trustee as contemplated under the common law. Rule 18.17 is clear in this regard - trustees may be reimbursed for all professional fees arising from their duties as trustees. Trustees are, therefore, entitled to be paid professional fees for work performed arising from their duties as trustees. Thus, the only remuneration which trustees of the Scheme are entitled to, under the Rules, is of the nature described in Rule 18.17.

[31] The payment of remuneration to a trustee under the Rule 18.17 is linked to performance of a trustee's duties. No performance, no professional fees. Thus, once a trustee stops performing duties on resignation from the Scheme, the trustee is not entitled to payment of remuneration. Therefore, a trustee cannot on resignation claim compensation for the loss of future professional fees arising from his or her resignation. Yet that is precisely the basis on which Mkhize seeks to justify the "lost opportunity" payment to him. It is abundantly clear from the Rules of the Scheme, providing as they do for post-amalgamation reduction, as well as ordinary removal of trustees, that there is no scope for compensating a trustee on the basis of his or her resignation from the Scheme.

[32] Rule 20.18 of the Rules of the Scheme provides the Board with a residual power to do anything, which it deems necessary or expedient to perform its functions in accordance with the provisions of the Medical Schemes Act and the Rules. This Rule, in my view, does not provide the Board with the power to remunerate trustees in a manner that is in conflict with the Rules. Thus, any payments by the Board, to a trustee, in contravention of Rule 18.17, which provides specifically for the circumstances in which a trustee may be remunerated, would be *ultra vires* the Rules of the Scheme. Nor, in my view, can the Scheme's Rule be read impliedly to authorise payments of the nature of a restraint of trade and "lost opportunity" payment. Any importation of implied powers to make these payments would have to contend with the position under both the common iaw and Rule 18.17, in terms of which such payments are simply not competent. The Supreme Court of Appeal, in *Absa Bank Ltd v South African Commercial Catering and Allied Workers Union National Provident Fund,*[6] has recently held, in relation to a pension fund, that an implication of a power to perform certain functions will not be lightly made:

> *"No doubt it may be said to be desirable that there should be a provision in the Rule that would enable the principal officer to enter into written contracts with regard to the day-to-day functioning to the fund. But there is no such express provision. Nor for that matter does one find any such provision in the Act. The question that then arises is whether it can be inferred by necessary implication from the Rules* (Cape Union Sick Fund v Forrest *at 532D).*

Needless to say a court should be very slow to do so (Mullin (Pty) Ltd v Benade *1952 (1) SA 211(A))'*

[33] There is no express provision in the Rules of the Scheme, which empowers the Board to make payments, of the nature contended for by the Respondents, to a trustee who agrees to resign from the Board. Nor, in my view, can this power be inferred by necessary implication from the Rules of the Scheme. To import into the Rules of the Scheme a power to pay a trustee for not performing his duties but, in fact, for relinquishing them would, in my view, be contrary to the provisions Rule 18.17 of the Rules of the Scheme. Our courts have, in this regard, made it clear that an implied term which conflicts with an express term may not be imported into a contract. Rumpff JA in *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd*[7] stated thus:

> "*When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the agreement, there is any room for importing the alleged implied term."*

[34] The Council, in 2011, commissioned a study of the factors in the medical schemes industry, which influence the differences in the remuneration strategies and policies of boards of trustees. The study, entitled *溺edical Scheme痴 Board of Trustee Remuneration*”[8] (鍍he discussion document・), sets out the Council痴 proposals for the remuneration of trustees in the medical schemes industry. Citing the discussion document[9], the Scheme contends that in view of the fact that the boards of trustees of medical schemes collectively govern an industry valued at R96.5 billion (of the total annual contributions paid by members in 2010), and that remuneration principles guiding private health insurance entities are designed to attract, retain and motivate members of the board of trustees and the executive management to do their work efficiently and effectively, medical schemes are required to provide remuneration that is high enough to attract and retain appropriately skilled and qualified executives, but not as high as to cause unnecessary financial burden to beneficiaries. Hence, remuneration decisions, particularly in large schemes, must take cognisance of economic, efficient and effective use of resources by the health insurer, where the office of trustee requires particular skills, and is very time consuming. The Scheme consequently argues that a large scheme, like itself, cannot be expected to attract top-notch, skilled and responsible people to serve as trustees and then, without proper remuneration, expect those trustees to act to the detriment of their own personal and professional lives.

[35] Whilst the Court recognises, the need for medical schemes to pay trustees in accordance with the expertise and demands of the office, which are essential to the proper and sound management of medical schemes and, that the approach to remuneration of trustees, in the medical schemes industry, is not homogeneous, it must be borne in mind that the dispute before court does not concern the question of paying

trustees of medical schemes a proper remuneration, but rather whether the Board acted beyond the scope of its powers under the Rules of the Scheme by making payments to an ex-trustee, which are not expressly provided for in the Rules. That the medical scheme industry is worth billions of rands does not, in my view, give a board of trustees of a medical scheme *carte blanche* to conduct itself in a manner that goes beyond the scope of its powers as provided for in that scheme痴 rules. Significantly, a core proposal of the Council, as set out in the discussion document,[10] is that a medical scheme痴 remuneration policy/strategy must be outlined in the scheme痴 rules in order to promote transparency and public accountability. The Council furthermore proposes that the remuneration policy for the board of trustees of a medical scheme should be supported by performance reviews linked to measurable quantitative and qualitative indicators, and that it should clearly state that trustees will be rewarded according to the effective execution of the job as determined by a performance management system[11]. Council痴 proposal痴 for the remuneration of trustees of medical schemes are, in my view, completely in line with the common law position on the remuneration which a trustee is entitled to receive, and like the common law, it is silent on the question of the payment of a restraint or 斗ost opportunity・ fee to a trustee who agrees to resign - because such payments are not in the general scheme of a trustee痴 relationship and duties to a medical scheme, which is manifestly not an organisation for gain. Thus, the guiding philosophy that must inform trustee remuneration in the medical schemes industry, as articulated in the discussion document, is that:[12]

> "*1. Serving on a board of trustees must not be economically motivated but rather essentially inspired by attainment of a social good, public benefit and solidarity.*
>
> *2. The Board of Trustees should seek to balance the economic and social goal of the scheme being mindful towards protecting beneficiaries as well as in cognisance of the fact that a medical scheme is a mutual fund whose ownership vests in members.*
>
> ...
>
> *5. The Board of Trustees shall uphold the fiduciary duty of loyalty and the duty of care.*
>
> *6. In exercising their fiduciary responsibilities the Board shall maintain integrity, objectivity, honesty, competency and confidentiality."*

"Compromise" payment *ultra vires* the Rules of the Scheme

[36] The Scheme explanation for not following its Rules is that it wanted to avoid 電amaging litigation・. The explanation is unconvincing for a number of reasons. First, the Respondents do not make out a case, on the papers, that Mkhize threatened litigation if the Board opted to vote him out as a trustee by way of a secret

ballot as provided for in Rule 18.1.6 of the Rules of the Scheme. However, assuming that there was a threat of litigation from either Mkhize or Jacques, this can never be a legitimate excuse for trustees of a medical scheme not to carry out their fiduciary and statutory duties[13] as provided for in the scheme痴 rules. Secondly, by entering into the so-called 都pecial arrangement・ with Mkhize, which was clearly at odds with its obligations under the Rules, the Board had allowed itself to be held at ransom by Mkhize, whose peculiar view of the impending expiry of his tenure was that it presented *殿 unique challenge which necessitated a special arrangement such as the one entered into between the scheme and myself."* Even if it is accepted that the Scheme could legitimately ignore the legal advice obtained from counsel, in order to avoid litigation, it is perplexing why the Scheme could not, in avoiding litigation, simply follow the provisions of Rule 18.1.6. It cannot be seriously maintained that Mkhize would have engaged in *電amaging litigation*・ against the Scheme if he had been properly removed by way of a vote under Rule 18.1.6. If that was the fear, then the Scheme was obliged to resist the litigation.

[37] The Scheme implores the Court to view the payment as a “settlement” or “compromise” arising from the dispute with Mkhize in relation to his resignation from the Board. But this implies that there was a dispute to settle. There was, by all accounts, no such dispute. There was Mkhize’s insistence that his tenure would go beyond June 2011, on the one hand, and there was the Scheme’s entitlement to terminate his tenure upon a vote, on the other. It could not have been Mkhize’s position that, in the event of the exercise of that vote, he would have been able to sue the Scheme. What would he. sue for? It cannot be “lost opportunity” because, as already pointed out, there was no “lost opportunity” in this case. Since, Mkhize clearly took into the bargain the fact that his tenure was terminable at the instance of the Scheme, there was no realistic prospect of “damaging litigation” - because there was simply nothing for which Mkhize could sue. Accordingly, having regard to counsels’ opinion that Mkhize’s tenure would terminate in June 2011, the most prudent thing to do was to await the termination of his tenure instead of signing, a month earlier, a contract by which the Board purported to settles a non-existent dispute, and thereby disable it from removing Mkhize from office.

[38] There was, in my view, nothing to settle or compromise between Mkhize and the Scheme. The Scheme was contractually bound to remove Mkhize once the Board had identified him as one of the trustees to be removed pursuant to the amalgamation. I, therefore, agree with the contention of the Applicants that far from being a compromise, the payment has all the hallmarks of the conduct of a supine board succumbing to the demands of a trustee who self-confessedly would have resigned only on the terms of the agreement, or on better terms, despite the fact that he could simply have been voted out by the Board in terms of Rule 18.1.7 of the Rules of the Scheme. For his part, Mkhize seemed blissfully unaware of his fiduciary obligations to the Scheme and its beneficiaries. Mkhize’s insistence that he would never have resigned on terms more disadvantageous than those contained in the agreement sadly reveals his misunderstanding of his fiduciary

duties to the Scheme and its beneficiaries.

[39] Surprisingly, it emerged during argument that although Jacques had also resigned from the Board, the Board did not see fit to enter into a termination and restraint agreement with him. Nor was he paid a restraint or "lost opportunity" payment by the Scheme. Jacques recalcitrance, much like Mkhize's, was fundamental to the acrimony amongst Board members, yet quite remarkably, the Board saw no need to pay him a "compromise" or "lost opportunity" payment, on resigning. At best, the Court would have to speculate as to the reasons for the Scheme not doing so, since the Scheme has failed, on its papers, to be candid in relation to its differential treatment of Mkhize, on the one hand, and Jacques on the other. Accordingly, I find that by entering into the termination and restraint agreement with Mkhize, and by paying him the amount of R 962 500, 00 as a "compromise" or "lost opportunity" payment, the Board's conduct was *ultra vires* the Rules of the Scheme.

Restraint of Trade Payment *ultra vires* the Rules of the Scheme

[40] The Scheme seeks to justify the restraint of trade payment to Mkhize on the basis that, in view of the competitive nature of the medical schemes industry, it is necessary to protect the disclosure of confidential information by outgoing trustees. This argument is manifestly unfounded. Rule 18.17 is exhaustive of the nature of payments which may be made to trustees. Those payments do not include payments for restraints of trade. As indicated, the one uniform thing about permissible payments under the Rules of the Scheme is that they are either reimbursements or professional fees for work done. A restraint payment is neither a reimbursement nor payment for work performed. On the contrary, the payment of the restraint fee was made, by the Scheme, in order to keep Mkhize, a trustee, loyal to his statutory and fiduciary obligations which he owed to the Scheme and its beneficiaries. Significantly, the Board did not see the need to keep Jacques loyal to his statutory and fiduciary obligation to the Scheme and its beneficiaries, by paying him a restraint fee on resignation from the Board. Also notable, is that counsels' opinion on the question of the legality of a restraint payment to a trustee, on resignation, was sought in respect of both Jacques and Mkhize - yet Jacques, the then Chairman of the Board, who too would have had exposure to highly confidential and commercially lucrative information concerning the Scheme's affairs - was allowed to walk away without a restraint of trade in place. This begs the question: was there need for a restraint payment to Mkhize at all?

[41] It is thus irrelevant to the question of whether the Board acted *ultra vires* the Rules of the Scheme that a restraint payment may, to some, be an attractive way of keeping outgoing trustees honest. It is either permitted by the Rules or it is not. In any case, it is highly undesirable, from a policy perspective, that trustees be induced by attractive restraint payments to be loyal and honest. That would require them to heed two masters: their self-interest in the restraint fee and acting in the best interest of the scheme, regardless of whether a restraint fee is paid. There can furthermore, as a matter of law, be no justification for the payment

of a restraint fee to a trustee, as a trustee's fiduciary duty must necessarily include the duty, after her term of office comes to an end, not to disclose confidential information and not to make use of confidential information in competition with the scheme in which she served as a trustee.

[42] In my view, Mkhize痴 fiduciary obligation not to disclose the Scheme痴 confidential information survived the termination of his office as trustee, and there was, therefore, no rational reason for the Scheme to pay him the restraint fee. As is apparent from the termination and restraint agreement, the Scheme痴 avowed justification for the fee was to incentivise Mkhize to protect its confidential information. But any such incentive would be unlawful since, in any event, Mkhize has a continuing obligation to protect the Scheme痴 confidential information beyond the termination of his office as trustee. It is established law that if a director of a company discloses confidential information to compete with the company or to advance her personal interests, she will be liable to an action in unlawful competition because her fiduciary obligations to the company prevents her from disclosing such information[14]. The general rule was stated as follows in *Easyfind International (SA) (Pty) Ltd tnstaplan Holdings*[15]

> *"What is clearly established in our law is that it is unlawful for a servant to take his master's confidential information or documents and use them to compete with the master. "*

A trustee is, in principle, in the same position by virtue of his or her fiduciary duties to the trust. When in *Robinson v Randfontein Est. G.M Co. Ltd*[16] Innes CJ expounded this principle, he drew no distinction between employees and trustees. Indeed, he based the duty on the fact that a trustee or director is in a position of confidence *vis-a-vis* the trust or company. He stated thus:

> "*Where one man stands to another in a position of confidence involving a duty to protect the interest of that other, he is not allowed to make secret profit at the other's expense or place himself in a position where his interest conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position"*

[43] Our courts have consistently held that the common law fiduciary duty of directors owed to the company subsist even after the appointment has ceased.[17] I am of the view that no principled distinction can, in this context, be maintained between a trustee and a director. Certain fiduciary duties of a trustee also subsist ・ after termination of office, and any breech thereof may constitute a wrongful act in the context of an action for unlawful competition. Thus, if an ex-director owes a duty of confidence to the company, after her directorship has terminated, by virtue of a fiduciary relationship with the company, then an ex- trustee who equally stands in a fiduciary relationship to her trust will owe to the trust the same fiduciary duty of

confidence. This is not unique to the law of unlawful completion imposing as it does these duties on ex-directors or ex-employees. It also finds resonance in the law of trusts, where it has been held that in certain circumstances the trustee痴 fiduciary obligations survive the termination of her vacation of her position as trustee. This is how *Honore痴 South African Law of Trusts* puts: [18]

> *"However, duties attaching to the trustee's office may continue to exist. If for instance the trustee still retains trust property, it must be returned or disposed of to the person properly entitled it. In this sense the former trustee's fiduciary duties continue.."*

[44] This principle will apply equally to a trustee's fiduciary duty to maintain confidences. I am of the view, in this regard, that the duty of a trustee not to disclose confidential information would necessarily survive termination of office until no confidentiality can be said to attach to the relevant information or ideas. The duty not to disclose confidential information survives termination because of its nature, since it is just as easy to breach confidences once a trustee has vacated the office of trustee, as was when she still occupied it. A trustee does not, in my view, divest herself of the duty not to disclose confidential information by simply resigning. Similarly, whilst there would be no obligation, on resignation, for a trustee to join a rival scheme, her fiduciary duty not to disclose confidential information, to which she had access whilst in office, will continue to exist until no confidentiality is said to attach to the information. If any such information is disclosed, in breach of the duty of confidentiality, it would likely found a claim for unlawful competition. It follows, that even in the absence of a restraint arrangement, a medical scheme will have a remedy, in law, should an ex-trustee breach its confidences.

[45] Another instance where the fiduciary duties of a trustee will survive the termination of her office is the "no opportunity rule". Take a case of a trustee who espies an opportunity, and then resigns from a scheme for the sole purpose of taking advantage of the opportunity. Or take a trustee who resigns in order to use confidential information of the scheme. In neither case could it be seriously maintained that the trustee is not in breach of her fiduciary duties. It would be wholly irrelevant that she is no longer a trustee because certain duties are capable of breach even after the trustee has vacated her position. Anything else would be subversive of the fiduciary duty of loyalty and confidentiality, as well as the duty of care, that a trustee owes to a trust. In the circumstances, I am of the view that there was no rational purpose for the restraint agreement, which the Scheme entered into with Mkhize, and the related payment. The termination and restraint payment was therefore *ultra vires* the Rules of the Scheme.

Conclusion

[46] The Rules of the Scheme do not provide for resignation, 斗oss opportunity・ or restraint payments

because these payments are not in the general scheme of a trustee痴 relationship and duties to the Scheme. Simply put, any such payments would be *ultra vires* the Scheme痴 Rules. The payments, which the Board made to Mkhize pursuant to the termination and restraint agreement, were not expressly provided for in the Scheme痴 Rules. The payments were clearly impermissible, as they were contrary to the provisions of Rule 18.17 of the Rules of the Scheme. Accordingly, the termination and restraint agreement, and the payments made pursuant thereto, patently offend against the principle of legality as the Board exceeded the scope of its powers under the Rules of the Scheme. For these reasons, the termination and restraint agreement is null and void, and falls to be set aside.[19]

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

(1) The termination and restraint agreement, which was concluded between the First and Second Respondents, on 20 May 2011, is set aside.

(2) The Second Respondent is liable to the First Respondent for disgorgement of profit in the sum of R1 622 500, 00.

(3) The Second Respondent is to pay to the First Respondent the amount of R1 622 500, 00.

(4) The Second Respondent is ordered to pay the costs of the application including those costs consequent upon the employment of two counsels.

F. KATHREE-SETILOANE

JUDGE OF THE SOUTH AND

NORTH GAUTENG HIGH COURTS

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Counsel for the Second Respondent: K Tsatsawane

Attorneys for the Second Respondent: Damons Magardie Richardson Attorneys

Date of Hearing: 16 April 2013

Date of Judgment: 28 May 2013

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1 Eskom v Soweto City Council 1992 (2) SA 703(W), Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624I-625A; Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA) at para 14-16

2 *Meaker NO v Roup. Wacks, Kaminer, Kriger and Another 1987 (2) SA 54 ㄕ at 61G-62C; Pennington v Friedgood and Others* **2002 (1) SA 251 (C) at para 36**

3 Cameron, De Waal, and Wunsch, *Honore痴* South African Law of Trusts (5th Edition) at 345

4 *Ex Parte Executor Testamentary Estate Late Arthur Storm* 1943 NPD 279 at 284.

5 186 CLR 71 (HCA) at 108

6 2012 (1) All SA 121 (SCA) at para 33

7 1965 (3) SA 150 (A) 175C

8 *Circular 45 of 2011: Medical Scheme's Board of Trustee Renumeration. Discussion Document. 18 November 2011*

9 Discussion Document at para 5.4, page 11, and para

10 Discussion Document at para 7.2.2, p 19

11 Discussion Document at para 7.2.6 and 7.2.7, page 19

12 Discussion Document at para 7.1, p 18

13 *Msimang NO v Katuliiba* March (1) 2013 All SA 599 (GSJ) at para 67

14 *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T) at 63I - 64

15 1983 (3) SA 917 (W) at 927

16 1921 SA (AD) 168 at 177

17 *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) at 480C; *Cyberscene Ltd v i-Kiosk Internet and Information (Pty) Ltd* 2000(3) SA 806 at 820H-J; *Multi Tube Systems (Pty) Ltd v Ponting and Others* 1984 (3) SA 182 (D), *Sibex Construction (SA) (Pty) Ltd and Another v Injectaseal CC and Others* 1988 (2) SA 54 (T); and Joubert (ed) *The Law of South Africa* 1st issue, volume 4, part 2, para 137

18 *Honore's South African Law of Trusts* at 227

19 *Grundling v Beyer and Others* 1967 (2) SA 131 (W) at 139H-140B; *Absa Bank v SACCAWU National Provident Fund* 2012 (1) ALL SA 121 (SCA) at para 37