



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 004741/2023

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**

19 July 2024

DATE

SIGNATURE

THE REGISTRAR OF MEDICAL SCHEMES

Applicant

and

MEDIPOS MEDICAL SCHEME

Respondent

JUDGMENT

NEUKIRCHER J:

1] The respondent (Medipos)¹ is a medical scheme registered in terms of s24 of the Medical Schemes Act 131 of 1998 (the MSA). It is a restricted medical scheme and its membership is available only to persons by virtue of their employment with the South African Post Office (SAPO) and Postbank. Given that it is a medical scheme, it resides under the supervision of the applicant.²

2] As of October 2022, Medipos had 21 141 beneficiaries of which 10 218 were members and the remainder were their dependents. The members pay monthly contributions to Medipos via deductions from their salaries. It is not in dispute that SAPO subsidises one third of the employee's medical aid contributions and the member's balance of two thirds is then deducted from their salary and paid directly to Medipos in terms of s26(7) of the MSA. SAPO's contribution of one third is also paid to Medipos in terms of the same provision. It is common cause that SAPO indeed deducted the members' contributions from their salaries but failed to pay these over to Medipos. This resulted in a dire financial situation for Medipos.

3] Ultimately, as a result, on 14 February 2023 Medipos was placed under provisional curatorship in terms of s56(1) of the MSA as read with s5(1) and s5(2) of the Financial Institutions (Protection of Funds) Act 28 of 2001 (the FIA). The application was brought by the Registrar.

4] The return date is opposed by the Medipos Board of Trustees (the Board) and the issues to be determined have been crystalized as follows:

¹ Also referred to as "the Scheme" in this judgment.

² The Registrar.

- a) whether the Board has locus standi to oppose the granting of the final order;
- b) whether:
 - (i) the provisional order should have been granted in the first place; and
 - (ii) whether a case has been made out for confirmation of the rule;
- c) the costs of the application.

5] The context of this application is founded in the provisions of s56 of the MSA as read with s5(1) and s5(2) of the FIA:

- a) s56 provides:

“(1) The Registrar may, notwithstanding the provisions of section 52 and 53, if he or she is of the opinion that it is in the interest of beneficiaries or that it is desirable to do so, because material irregularities have come to his or her notice, or because a medical scheme is not in sound financial condition or as a result of an inspection of the affairs of a medical scheme, apply, with the concurrence of the Council, to the High Court, for the appointment of a curator to take control of and to manage the business of that medical scheme.

(2) The provisions of the Financial Institutions (Investment of Funds) Act, 1984 (Act 39 of 1984), insofar as those provisions relate to the appointment of a curator in terms of the said Act, and insofar as they are not inconsistent with the provisions of this Act, shall apply with the necessary changes to the appointment of a curator of a medical scheme in terms of this section.

(3) In the application of the Financial Institutions (Investment of Funds) Act, 1984 as provided for by subsection (1) –

- (a) a reference to a company and the registrar in section 1 of the Financial Institutions (Investment of Funds) Act, 1984, shall be

construed as a reference also to a board of trustees and the Registrar, respectively;

- (b) a reference in that Act to a director, official, employee or agent shall be construed as a reference also to a member of the board of trustees or the principal officer, as the case may be; and
- (c) a reference in that Act to a financial institution shall be construed as a reference also to a medical scheme."

b) s5(1) and s5(2) of the FIA, state:

"(1) The registrar may, on an ex parte basis, apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution.

(2) Upon an application in terms of subsection (1) the court may-

- (a) on good cause shown, provisionally appoint a curator to take control of, and to manage the whole or any part of, the business of the institution on such conditions and for such a period as the court deems fit; and
- (b) simultaneously grant a rule nisi calling upon the institution and other interested parties to show cause on a day mentioned in the rule why the appointment of the curator should not be confirmed."

6] The Registrar must therefore, for purposes of s56³ of the MSA, make out a case that the curator should be appointed as:

- a) it is in the best interests of the members; or
- b) it is desirable to do so because material irregularities have come to his notice; or

³ Section 52 and s53 of the MSA do not apply to this application and are therefore not discussed.

- c) the medical scheme is not in a sound financial condition; or
- d) it is desirable to do so as a result of the inspection of the affairs of the scheme⁴; or
- e) good cause is shown⁵.

7] Whilst the opinion of the Registrar that informs the application in terms of s56 of the MSA is a subjective one, it must be based on objective grounds:

“The test under s56(1) of the MSA is the opinion held by the registrar that it is in the best interest of the beneficiaries of the scheme that a provisional curator be appointed to the scheme, or that it is desirable to do so, because of material irregularities that have come to his or her notice or because the medical scheme is not in sound financial condition. As was correctly submitted on behalf of the registrar, the opinion is the subjective opinion of the registrar which must be held on objective grounds.”⁶

8] As stated in *Barnard*⁷ however, the test under s5 of the FIA is different:

“The registrar must therefore satisfy the court that there is good cause to appoint a curator...that means that the court must be satisfied on the basis of the evidence placed before it that it is desirable to appoint a curator. Something is desirable if it is ‘worth having, or wishing for’. The court must assess whether curatorship is required in order to address identified problems in the business of the financial institution...It must determine whether appointing a curator will address those problems and have beneficial consequences for investors. It must also consider whether there are preferable alternatives to resolve the problems. Ultimately what will constitute good cause in any particular case will depend on the facts of that case... The inability or

⁴ These are the grounds set out in s56 of the MSA.

⁵ The requirements of s5(2)(a) of the FIA.

⁶ *Barnard and Others v Registrar of Medical Schemes* 2015 (3) A 204 (SCA) at par 12 (Barnard).

⁷ With reference to *Executive Officer FSB v Dynamic Wealth Ltd and Others* 2012 (1) SA 453 (SCA) par 4.

unwillingness of the institution to comply with regulatory requirements applicable to protected funds itself provides a reason for appointing a curator."

9] The founding affidavit, which informed the grant of the provisional order and the appointment of the provisional curator (the curator), was based on the following grounds:

- a) good cause;
- b) that it is in the interests of the beneficiaries;
- c) that it is desirable because material irregularities have come to the Registrar's notice.

10] The registrar alleges that:

- a) Medipos faces imminent financial collapse;
- b) Medipos will not maintain the required statutory solvency levels of 25%⁸ and there is a severe risk of the suspension of members' benefits;
- c) Medipos has seen a substantial decline in its membership;
- d) there are severe governance irregularities;
- e) the Board has exhibited an inability to manage Medipos in accordance with its rules.

11] In light of these allegations, the court granted the provisional order on 14 February 2023 in the following terms:

⁸ As set out in Regulation 29, GNR. 1262 OF 20 October 1999
"(2) Subject to subregulations (3), (3A) and (4), a medical scheme must maintain accumulated funds expressed as a percentage of gross annual contributions for the accounting period under review which may not be less than 25%."

- a) the curator was appointed and given certain interim powers, inter alia to manage the business operations of Medipos, exercise control and management of Medipos and investigate allegations of the alleged financial and governance irregularities made by the Registrar against the Board;
- b) paragraph 4 of the order gives context to the return date. It provides inter alia that the curator is to file a provisional report within six months, and report to the Registrar every six months regarding Medipos's affairs;
- c) finally, the order provides that the curator is to convene a special general meeting of Medipos in order to appoint a new Board.

12] The curator's provisional report (the report) was filed on 31 September 2023⁹. It informs the supplementary affidavit filed by the Registrar dated 6 November 2023. The affidavit, as read with the report, informs the return date and the confirmation of the rule according to the Registrar. These two documents detail alleged severe financial problems in Medipos:

- a) the Board has failed to collect contributions from SAPO for several years which led to the members being placed under threat of suspension of their benefits¹⁰;
- b) the solvency ratio of the scheme was under threat and the Board failed to curb the declining membership;
- c) the Board failed to keep an arms' length relationship with SAPO;
- d) there were severe governance failures contrary to the MSA and Medipos's rules.

⁹ Clearly a typing error as September only has 30 days

¹⁰ The suspension was realised between 1 October 2022 and 13 October 2022.

13] Based on these facts, the Registrar seeks confirmation of the rule. It is, however, important to note that the only purpose of this confirmation is that set out in paragraph 4.6 of the order which states:

“Directing the curator to take all steps which are necessary to convene a special general meeting of the respondent at which a new board of trustee who are fit and proper for this purpose shall be elected and report thereon within the six (6) month period referred to above.”

14] It is common cause that this meeting has not yet been called, that the curator has yet to set a date for this meeting, that an AGM has to be held by 31 July of each year and that this is the curator's only duty left in discharge of his obligations. The latter was also expressly conceded by the Registrar who urged me to allow the curator to finalise his appointment.

15] Although the Registrar alleges that the application was properly served on Medipos¹¹, Medipos did not appear to oppose the grant of the rule nisi – the order was thus granted in its absence. It alleges that this is because there were irregularities in the manner that the application was served and it subsequently, after the provisional order came to its notice, brought an application for reconsideration. That application was set down for hearing but it was not heard. I was informed that the reason for this is that the argument would not have been finalised in the time allotted for the hearing and so the parties agreed that the application would be withdrawn “*without prejudice and for the convenience of the parties*”¹² and costs were reserved. I was not required

¹¹ The application was not brought ex parte as provided for in s5 of the FIA, but rather on long form notice of motion.

¹² Per the court order issued on 9 June 2023.

to read those papers and it was not contested that the allegations made in that application by the Board are fully canvassed in the answering affidavit before me.

16] As stated in paragraph 4 supra, the Board's case is that the provisional order should not have been granted in the first instance and, whatever the situation, there are no grounds made out for confirmation of the rule.

Preliminary points

17] But before I deal with these issues, there are two issues to be decided first:

- a) does the Board have locus standi to oppose the application?
- b) whether the Registrar properly notified the Board of its intent to place the scheme under curatorship and consequently whether the internal appeal process¹³, and thus *audi alteram partem*, was denied to it

Locus standi

18] On 21 February 2023 the Board passed a resolution the relevant portion of which states:

- "1. Upon the Board becoming aware of Medipos being placed under provisional curatorship on 16 February 2023, it resolved:
 - 1.1 to institute urgent legal proceedings to challenge the grant of the Order on 14 February 2023 in terms of which Medipos was placed under provisional curatorship, and
 - 1.2 to take all steps necessary to finalise such proceedings including appointing attorneys, deposing to affidavits and signing any and all

¹³ Section 50 of the MSA.

documents to give effect to the finalisation of such proceedings, including any appeal or reviews; and

1.3 to authorise Ms. Nombulelo Ngubane ("Ms. Ngubane") to do all things necessary, and sign any and all documents to give effect to any proceedings or court process in order to give effect to this resolution...

2. The Board further resolves that notwithstanding the date of signing of this resolution, it hereby ratifies all actions taken prior to the date of this resolution to the extent that such ratification is necessary."

19] The Registrar attacks the Board's locus standi on several fronts. He argues that:

- a) the control of Medipos presently vests in the curator and the Board cannot oppose the return date - only the curator has this authority;
- b) the resolution of 21 February 2023 does not make provision for opposing these proceedings - it makes provision for the institution of urgent legal proceedings and therefore any instruction to the Board's attorneys for any action other than that is *ultra vires*;
- c) Ms Ngubane had terminated her membership with Medipos with effect from 30 April 2023. Rule 19.15.8 of the Scheme's Rules, provides that a member of the Board ceases to be a member when a member ceases to be a member of the scheme;
- d) as a result, the Board was inquorate and as the position of trustee must be obtained through election and as the Board was inquorate, the deponent could not have been re-appointed.

Only the curator can oppose

20] The Registrar contends that the Board retains no residual power to oppose this application. Its argument rests on the finding of Kollapen J in *Registrar of Medical Schemes v Keyhealth Medical Scheme and Others*¹⁴ (*Keyhealth*) in which he states:

“It is common cause that the current trustees of the respondent no longer exercise any control over the respondent, in particular in light of the order of the Court of 16 September 2020 which expressly authorises the curator to take immediate control and in place of the board of trustees manage the business and operations of the respondent. They accordingly cannot seek to intervene as the board of the respondent as the board does not exist for now or at the very least is not functional nor possessed of any power or authority. It is the curator who now manages the respondent and who assumed the powers of the board.”

21] But in *The Prudential Authority v 3Sixty Life Limited and Others*¹⁵ (*3Sixty*) and on facts similar to those in casu, Dippenaar J found that the Board of Trustees of 3Sixty retained the residual power to oppose the confirmation of the provisional order:

“It would be contrary to the interests of justice and the principle of audi alteram partem to deprive an entity in the position of 3Sixty of the right to be heard in order to oppose the granting of a final provisional curatorship order, where a provisional order had been granted on an ex parte basis. To deprive the board of that power and to leave it vested in a provisional curator who acts under the control of the Authority under section 5(6) of the FI Act would render the express provisions of sections 5(2)(b) and 5(8)(a) nugatory.

...In any event, on a proper interpretation of paragraph 8 and 11 of the provisional order as well as sections 5(2)(b) and 5(8)(a) of the FI Act, it is my view that the board

¹⁴ Unreported case no 35478/2020 (GNP) (25 March 2021).

¹⁵ 2022 JDR 2700 (GJ) para 28-29.

of directors of 3 Sixty would have the residual power to oppose the confirmation of the provisional curatorship order.”

22] In casu, the rule nisi calls upon “*the respondent and other parties*” to show cause why the rule should not be confirmed. The respondent is Medipos and it is represented by its Board. Whilst s5(1) of the FIA provides that the Registrar makes application for the appointment of a curator to take control of and manage the whole or any part of the business of an institution, it does not provide that the curator takes control of the institution itself - this is still vested in the Board.

23] I also agree with Dippenaar J that one must have regard to the principles of residual powers of directors to oppose liquidation proceedings in the context of applications brought under s56 of the MSA. In *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and Others*¹⁶ it was held that the directors of a company placed in provisional liquidation retained the residuary power to oppose the grant of a final order of liquidation as:

“To hold that after the granting of a provisional liquidation order the directors of the company which has been provisionally liquidated, by virtue of such order have lost their locus standi in judicio to oppose the granting of a final order would fly in the face of the very object and purpose of the rule nisi and it would, therefore, be quite wrong to emasculate such objective and purpose by finding that the directors have lost their residual power to show cause why the company should not be wound up, for that matter to anticipate the return day of the rule nisi. It would be quite ludicrous to hold that a director, or a company acting through its directors, is not an interested party

¹⁶ 1993 (2) SA 534 (C) at 537.

when it comes to deciding whether it and/or they have the right to be heard on the return day of a rule nisi.”

24] In fact, to emphasize this point, it is apposite to refer to *Ex Parte G Pagan Enterprises (Pty) Ltd*¹⁷ in which attorneys representing the sole director appeared on the return date of a provisional liquidation. In affirming that directors retain, in provisional proceedings, the power to oppose the confirmation of a rule nisi, the court held that where there is a conflict between a provisional liquidator and directors, it is the directors that are entitled to instruct legal representatives and to represent the company and not the liquidator¹⁸.

25] The court confirmed the basic principle that, whilst the directors are divested of their powers upon provisional liquidation of a company, they retain their residual powers to instruct attorneys to oppose confirmation of the rule nisi and, if it was made final, to appeal, and this without the co-operation of the liquidator.

26] Furthermore, were the sole right to oppose the final order to vest in the curator in this matter, it would create the anomalous situation that he would be the sole arbiter of the decision whether or not to oppose the very order that appointed him in the first place – this would, in my view, create a very obvious and uncomfortable conflict of interest, and, as said in *3Sixty*, would render the provisions of s5(2)(b) and s5(8)(a) of the FIA nugatory.

¹⁷ 1983 (2) SA 30 (W).

¹⁸ At 31G-H.

27] This was realised in casu when the curator actually terminated the mandate of the Board's attorneys and refused to continue with the reconsideration application as he was of the view that it had no merit. That this decision would be left to his discretion is simply, on any construction, untenable.

28] Furthermore, it was argued by the Board that the curator acts under the control and supervision of the Registrar and, were he to decide to oppose the grant of the final order and the Registrar to oppose this decision, that would also create an untenable conflict - I agree with this argument as well.

29] This being so, in my view, the decision in *3Sixty* sets out the correct legal position vis-à-vis the residual powers of the Board to oppose the final order and I find that they are indeed vested with that power.

The resolution

30] The Registrar then contends that inasmuch as the Board's resolution of 21 February 2023 only provides for the right to institute urgent proceedings - ie the reconsideration application - the Board was not authorised to oppose the final order.

31] In my view, this argument holds no water: the resolution is clearly aimed at opposing the provisional order - that is the entire purpose of the reconsideration application. In any event, the resolution states that its purpose is to "*challenge the grant of the Order on 14 February 2023 in terms of which Medipos was placed under provisional curatorship...*" The fact is that effect was given to that resolution and the reconsideration application was postponed to be heard with this application. It is

common cause that the two affidavits filed by the Board are similar and therefore the one serves as Medipos' case vis-à-vis the other *pari passu*.

32] Thus, this point is dismissed.

Ms Ngubane's authority

33] This argument is premised on the fact that Ms Ngubane held no authority - despite the resolution - to depose to affidavits on behalf of Medipos as she was not a trustee. This argument is premised on the common cause fact that:

a) she resigned her membership with Medipos on 4 April 2023, with effect from 30 April 2023 and was no longer a SAPO employee;

b) Rule 19.15.8 of the scheme's rules provides:

"A member of the Board ceases to hold office:

...

19.15.8 In the case of a member representative if he ceases to be a member of the Scheme..."

34] The rules provide that the position of a trustee must be obtained through election but the Board became inquorate as far back as on 4 October 2022 when SAPO informed the Board that it was withdrawing all 5 of their appointed trustees from the Board¹⁹.

¹⁹ Rule 19.1 and 19.2 provide that the Board shall consist of 10 fit and proper persons of which 5 are appointed by SAPO and 5 are elected by members. They hold office for a term of 5 years and may not hold office for more than a maximum of two consecutive terms (Rule 19.4).

35] Despite the Board nominating three trustees to fill these vacancies in order to prevent an inquorate Board, the Registrar contends that this decision was unlawful – in my view it is not –

a) according to Rule 19.9²⁰ a quorum consists of “*half plus one members of the Board*” – ie six members;

b) in terms of rule 19.10

“Notwithstanding any vacancy on the Board, the remaining board members may act on its behalf, provided that if and so long as their number no longer meets the requirement fixed for a quorum, such Board members may act only for the purpose of increasing the number of board members to that number or for summoning a General Meeting of the Scheme, but for no other purpose.”

36] Thus, it is clear that Rule 19.10 provides for the situation in which the Board found itself on 4 October 2022. By appointing the three trustees, it acted within its powers. Furthermore, the Board applied to Council for the authority to amend Rule 19.2 to delete SAPO's right to appoint trustees to the Board given SAPO's conduct – the Council has, as at date of the application, yet to make a decision on this issue.

37] Insofar as Ms Ngubane signed the answering affidavit in her capacity as chairperson of the Board on 14 November 2023, the following:

- a) the resolution was taken prior to her resignation;
- b) she gave less than the three months' notice required by Rule 12.1;
- c) on 1 May 2023, Ms Ngubane took up employment at Postbank;
- d) employees of Postbank are eligible to become members of Medipos;

²⁰ The Rules were placed before me and it is clear that they have been amended from time to time. Some were dated January 2012, others January 2016 and others October 2021.

- e) as her resignation fell foul of Rule 12.1, Medipos states that her resignation was of no force and effect;
- f) she has had no interruption in the payment of her medical benefits or her contributions to Medipos and she has retained the same membership number throughout;

All of this demonstrates her continued membership to the Scheme.

38] In my view, Ms Ngubane remained a member of Medipos throughout and was therefore eligible to be elected to the Board.

39] Insofar as the Registrar points out in his further supplementary affidavit that two further members of the Board have ceased to be employees of SAPO and are therefore no longer eligible to serve on the Board - that does not influence the de facto position that only six members are required to ensure that the Board is quorate, which it is.

40] One last aspect is the issue of whether Ms Ngubane requires authorisation to depose to an affidavit on behalf of the Board - she does not. In *Ganes and Another v Telekom Namibia Ltd*²¹ the SCA stated:

“[19] ...The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised... In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The

²¹ 2004 (3) SA 615 (SCA).

appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C-J”).

41] It is common cause that the Registrar did not deliver a rule 7 notice at any stage. Furthermore, Ms Ngubane is no more than a witness to the events to which she has testified under oath and no resolution is required authorising her to be a witness or to depose to an affidavit. The fact that she states that she is chairperson of the Board is neither here nor there – it does not elevate her to being more than a witness.

42] Thus, I find that, in all respects, the *locus standi* arguments must fail.

Points taken by Medipos

43] Medipos has taken two specific points:

- a) that the Registrar failed to properly consult with the Council for Medical Schemes (the Council), as it was required to do in terms of s56(1)²² before the application was launched;
- b) the Registrar failed to properly engage with Medipos prior to launching this application, thus denying the Board *audi alteram partem* and denying it the right to appeal the decision in terms of s50 of the MSA.

Concurrence of the Council

44] As to the issue of the concurrence of the Council, it appears that Council's resolution to invoke s56 was taken on 3 November 2022. The minutes of the meeting

²² Section 56(1) requires 'the concurrence of the Council' to apply to court for the appointment of a curator.

at which the resolution was adopted are attached to the founding affidavit and, inter alia, state:

Decision:	Council concurs with the Registrar to apply to the High Court to place Medipos under curatorship in terms of section 56(1) of the MS Act
Rationale and basis for decision:	Council concurs with the Registrar to apply to the High Court to place Medipos under curatorship in terms of section 56(1) of the MS Act, as it is in the best interest of members to do so

45] Medipos argues that the resolution itself does not indicate whether Council approved the decision or not - but that does not appear to be correct as is clear from the wording of the resolution. Had Medipos had any doubt, it was at liberty to file a rule 35(12) notice to clarify this issue.

46] Medipos then argues that, in any event, two months have passed between the passing of the resolution and the launch of this application on 23 January 2023, and that material developments had transpired which were brought to the attention of the Registrar. Medipos argues that he should have consulted Council again to bring those developments to its attention and obtain fresh concurrence for this application. It argues that the failure to do so renders Council's decision unlawful as it breaches the doctrine of legality.

47] In support of this, Medipos relies on *Earthlife Africa and Another v Minister of Energy and Others*²³. In this case, the Minister of Energy made a determination in terms of s34 of the Energy Regulation Act 4 of 2006, that South Africa required 9.6 gigawatts of nuclear power that would be procured by the Department of Energy. The Minister obtained the concurrence of the National Energy Regulator - which he was required to do - four weeks after the determination. However, he only published the decision two years later. The court found that the Minister's conduct was unlawful as he should have approached NERSA anew prior to publication of the decision, due to the lapse of time and any developments that could have occurred during that period.

48] In my view, *Earthlife* is not comparable to this matter as two years is a far cry from two months. To require that the Registrar obtain concurrence of Council in respect of every change in a factual situation would stymie the purpose of s56 of the MSA and s5(1) of the FIA and effectively tie his hands. It may, in extreme circumstances, result in what could be described as Stalingrad tactics as a recalcitrant Board could indefinitely prolong an inevitable result and could potentially result in the collapse of an institution that could have been saved with timeous intervention.

49] In my view, so long as the application is brought within a reasonable time after concurrence of Council is obtained, the purpose of the relevant sections is achieved. What is a reasonable time, would depend on the circumstances of each case. In this matter, three months is not unreasonable.

²³ 2017 (5) SA 227 (WCC) para 58.

Engagement with Medipos and the Internal Appeal process

50] Medipos now argues that the Registrar failed to notify it of the decision of Council which then deprived it of the right to approach the Appeal Board to challenge the decision. It was argued that, once the decision was taken, the Registrar ought not only to have notified Medipos of the decision, but also inform it of its right to lodge an appeal against the decision.

51] It argues that the failure to do so amounts to a violation of its s34²⁴ Constitutional rights and is a breach of the *audi alteram partem* principle which stands at the very cornerstone of a fair hearing.

52] The appeal procedure is set out in s50 of the MSA and s50(3) provides:

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

53] Section 50 of the MSA resides under Chapter 10 of the MSA which provides for a complaints and appeals procedure. It appears that the s50(3) procedure is triggered in this specific case, by the words “*a decision of the Registrar acting with the concurrence of the Council*”. Thus, in my view, s50 is available to Medipos in relation to the decision taken by the Registrar to institute this application.

²⁴ “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

54] The issue is whether the Registrar properly notified Medipos of the decision to appoint a curator.

55] On 14 September 2022, the Registrar wrote to Medipos in terms of s57(5) of the MSA. Section 57(5) states:

“Any notice required or permitted to be given to a medical scheme in terms of this Act shall, if given to the principal officer, be deemed to have been duly given to the medical scheme.”

56] The letter detailed the challenges experienced by Medipos and the reasons informing the Registrar's view that a statutory manager should be appointed “*to protect the interests of the members of Medipos*”. It concludes:

- “7. For the reasons given above, I wish to appoint a statutory manager for Medipos, as provide for in terms of section 5A(1) of the FI Act, with your agreement.
8. The appointment of the statutory manager must take effect immediately. In the circumstances, I wish to hear from you as soon as possible, but no later than 30 September 2022.”

57] Medipos' response is contained in a letter dated 30 September 2022, under the hand of Mrs Mlotshwa, the principal office. It states:

- “8. Noting the above, the Board seeks to understand what a Statutory Manager will do which the Board is currently not doing. As has been demonstrated above, the Board is exploring every avenue open to it to ensure that the Scheme [is] financially sustainable (which is not brought about by no fault of the Trustees or officials of the Scheme) and matters are dealt with in a pro-active manner.

9. Furthermore, a Statutory Manager would come at an additional, and with respect, unnecessary, costs to the Scheme. Accordingly, the Board currently cannot agree to the appointment of a Statutory Manager in the circumstances.”

58] On 4 October 2022 the Registrar responded, inter alia, as follows:

- “8. ...it is clear that the Scheme is likely to be in an unsound financial position and it is advisable to appoint a statutory manager to protect the interests of members. I, therefore, call on the Board to reconsider its position to refuse the appointment of a Statutory Manager as its refusal is clearly not based on the law and it is not in the interest of members.
9. The Board has until 06 October 2022 to appraise me of its reconsideration and decision.”

59] On 6 October 2022 Medipos again engaged with the Registrar, setting out the steps it had taken to regularise any irregularities and requesting a meeting to discuss outstanding issues.

60] On 10 October 2022, the Registrar responded and, whilst indicating a willingness to the requested meeting, also indicated:

- “5. It is not clear what the requested meeting will cover which has not been or could not be covered in your letter under reply. Accordingly, I will regard your response thus far as a clear refusal or failure to agree to the appointment of a statutory manager and proceed as permitted by the MS Act and/or any other relevant legislation.
6. In due course CMS will provide suggested tentative dates for a meeting aimed at obtaining regular updates as per usual.”

61] Medipos' response of 12 October 2022 was:

"We acknowledge receipt of your letter dated 11 October 2022 regarding the above.

The contents of the letter are noted – the Scheme will wait for information on the proposed meeting dates to engage further..."

62] Insofar as Medipos alleges that the Registrar ignores the *audi* principle and failed to give it a proper audience, the correspondence clearly indicates otherwise. Insofar as Medipos alleges it was given no notice of this application, paragraph 5 of the letter of 10 October 2022 similarly clearly and firmly establishes the Registrar's view.

63] Whilst it may be argued that the same letter constitutes an invitation to discuss the reasons for the appointment of a statutory manager or an invitation to negotiate that issue, that letter states that the purpose of the meeting is to obtain "*regular updates as per usual*". Medipos also did not argue that the letter is ambiguous and, even if it had, it could have and should have sought clarity – it did not.

64] But on one issue, Medipos' point has substance: it was never notified that the Registrar had approached Council and had, in concurrence with Council, resolved to launch this application. As this decision was taken after the Registrar's letter of 12 October 2022, this should have been done. Therefore, on this basis, I find that the Registrar failed to apply the rules of natural justice.

65] But one must bear in mind that this is neither an application brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), nor is it a legality review. In fact, Medipos is not seeking to set aside the decision of Council and the Registrar

at all and, during argument of this issue, no relief was proposed or sought were this point to be found to have merit. Accordingly, in my view, at best for Medipos, it is simply a factor to be considered in the determination of whether or not the rule nisi should be confirmed.

66] But even if I am wrong on this aspect, the facts informing the application are relevant to the ultimate outcome.

The merits

67] In *Barnard supra*²⁵, the court stated:

“...A registered medical scheme is a public organisation and one possessed of a substantial trust fund. As such, its trustees are bound to observe the utmost good faith and to exercise proper care and diligence with regard to the funds and property of the scheme... They are...obliged to ensure that proper control systems are employed by or on behalf of the medical scheme, and that the rules, operations and administration over the medical scheme comply with the provisions of the MSA and all other applicable laws. In addition, the board must take all reasonable steps to ensure that the interest of beneficiaries in terms of the rules of the medical scheme and provisions of this Act are protected at all times, and to avoid conflict of interests...”

68] This sentiment was echoed in the *KeyHealth* where the court stated:

“...It is thus evident that a high bar is set for the performance of trustees and understanding so as they are the repositories of what is often substantial funds. That standard does not only relate to the proper management of funds at their disposal but

²⁵ See footnote 6 supra.

also and equally so to matters of good governance and compliance with the rules of the fund...”

69] It is as against this backdrop that the Board’s conduct was found seriously wanting by the Registrar. The facts set out in the founding affidavit, as supplemented by the Curator’s report, demonstrate a concerning decline in Medipos’ reserves. These reserves determine Medipos’ solvency ratio which, in terms of Regulation 29 may not fall below 25%. But, according to the Registrar, they ran precariously close due to the dwindling reserves:

- a) in 2019 the reserves were R609 716 041;
- b) in 2020 the reserves were R442 016 141; and
- c) in 2021 the reserves were R212 759 918.

70] The reason for this was all too clear: SAPO had simply failed to pay over the member’s contributions for a substantial period of time as it had suffered significant financial losses and was simply unable or unwilling to pay the contributions over to Medipos. As a result, members were faced with the threat of suspension of their medical benefits. In August 2021, the outstanding contributions stood at R602 million.

71] This looming threat culminated in an application by SAPO member’s union, Solidarity, who issued out an application in the Labour Court in September 2021 against SAPO. SAPO filed a counter-application and joined Medipos as a party. This resulted in a settlement, which was made a court order on 29 September 2021 (the September order) – subject to the approval of Council, in terms of which inter alia, SAPO would pay to Medipos:

- a) R20 million per month in respect of arrear contributions for September to November 2021;
- b) R43 million per month in respect of arrear contributions for December 2021 to March 2022;
- c) R50 million per month from April to December 2022; and
- d) Medipos undertook not to suspend members' benefits provided these payments were made.

72] On 4 October 2021, Medipos sought an extension of an exemption previously granted in terms of s26(7) and s54(4)(e)²⁶ of the MSA. The request was made in terms of s8(h) of the MSA which provides:

“The Council shall, in the exercise of its powers, be entitled to –

- (h) exempt in exceptional cases and subject to such terms and conditions and for such period as the Council may determine, a medical scheme or other person upon written application from complying with any provisions of the Act...”

73] It is clear that the exemption was sought against the backdrop of SAPO's historic debt of R602 million²⁷ which it had just undertaken to remedy. The exemption sought by Medipos on 4 October 2021 was not its first – in fact, the Registrar had exempted Medipos from compliance since June 2020. However, the last exemption, granted on 13 October 2021, was subject to the following conditions:

- a) that the September court order was to be complied with in full;
- b) that the Scheme's ratio was not to drop below 25%;

²⁶ 'The duties of the board of trustees shall be to –

(e) take all reasonable steps to ensure that contributions are paid timeously to the medical scheme in accordance with this Act and its rules...'

²⁷ As at 31 August 2021.

- c) that the Scheme was to submit management accounts highlighting the impact of the order on its financial position.

74] It appears that Medipos indeed provided the management accounts and, in order to comply with solvency ratio issues, eventually, in late 2022, provided the Registrar with two actuarial reports prepared by Insight Actuaries and Consultants (Pty) Ltd (Insight)²⁸. The reports postulate three scenarios:

- a) if invoiced contributions are received for the remainder of 2022 and 2023, the projected solvency at the end of 2023 was 44,6%;
- b) if Medipos receives only R34,9 million each month for 14 months, it will reach a solvency ratio by the end of 2023;
- c) if it receives nothing from SAPO for November 2022 and December 2022, and R40,6 million each month in 2023, it will reach a solvency ratio margin of 25% by end 2023.

75] The actuaries recommend a solvency ratio of 50% in order to absorb high claims from unforeseen circumstances and to cushion against uncollected contributions. But this recommendation is double the statutory requirement of 25%.

76] This was, of course, of immense concern to the Registrar and became an ever greater issue when SAPO defaulted on its payment arrangements. In order to remedy this, the Board saw to the attachment of SAPO's bank account: in October 2022 an amount of R60 578 966-76 was attached, in November 2022 an amount of R59 649 711-48 was attached and in February 2023 an amount of R101 095 205-46.

²⁸ The reports are dated 3 November 2022 and 1 December 2022.

77] But, unfortunately, as a result of SAPO's non-payment, Medipos was compelled to suspend members' benefits for approximately two weeks from 1 October 2022 until 13 October 2022 when the due amount was received – this did not sit well with the Registrar.

78] To compound issues, SAPO sent a letter to Medipos dated 3 October 2022. It states:

“Section 30 of the MEDIPOS rules of 2020 reads as follows:

30. NOTICE BY EMPLOYER

The South African Post Office Limited may, on three months written notice to the Board, reduce, suspend or formulate his contribution to the scheme. SAPO hereby invokes Section 30 of Medipos Rules of 2020, and serves notification to terminate medical aid contributions in accordance with said rule. The termination is with effect from 1 October 2022 which will trigger the three months' notice period.”

79] The next day, on 4 October 2022, SAPO informed Medipos that it was withdrawing all five of their appointed trustees from the Board. This then resulted in the Board appointing the three trustees as detailed in paragraphs 36 supra, and the allegations by the Registrar that the Board was then, and remains, inquorate.

80] In the meantime the Board did not accept SAPO's Section 30 notice - quite simply because Section 30 was removed from the Rules in 2021 and thus the Notice was invalid. The correspondence that flowed between the two did not resolve the issue and the Registrar and curator also used this as a ground to accuse the Board of failing its mandate and failing to act in the interests of its members.

81] A further concern of the Registrar is the undeniable fact that membership of Medipos has declined significantly - a 9,9% loss of members between 2018 and the first quarter of 2022. This has a knock-on effect as it means that Medipos contributions have declined as well. In fact, according to the Registrar, the management accounts submitted by Medipos show that the Scheme is running at a significant deficit - hardly surprising given the decline in membership and the failure of SAPO to pay over its contributions.

82] At the time the founding affidavit was signed on 19 January 2023, the Registrar based the application on:

- a) Medipos' failure to enforce compliance with the September court order;
- b) Medipos' failure to enforce collection of SAPO's historical debt;
- c) that Medipos was facing imminent collapse due to the above and the ongoing financial losses, decline in membership all of which put the solvency ratio of 25% in jeopardy;
- d) that, given SAPO's erratic payment history, there was no guarantee of payments and the Section 30 notice confirmed this;
- e) the Board's alleged failure to properly resolve the Section 30 notice;
- f) the financial stability of the Scheme is linked to that of SAPO and, for as long as SAPO's financial position remains precarious so too does Medipos which puts the members' interests in jeopardy;
- g) the impasse between the Scheme and SAPO has led to governance issues and a breakdown in legitimacy in terms of the rules and the MSA;
- h) given the fact that the Board is inquorate, there is no effective management of the Scheme to the prejudice of the beneficiaries.

83] It was therefore, given these facts, and without appearance by the Board, hardly surprising that a rule nisi was issued placing Medipos under provisional curatorship.

84] The curator's report also highlights other issues than those set out supra.

The premises

85] Medipos' registered address was at SAPO's offices and Medipos did not pay rent to SAPO. Neither the staff nor the Board members actually worked from those premises and it appeared that the relationship was not an arms' length one - this issue has subsequently been remedied by the curator, but Medipos' argument is that the premises issue was a historical one and not one of their own initiation.

Backdating payment

86] According to the minutes of the auditors' meeting of 9 February 2023, the Scheme's audit committee²⁹ instructed that a payment of R101 095 205-46, received on 7 February 2023³⁰ be backdated to reflect the date of 31 December 2023 on the management accounts which is not in accordance with accounting standards. The curator states that *"it is also of grave concern that this instruction comes from a committee of the Board that is charged with the responsibility to provide oversight of financial reporting, audit processes, strengthening internal controls and compliance with laws, regulations and accounting standards. What appears to have informed this backdating is a desire to make the AFS look better than they were as at the Scheme's financial years' end on 31 December (Rule 4.30). This would be a misrepresentation to the members and to the Registrar."* But it does not appear that the Board gave this

²⁹ A committee that is separate from the Board.

³⁰ See paragraph 76 supra.

instruction. In terms of the MSA, the audit committee is a separate committee and I have no further information on their composition or whether members of the Board also sit on that committee. It was, however, submitted that this instruction did not emanate from the Board and, based on the *Plascon-Evans* rule, I have no information to gainsay this.

Solvency ratio

87] Because Insight have recommended that the Scheme requires a solvency ratio of 50% to absorb high claims from unforeseen circumstances and to cushion against uncollected contributions, as of year-end 31 December 2022, the solvency ratio is below 50%. However, it remained above 25% for a period of six months since the curator's appointment and for June 2023 to August 2023 has remained above 50%. The curator states that *"the scheme has received a significant number of applications from Sizwe and Bonitas members wishing to return to Medipos"* as a result of his efforts in establishing and maintaining communication with members, their unions and healthcare providers.

Declining membership

88] The curator describes the declining membership as *"alarming"*, but states that from August 2023 to September 2023, and as a result of his efforts, it has seen an increase of 0,01%.

SAPO's retrenchment process

89] The curator states that SAPO's decision to offer voluntary severance packages to employees and its plan to retrench approximately 7000 employees also affects the

sustainability of the Scheme.³¹ But this is not of the Board's doing, nor is it in their control to prevent this. This falls squarely within the powers and duties of the business rescue practitioners (BRPs).

Financial failures of the trustees

90] The curator then takes the Board to task for:

- a) failing to outright reject a request made by SAPO on 29 June 2022 to write off the historical debt of R602 million and instead to refer it to the members for consideration at the July 2022 AGM;
- b) abdicating its financial responsibilities to Solidarity in September 2021 and instead of it pursuing payment from SAPO, leaving it to Solidarity to do so;
- c) failing to bring timeous enforcement proceedings to ensure SAPO's continued payments in the face of it failing to pay in January 2023 and February 2023;
- d) launching abortive reconsideration proceedings in the face of an inquorate Board who could not resolve to bring such an application and without proper grounds to do so.

91] But this is a very one-sided view of the facts:

- a) the fact is that the Board quite correctly referred the request made by SAPO to write off the historical debt to its members at an AGM - where it was rejected. By doing so it kept the members informed and involved them in the important decisions to be made regarding the financial health

³¹ This is the information set out in the business rescue application brought by SAPO.

of the Scheme - I see nothing wrong with that approach. In any event, it is not denied that, at all times, the Board kept the Registrar informed of all matters and he never took issue with their approach;

- b) the Board did not leave it to Solidarity to protect its members' interests. The Labour Court application was as between employer and employee. As I understand these papers, it was brought because SAPO was deducting employees' salaries with Medipos' payments and failing to pay those over which put the members' benefits in jeopardy. That is an issue between employer and employee and Medipos has no locus standi in the Labour Court vis-à-vis that issue. When it was joined to those proceedings, it was pro-active and its intervention led to the September 2021 order. Thus, it acted appropriately at the time;
- c) it must also be borne in mind that COVID also took its toll on SAPO's financial situation and its failure to pay over members' contributions - this cannot be laid at the door of the Board;
- d) when SAPO defaulted on the September 2021 court order, the Board took steps and attached SAPO's bank account ensuring payment of arrear contributions;
- e) and when SAPO again defaulted in January 2023, it immediately took steps to launch the very enforcement proceedings for which the curator now takes credit. In fact, the day after those proceedings were launched, the curator terminated the mandate of the Board's attorneys and appointed new attorneys who simply continued with the pending proceedings. This very application led to an enforcement order being granted against SAPO on 8 April 2023;

- f) the curator also cannot take credit for the fact that the Scheme has been stable since July 2023 because members' contributions are now paid over every month: SAPO was placed in business rescue in July 2023. It is thus the BRPs who are ensuring that SAPO's financial obligations are complied with and are making the monthly payments to Medipos;
- g) furthermore, SAPO has received a financial bail-out from the Government of at least R3,8 billion, with further funding promised, and this also bodes well for Medipos and the collection of the historical debt;
- h) there is no dispute on these papers that Medipos' solvency ratio has never dropped below 25% and it appears that it is undisputed that for as long as the BRPs pay over the members' monthly contributions, the likelihood of this happening is very slim;
- i) the Board also took immediate steps to prevent itself from becoming inquorate and also immediately addressed SAPO's invalid Section 30 letter.

92] In my view, whilst it is not surprising that the rule nisi was granted, the confirmation of the rule is quite a different story. I cannot find reason to confirm the rule when the sole conceded reason to do so is to allow the curator to call a special general meeting to appoint a new "fit and proper" Board. In terms of Rule 27.1.1, an AGM must be held by 31 July of a year. Rule 27.2 also makes provision for a special general meeting to be called which, given the time periods relevant to the election of candidates³² may be more appropriate, but I am not called upon to make this decision and therefore I make no finding on this issue.

³² 60 days in terms of Rule 19.5

93] But I find that the fulfilment of this last duty is not sufficient cause to confirm the rule. I also make this finding as:

- a) the failure of the Registrar to appraise the Board of the decision taken in conjunction with the Council deprived Medipos of its right to a fair hearing;
- b) there are no substantive governance issues arising from the Board's actions and they have acted in the interests of their members in ensuring an order against SAPO in September 2021; in ensuring that writs of execution were issued resulting in payments of over R220 million when SAPO defaulted on that order; in instituting enforcement proceedings in February 2023; in refusing to write off SAPO's historic debt; in refusing to accept SAPO's Section 30 Notice and immediately ensuring that the Board remains quorate – these are not the actions of a supine Board;
- c) the BRPs are ensuring that SAPO's contributions are paid over timeously to Medipos thus ensuring the continued solvency ratio is maintained.

94] Thus, in my view, the rule should be discharged.

Costs

The reconsideration application

95] The first issue is who should be ordered to pay the reserved costs of the reconsideration application. The Registrar seeks these costs. In fact, the submission was that the Trustees must pay these costs. But the Trustees are not before the court.

96] But it seems to me that no one is to blame for the reconsideration application not proceeding and given the terms of that order, I am of the view that the more appropriate order would be that those costs are costs in the cause.

The costs of this application

97] Usually costs follow the result and in this instance, Medipos seeks the costs of this application, including the costs of two counsel to be taxed on Scale C. The Registrar submits that, not unlike the Legal Practice Council, it acts as the proverbial “watchdog” and as it was fulfilling its statutory duty, it should not be ordered to pay the costs of the application.

98] In *National Credit Regulator v Dacqup Finances CC t/a ABC*³³ the court stated”:

“[31] ...It is a long-established principle in our law that where a statutory body is fulfilling its statutory duties, costs should not be awarded against it, even if it acted incorrectly, as long as its conduct is not mala fide.”

99] Whilst the pursuit of the confirmation of the rule may, in light of Medipos’ response, be considered perhaps to be misguided, I cannot find that the Registrar’s conduct is mala fides. Accordingly, pursuant to the principle set out supra, each party shall pay their own costs.

Order

100] The order is:

³³ (382/2021) [2022] ZASCA 104 (24 June 2022).

1. The rule nisi granted on 14 February 2023 is discharged and the application is dismissed.
2. Each party is ordered to pay their own costs.



NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the judge whose name is reflected, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 19 July 2024.

For the applicant	:	Adv CPJ Strydom, with him Adv van Wyk
Instructed by	:	FourieFismer Inc
For the 4 th to 8 th respondents	:	Adv A Bawa SC, with him Adv K Pillay
Instructed by	:	GMI Attorneys
Matter heard on	:	10 June 2024
Judgment date	:	19 July 2024