IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case Numbers: 1306/2018

In the matter between:

THE REGISTRAR OF MEDICAL SCHEMES Applicant

and

SAMWUMED MEDICAL SCHEME Respondent

JUDGMENT

Andrews AJ

Introduction

[1] This is an opposed application launched on a semi-urgent basis in terms of which the Applicant seeks to place the Respondent under provisional curatorship as contemplated by the provisions of Section 56(1) of the Medical Schemes Act 131 of 1998 ("the MS Act") and Section 5(1) and (2) of the Financial Institutions (Protection of Funds) Act 28 of 2001 ("the FI Act"), pending the return date of a rule *nisi*.

[2] The application was heard on 17 April 2018. For the Applicant appeared Adv Maritz (SC) who was assisted by Adv Seseane. Adv Fruend (SC) appeared on behalf of the Respondent, and was assisted by Adv Mayosi.

Preamble

[3] The South African Municipal Workers Union ("SAMWU" or "the Union") established its own retirement fund and medical scheme during mid-1990. The Respondent was formally established in 1998 and in March 2001 it was registered as a national medical scheme in terms of the MS Act ("the Scheme"). The Respondent is also regulated by the MS Act. It is common cause that the Respondent and the Union would operate independently and be able to accept members from other trade unions as well as non-affiliated employees. Also common cause is that it Respondent would be financially independent from the Union.

[4] Since 2001, the Respondent operated as a restricted scheme in accordance with the MS Act within the local government sphere. In terms of chapter 5 of the MS Act, a medical scheme is regulated and governed by its rules once they have been duly registered by the Registrar. Section 29(1)(a) requires the rules to provide for the appointment and election of a Board of Trustees("BOT") consisting of persons who are fit and proper to manage the business contemplated by the medical scheme. The latest approved and registered scheme rules deal with the Scheme's governance under rule 21 which makes the following provisions regarding the governance and role of the BOT:

(a) The board consists of not more than 19 persons who must govern the affairs of the Scheme.

(b) The trustees are appointed in the following manner:

(i) The Union's Central Executive Committee ("CEC") *"shall appoint"* nine of these trustees, who are required to be members of the Scheme.

(ii) Nine member-elected trustees *"shall be elected from amongst the Scheme's members at the Annual General Meeting"* (AGM).

(iii) The member-elected trustees "*shall at all times"* constitute 50% of the total composition of the Board.

(iv) A single pensioner trustee shall be elected at the AGM from amongst the pensioner members of the Scheme.

(c) All trustees "*shall serve a term of office of three years"* and shall be eligible for re-election.[1]

(d) Should a Union-appointed trustee *"vacate office; the Union shall appoint a replacement trustee within a reasonable period".*[2]

(e) Should a member-elected trustee or pensioner trustee *"vacate office"* during his or her term, the Board *"may appoint"* a trustee from amongst the members in good standing of the Scheme.

(f) Ten trustees shall constitute a *quorum* at meetings of the Board.

(g) Matters requiring decision-making by the Board are to be determined by a majority vote, with the Chairperson having a casting vote in the event of a deadlock.

Factual Background

[5] The Respondent is closely associated with SAMWU. Since 2016 internal strife arose within SAMWU between two factions known as the Molalenyane and the

[1] Rule 21.3.
[2] Rule 21.4.

Tshililo factions, respectively, that spilled over to the Respondent since approximately May 2016.

[6] The genesis of the strife was ostensibly borne out of disputes regarding control of the KwaZulu-Natal provincial SAMWU structure. This purportedly cascaded to disputes regarding control over the national (Central Executive Committee "CEC") SAMWU structure. As a result of the uncertainty regarding which faction to engage, the City of Johannesburg lodged a declaratory application to the Labour Court. On 14 December 2016, the Labour Court declared that the members of the Molalenyane faction are the legitimately elected and appointed national CEC office bearers of SAMWU. Additionally, the Labour Court declared the meetings called by the two factions on 19 May 2016 to be illegal, the consequence of which is that the decision of the Molalenyane faction to replace the 5 trustees on 19 May 2016 was illegal. The Tshililo faction appealed the decision of the Labour Court.

[7] On 4 May 2016, a letter directed to Respondent from the Molalenyane faction, penned by Simon Mathe who described himself as SAMWU's general secretary, notified the Respondent that SAMWU had terminated the membership of five CEC appointed trustees. On 5 May 2016 and 12 May 2016 respectively, the Respondent responded to the Molalenyane faction and indicated its refusal to remove the trustees for the following reasons:

(a) The trustees are entitled to serve a three year period;

(b) SAMWU cannot arbitrarily remove appointed trustees; and

(c) Due process to remove the trustees had not been followed.

[8] Consequently, the Respondent requested reasons for the purported removal of the five appointed trustees together with proof that that due process had been followed. On 25 May 2016, the Tshililo faction directed a letter to the Respondent, which was penned by Thebeitsile Mkoto ("Mkoto"), who also described himself as the general secretary of SAMWU. The letter notified the Respondent of the reconfirmation of the trustees as per the resolution of the CEC. This list differed to the list in Mathe's letter as four of the trustees' names listed in Mathe's letter as no longer being trustees appear on Mkoto's letter. In response, Mathe, in a letter dated 26 May 2016 stated that the CEC had resolved to recall the CEC appointed trustees because they had been expelled from SAMWU and provided the Respondent with names of five replacement trustees.

[9] On 30 May 2016, the Respondent addressed correspondence to the Applicant, indicating that it refused to agree to the replacement of the SAMWU CEC appointed trustees who had been removed. The Respondent requested a directive from the Applicant as to how best to deal with the position of the CEC appointees. At a Board of Trustees ("BOT") meeting held on 6 and 7 September 2016, the trustees resolved to amend the scheme rules, subject to the Applicant's approval. There was an objection to the proposed scheme changes from SAMWU. In the interim certain union members were expelled and other members were dismissed resulting in five trustees being unable to represent the scheme on the BOT. It also came to light that four of the five trustees, who were no longer representatives of the Union, participated in the BOT's decision to change the scheme name. This resulted in the BOT not being properly constituted.

[10] The Applicant indicated its refusal to register the proposed changes to the scheme rules on the basis that the decision to amend was taken at a BOT that was not properly constituted because of the five persons who ceased to be CEC appointed trustees being present at the meeting. The Respondent has refused to remove the five trustees on the basis that the Labour Court decision is being appealed against.

[11] The Applicant's decision to refuse the name change and the amendment in terms of Rule 21.1 was subsequently appealed against, which appeal failed.

Applicant's Principal Submissions

[12] The Applicant submitted that material irregularities have occurred as a consequence of internal strife between the two factions which paralysed SAMWU's management including its ability to hold meetings. The Applicant argued that the Molalenyane faction has been unable to exercise control over the Respondent with the resultant effect that it has been drawn into the SAMWU factional strife.

[13] The Applicant avers that despite the termination of the appointment of the trustees on 4 May 2016, they have continued to participate in all the BOT decisions, with the resultant effect that the Respondent has been managed unlawfully for approximately 20 months. The Applicant argued that not only does the Tshililo faction exercise control over the scheme, it is also attempting to unlawfully do away with SAMWU's control of the scheme.

[14] According to the Applicant, the scheme rules do not provide for the Scheme to function with 14 trustees. It is the Applicant's contention that after the removal of the five trustees, they had to be replaced in order for the Scheme to be lawfully managed. The Applicant argued that this irregularity has exposed the Scheme to financial risk as proper financial governance may be compromised by the two factions fighting for control of the scheme.

[15] The Applicant pointed out that SAMWU has long historical ties to the Scheme and that the Scheme bears SAMWU's name. Consequently, according to the Applicant, the Scheme owes its very existence to SAMWU and without proper process being engaged to remove SAMWU's influence, which process may be fundamentally prejudicial to the Scheme. According to the Applicant, the continuance of the management of the present BOT would entail the Scheme's continued improper management as the BOT is invalid.

[16] Additionally, the Applicant contended that for the last 20 months, the BOT has allowed the scheme's resources to be used to advance the Tshililo faction's agenda which is reflective of the Respondent's lack of fitness and proprietary of all the trustees. The Applicant submitted that the Scheme's trust funds are at risk as there is a danger of the said funds being misappropriated.

[17] Furthermore, the Applicant contended that the appointment of a curator would be in the interest of the beneficiaries of the Scheme because of the material irregularities. It also avers that they have succeeded in showing good cause for the appointment of a curator. In this regard, a curator, once appointed, will be in a position to take control of and manage the affairs of the Scheme. Moreover, the

Applicant contended that the only way of rectifying the invalid BOT is for a curator to facilitate the election of a new BOT as an invalid BOT is unable to take valid decisions.

Respondent's Principal Submissions

[18] The Respondent's main grounds for opposing the granting of the relief sought are that:

(a) The Applicant has failed to demonstrate any irregularities in the Scheme, material or otherwise, that justify the appointment of a curator nor has he established that good cause exists for such appointment;

(b) The Applicant has failed to join the South African Municipal Workers Union which is fatal to the application;

(c) The application is not urgent.

[19] The Respondent contended that the Applicant has failed to identify any problems with the management of the Scheme upon which his opinion that there are material irregularities in the Scheme is based. As a consequence, it contends, there are no objective facts before this Court to justify the appointment of a curator. Consequently, the Respondent argued that it can neither be desirable nor in the interest of the beneficiaries of the Scheme to appoint a curator for it.

[20] Additionally the Respondent, referring to ***Executive Officer of the Financial Services Board v Dynamic Health Ltd and Others,***[3] submitted that the Applicant has failed to identify any problems in the business of the Scheme that

[3] 2012 (1) SA 453 (SCA).

require curatorship. Moreover, the Respondent contended that there is an alternative which is preferable to the appointment of a curator for resolving the Applicant's difficulties with the composition of the Scheme's BOT. In this regard, the Respondent argued that various rule amendments were adopted by the Board at its meeting held on 6 and 7 September 2016 which included, *inter alia*:

(a) A revision of the main body of the Scheme's rules, so as to bring them into line with model rules published by the Council.
(b) The establishment of revised annual benefit contribution rates for the 2017 year.
(c) An amendment changing the Scheme's name from SAMWU National Medical Scheme (SAMWUMED) to the neutral Municipal Medical Scheme (M-Med).
(d) An amendment to the governance structure to ensure 100% member election to the Board. If approved by the Registrar, this would have removed the Union's right to appoint representatives to serve as trustees on the Scheme's board.

[21] According to the Respondent, it was further resolved at the said meeting that the existing board would remain in office until the next elective AGM scheduled to take place on 18 June 2018. The Respondent conceded that whilst there may be room for debate as to whether four of the Union-appointed trustees remained validly appointed trustees, the BOT took the considered view that all of the trustees present at the meeting of 6 September 2016 were to be regarded as duly appointed trustees and that it was accordingly lawfully constituted and capable of taking decisions in the name of the Scheme. The Respondent contended that it has tendered certain undertakings which in its view, meets all of the concerns raised by the Registrar. The

Respondent furthermore argued that the future BOT would be at liberty to confirm or rescind any decision taken by the Scheme's BOT as it existed between 5 May 2016 and the date of the conclusion of the AGM scheduled for 18 June 2018.

[22] According to the Respondent, the BOT as it is currently constituted complies with the Scheme's rules and the provisions of the MS Act. The Respondent submitted that the Scheme's unwillingness to follow the instruction until legal certainty could be obtained as to which of the two competing factions constituted the lawfully appointed leadership of the Union does not constitute an irregularity, and certainly not an irregularity justifying placing the Scheme under curatorship. Moreover, the Respondent contended that the appointment of a curator in terms of section 56 would not be able to do more than what the Scheme has already tendered to do.

[23] Turning to the requirement of irreparable harm, the Respondent contended that it is incumbent on the Applicant to show that irreparable harm will be suffered should the application not be granted. In this regard, it was argued that the Applicant failed to prove that it is in the interest of the Scheme to grant the relief sought or that the Scheme's members will be adversely affected should the relief not be granted.

[24] The Respondent argued that the Scheme is in excellent financial health and remains one of the most sustainable schemes in the country thus posing no risk to the members or their reserves. In this regard, it was argued that the Scheme was never in the past subjected to remedial action. It also highlighted they there has been strict adherence to the highly regulated accounting requirements prescribed by Section 26 of the MS Act. Additionally, the Respondent contended that the Applicant

has never had cause to raise any material complaints in respect of the Scheme's financial affairs.

[25] According to the Respondent empirical substantiation that the Scheme's Management Accounts for the period ending 28 February 2018 show that:

(a) The Scheme continues to generate favourable monthly surplus;
(b) The Scheme's reserves under investment have increased by over R130 million year on year;
(c) The Scheme's solvency ratio has increased to 93.26%, in comparison with the requirement of 25% set by the MS Act Regulations;
(d) The Scheme's liquidity ratio has increased to 9.58; and
(e) The Scheme has extremely low administration cost of 5.5% compared to the industry target of 10%.

Issues to be determined

[26] The crisp issues for determination is whether:

(a) the current BOT of the Respondent is legitimately constituted;
(b) Whether the Applicant has established that there is good cause to warrant the appointment of a curator.

Legal Principles

[27] The purpose of the Medical Scheme's Act as it appears from the long title of the Act, is *inter alia* to *"protect the interests of member of medical schemes".* Section 7 of the MSA enjoins the Council (Applicant) to protect the interest of beneficiaries. The Registrar is empowered through Section 56 of the MSA and

Section 5 of the FI Act to apply for the appointment of a curator in certain circumstances. Section 56 of the MS Act permits the Applicant to, *inter alia,* in the interest of beneficiaries or because material irregularities have come to its notice, to apply to the High Court for the appointment of a curator to take control of, and to manage the business of that medical scheme. The test is based on the opinion of the Registrar, which is a subjective opinion but which must be held on objective grounds.[4] Furthermore, Section 5 of the FI Act provides that an application for the appointment of a curator is to be done on good cause shown by the Registrar.

[28] ***Executive Officer of the Financial Services Board v Dynamic Health***[5] deals with the requirement of "good cause" where it was held that:

> *"[4] The registrar must therefore satisfy the court that that there is good cause to appoint a curator. Reading ss (1) together with ss (4), 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 assesses this in the light of the interests of actual or potential investors in the financial institution, or investors who have entrusted or may entrust the management of their investments to it. 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 upon the facts of that case. I take heed of what Innes CJ said in regard to any attempt to define the content of the expression 'good cause', that:*
>
> > *'In the nature of things it is hardly possible, and certainly undesirable, for the court to attempt to do so. No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits, and decide in each case whether good cause has been shown'.*

[4] *Barnard & Others v Registrar of Medical Schemes* 2015 (3) SA 204 (SCA) at paras 12 and 41.
[5] 2012 (1) SA 453 (SCA) at para 4.

*[6] **...** [T]he inability or unwillingness of the institution to comply with regulatory requirements applicable to protect funds itself provides a reason for appointing a curator… When dealing with the investment of funds of the public, where considerable hardship will be suffered by ordinary people if things go wrong, the Registrar cannot be expected to resolve factual disputes by litigation before obtaining an order appointing a curator. Provided the court is satisfied that the Registrar's concerns are legitimate and that the appointment of a curator will assist in resolving those concerns, it will ordinarily be appropriate to grant an order."*

[29] The Registrar's "opinion" is a subjective one which must be held on objective grounds. In ***Barnard v Registrar of Medical Schemes***[6] Fourie AJA held that *'[t]he test under s 56(1) of the MSA is the opinion held by the registrar, that it is in the interest of the beneficiaries of the scheme that a curator be appointed to the scheme, or that it is desirable to do so, because of the medical scheme is not in sound financial condition…the opinion is the subjective opinion of the registrar which must be held on objective grounds.'*[7]

[30] Medical Schemes are governed by a BOT in terms of Section 57(1). The BOT governs and manages the affairs of the medical scheme in accordance with the official approved scheme rules. It is trite that the rules constitute a contract between the scheme and its members.[8] Section 32 of the MSA essentially provides that the rules of a medical scheme shall be binding on the medical scheme and its members. Additionally, the rules of the scheme prescribe the powers and authority of the BOT. Furthermore, the rules serve to safeguard the interests of members of the scheme.

[6] 2015(3) SA 204 (SCA) at para 12.
[7] See also *Barnard and Others v Registrar of Medical Schemes* (628/13) [2014] ZASCA 111; 2015 (3) SA 204 (SCA) (16 September 2014) at para 12.
[8] *Pennington v Friedgood & Others* 2002 (1) SA 251 (CPD) at 262 (para 36) and *Meaker NO v Roup, Wacks, Caminer & Kriger & Another*, 1987 (2) SA 54 (CPD) at 61G-H.

[31] Rule 21 states that "*[s]hould the Union-appointed Trustee as provided for in Rule 21.1.2.1 vacate office, the Union shall appoint a replacement Trustee within a reasonable period."*

Discussion

[32] The Applicant holds the view that the BOT must at all times be composed of 19 trustees and that the Scheme's failure to maintain these numbers renders the BOT invalidly constituted. The Respondent contends that this view is incorrect as Rule 21.1.1 provided that the BOT is to consist of "*no more than nineteen (19) persons*" and does not state that the BOT is to comprise of "*at least*" 19 trustees. The break-down of the composition of 19 trustees appear to be peremptory and repeatedly use the word "*shall*", yet, provision is made for the method in which replacements of trustees are to occur which arise before the expiration of the three year term. The Respondent argued that this implies that there is no obligation on the Scheme to retain a full complement of trustees save that:

(a) It must meet the quorum requirement of 10 trustees;[9] and

(b) The BOT must ensure that member trustees *"at all times constitute fifty percent of the total composition of the Board*."

[33] It is common cause that two of the Union-appointed Trustees have resigned and have not been replaced. Also common cause is that a further two trustees were removed in accordance with Rule 21.12.6 who were similarly not replaced. It is also common cause that the appointments of three of the five remaining Union-trustees were terminated, after their expulsion as shop stewards of

[9] Rule 21.7.

the Union. This termination was and is contested by a competing faction of the Union.

[34] Although Rule 21.1.1 provides for a BOT consisting of "*not more than nineteen (19) persons*", Rule 21.1.2 is couched in peremptory terms uses the words "*shall*". The Applicant contended that this means that the BOT is to at all times consist of a full complement of 19 persons, which interpretation it submits is borne out by Rules 21.4 and 21.5 which provide for the replacement of trustees within set time frames.

[35] The Respondent acknowledged that the trustees have not been replaced despite the Union's obligation to do so. The Respondent's contention is that this failure does not invalidate the BOT. The Respondent furthermore contended that it still meets the quorum requirement as well as the *"at least 50%"* requirement for the member trustees notwithstanding the failure to replace trustees. Moreover, the Respondent argued that the BOT is not obliged to fill a vacancy as the wording used is "*may*" which connotes that it has the option to do so.

[36] Inasmuch as direction is being sought as to the validity of the composition of the BOT, the ultimate question to be answered is whether the trustees endangered trust property by their acts or omissions. The Applicant contended that the proposed section 46 process[10] is not a solution to the current impasse as it will entail the removal of all the trustees because they are all, according to the Applicant, aligned with the unlawful management of the scheme and would leave the scheme without any management if all the trustees are removed. Even if the trustees are

[10] AGM scheduled for 38 June 2018.

removed, the Applicant predicts that it would take a further two years if they appeal their removal, hypothetically speaking. In the meantime, the unlawful management of the Scheme will be perpetuated.

Conclusion

[37] According to the Applicant, the BOT has over a long period of time been unwilling to address the mismanagement of the Scheme, despite the Applicant requesting the Scheme since 27 October 2016 to rectify the unlawful composition of the BOT. The Scheme is unwilling, according to the Applicant, to comply with regulatory requirements.

[38] The two factions remain at loggerheads despite various court cases and interventions by the Applicant. It is apparent that the Tshililo faction has not relinquished control over the Scheme despite the decision of the Labour Court. As is pellucid, the proposed AGM will in my view not be the answer especially as the legitimacy of the currently constituted BOT has not been resolve. The legitimacy of the AGM process will in any event be compromised in view of the uncertainty *apropos* the legitimacy of the composition of the current BOT.

[39] Even if the BOT in its current form is able to make valid, lawful and binding decisions, there are a number of anomalies in the scheme rules that require revisiting such as the reference in Rule 21.12.7 to "*participating employer*", and whether the BOT can function with less than 19 trustees. It is my view that a ruling of this Court on these issues will not resolve issues which should ultimately be decided at an AGM. It would require amendments to the scheme rules, which have already been proposed and should follow due process. I agree with the Applicant that a

curator will be obliged to take all steps necessary to convene a special general meeting of the Respondent at which a new board of trustees who are fit and proper for this purpose can be elected. Moreover the curator would be able to engage SAMWU in relation to the replacement and removal of trustees.

[40] On an interpretation of Rule 21.12.7 a trustee ceases to hold office if he or she ceases to be an appointee of the CEC. Currently the BOT consists of 10 trustees instead of 19, and instead of the Union having nine appointees, they only have two. At least three removed trustees have been participating in deliberations and decisions at the BOT meetings. Even if the terminations of the appointments are in dispute, the uncertainty and legitimacy of the BOT decisions impact on the proper governance of the Scheme. Herein lies the pivotal irregularity as decisions taken by an improper and irregularly composed BOT could be rendered null and void. I agree that the impasse has dire consequences for the Scheme's members / beneficiaries.

[41] The reality is that the Scheme, at the time of launching these proceedings, had approximately 80 000 beneficiaries of which approximately 36 000 were members and the remainder were dependants. Its annual contribution income was in excess of R1.2 Billion and at 31 December 2016 it had reserves of approximately R1 Billion. The BOT has a fiduciary duty to act in accordance with the Trust Deed, in the interest of the beneficiaries.

[42] It bears mentioning that on the Respondent's own version, it continues to lose members and states that the BOT believes that this is attributable to the reputational damage which has arisen from its perceived association with the Union.

[43] Although Alexander Forbes reported that the Scheme has consistently generated healthy surpluses before and after investment income and maintained a healthy financial profile despite the negative impact of the loss of members, the reality is that an improperly constituted BOT cannot make decisions on behalf of the Scheme to the potential prejudice of the Scheme's members and beneficiaries. Against this backdrop, it must be borne in mind that the BOT controls more than R1 Billon of public money. What is clear is that the state in which the BOT is currently functioning is not conducive and restoration of proper governance of the scheme in compliance with the provisions of the Trust Deed and its regulatory framework is of primary importance. I am therefore satisfied that there are sufficient grounds for the appointment of a curator and that there is no satisfactory alternative or less intrusive or less drastic remedy available to protect the interest of the beneficiaries.

[44] I echo what Fourie AJA stated in ***Barnard v Registrar of Medical Schemes***[11] that *"[i]t has to be reiterated that the interest of the beneficiaries of the scheme is paramount when considering whether a curator should be appointed to the scheme".* I therefore conclude that in view of the material irregularities detailed above, it is in the interest of the beneficiaries of the Scheme and desirable to appoint a curator to the scheme. I am satisfied that the Registrar has shown that he has objective grounds to believe that it is desirable to appoint a curator.

[11] *(supra)* at 214B.

[45] Despite the Respondent's contention that this matter is not urgent, I am of the view that this matter is sufficiently urgent to warrant a provisional order and a departure from the ordinary rules of Court.

[46] Although the Respondent argued that it was incumbent upon the Registrar to have joined the Union as well as both factions embroiled in the union leadership dispute, I am of the view that the joinder of these interest groups may still be applied for using the appropriate procedures prior to the confirmation of the rule *nisi*. The non-joinder at this stage is not prejudicial in light of the interim nature of this order. I am however of the view that it will be imperative for them to be notified of this order.

[47] In the result**,** the following order is made:

1. The Respondent is placed under provisional curatorship as contemplated by the provisions of Section 56(1) of the Medical Schemes Act 131 of 1998 and Section 5(1) and (2) of the Financial Institutions (Protection of Funds) Act 28 of 2001, pending the outcome of the return date of the rule *nisi*.
2. Royal Aldorance Khosana is appointed as provisional curator of the Respondent, pending the outcome of the return date of the rule *nisi*, in terms of the provisions of Section 56(1) of the Medical Schemes Act 131 of 1998 and in terms of the provisions of Section 5(1) and (2) of the Financial Institutions (Protection of Funds) Act 28 of 2001.
3. Pending the outcome of the return date of the rule *nisi*, and subject to the control of the Applicant, the provisional curator be and is hereby-
    3.1 authorised to take immediate control of, and in the place of the board of trustees, manage the business and operations of, and concerning, the Respondent, together with all assets and interests relating to the

business of the Respondent, in accordance with the provisions of the MS Act and Respondent's rules;

3.2 vested with all powers of control and management which would ordinarily be vested in and exercised by the board of trustees or principal officer of the Respondent, whether by law or in terms of the rules of the Respondent;

3.3 directed to give consideration to the best interests of the members of the Respondent;

3.4 directed to exercise the powers vested in her with the view to conserving the business of the Respondent and not without the leave of the Applicant to alienate or dispose of any of the property of the Respondent, save to the extent and for the purposes set out hereunder;

3.5 directed to take control of the cash, cash investments, shares and other securities, as well as of all other assets owned, held or administered by or on behalf of the Respondent;

3.6 authorise to incur such reasonable expenses and costs as may be necessary or expedient for the curatorship and control of the business and operations of the Respondent, and to pay same from the assets owned, administered or held by or on behalf of the Respondent;

3.7 authorised to pay claims or other benefits to the Respondent's members, having regard to the rules of the Respondent and its financial position;

3.8 permitted to engage such assistance of a legal, accounting, actuarial, administrative or other professional nature, as she may reasonably deem necessary for the performance of her duties in terms of this

order, and to defray reasonable charges and expenses thus incurred from the assets owned, administered or held by or on behalf of the Respondent;

3.9 authorised to institute or prosecute any legal proceedings on behalf of the Respondent and to defend any action against the Respondent;

3.10 authorised to invest such funds as are not required for the immediate purposes of the business, with an institution or financial instrument as she may regard financially sound and appropriate;

3.11 authorised to take control of and to operate or close existing banking accounts of the Respondent whether conducted in South Africa or off-shore, and to open and operate any new banking accounts for the purposes of the curatorship;

3.12 authorised to investigate allegations of financial and governance irregularities and to recommend appropriate action to be taken to address same and where necessary, recommend action to be taken against any person who may be guilty of misconduct or crime;

3.13 authorised, at any time during her term of office, to apply on 48 hours' notice or on an *ex parte* basis for any amendment or amplification of the powers granted to her in terms of hereof in the event that it is necessary to amend or amplify such powers for the effective exercise of her powers and responsibilities; and

3.14 authorised to be entitled to reasonable remuneration and disbursements, as might be allowed by agreement with the Applicant, alternatively; failing such agreement as may be determined later by this

Court, and that such remuneration shall be paid by the Respondent and shall be a first charge upon the Respondent's assets.

4. That a rule *nisi* is issued calling upon the Respondent and other interested persons to show cause, if any on **30 July 2018** at 10:00 or so soon thereafter as Counsel may be heard, why an Order should not be made in the following terms:

   4.1 confirming the curatorship of the Respondent as contemplated by the provisions of Section 56(1) of the MS Act and the provisions of Section 5(1) and (2) of the FI Act;

   4.2 confirming the appointment of Royal Aldorance Khosana as curator ("the Curator") of the Respondent, in terms of the provisions of Section 56(1) of the MS Act and in terms of the provisions of Section 5(1) and (2) of the FI Act;

   4.3 confirming the powers and mandate of the curator, and subject to the control of the Applicant, order that she is-

      4.3.1 authorised to take immediate control of, and in the place of the board of trustees, manage the business and operations of and concerning the Respondent, together with all assets and interests relating to the business of the Respondent, whether by law or in terms of the rules of the Respondent

      4.3.2 vested with all powers of control and management which would ordinarily be vested in and exercised by the board of trustees or principal officer of the Respondent, whether by law or in terms of the rules of the Respondent;

4.3.3 directed to give consideration to the best interest of the members of the Respondent;

4.3.4 directed to exercise the powers vested in her with the view to conserving the business of the Respondent and not without the leave of the Applicant to alienate or dispose of any of the property of the Respondent, save to the extent and for the purposes set out hereunder;

4.3.5 directed to take control of the cash, cash investments, shares and other securities, as well as of all other assets owned, held or administered by or on behalf of the Respondent;

4.3.6 authorised to incur such reasonable expenses and costs as may be necessary or expedient for the curatorship and control of the business and operations of the Respondent, and to pay same from the assets owned, administered or held by or on behalf of the Respondent;

4.3.7 authorised to pay claims or other benefits to the Respondent's members, having regard to the rules of the Respondent and its financial position;

4.3.8 permitted to engage such assistance of a legal, accounting, actuarial, administrative or other professional nature, as she may reasonably deem necessary for the performance of her duties in terms of this order, and to defray reasonable charges and expenses thus uncured from the assets owned, administered or held by or on behalf of the Respondent;

4.3.9 authorised to institute or prosecute any legal proceedings on behalf of the Respondent and to defend any action against the Respondent;

4.3.10 authorised to invest such funds as are not required for the immediate purposes of the business, with an institution or financial instruments as she may regard financially sound and appropriate;

4.3.11 authorised to take control of and to operate or close existing banking accounts of the Respondent whether conducted in South Africa or off-shore, and to open and operate any new banking accounts for the purposes of the curatorship;

4.3.12 authorised to investigate allegations of financial and governance irregularities and to recommend the appropriate action to be taken to address same and where necessary, recommend action to be taken against any person who may be guilty of misconduct or a crime;

4.3.13 authorised, at any time during her term of office, to apply on 48 hours' notice or on an *ex parte* basis for any amendment or amplification of the powers granted to her in terms hereof in the event that it is necessary to amend or amplify such powers for the effective exercise of her powers and responsibilities; and

4.3.14 authorised to be entitled to reasonable remuneration and disbursements, as might be allowed by agreement with the Applicant, alternatively, failing such agreement as may be determined later by this Court, and that such remuneration shall

be paid by the Respondent and shall be a first charge upon the Respondent's assets;

4.4 The curator shall report on her curatorship to the Applicant and the Respondent within twelve (12) months from the date of this order and to include in her report a statement of her findings and recommendations concerning the Respondent's affairs and the continuation if necessary, of the curatorship;

4.5 The curator shall report on the Respondent's affairs to the Applicant on a monthly basis during the aforesaid period of twelve (12) months; and

4.6 The curator shall take all steps which are necessary to convene a special general meeting of the Respondent at which trustees who are fit and proper for this purpose shall be elected in the stead of the currently elected trustees, and trustees otherwise be appointed in accordance with the rules of the Scheme, and report thereon within the twelve (12) month period referred to herein.

5. It is directed that a copy of this order be served on:

(a) The South African Municipal Workers Union and all other unions that have an interest in Respondent;

(b) all the trustees serving on the Respondent's Board of Trustees;

6. Costs are to stand over for later determination.

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P ANDREWS, AJ
Acting Judge of the High Court

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case no: 1306/2018

In the matter between:

THE REGISTRAR OF MEDICAL SCHEMES Applicant

and

SAMWEMED MEDICAL SCHEMES Respondent

CIVIL JUDGMENT - provisional curatorship as contemplated by the provisions of Section 56(1) of the Medical Schemes Act 131 of 1998 and Section 5(1) and (2) of the Financial Institutions (Protection of Funds) Act 28 of 2001

JUDGE	:	Andrews AJ
JUGDMENT DELIVERED BY	:	Andrews AJ
For Applicant	:	Adv. Maritz SC assisted by Adv. Seseane
INSTRUCTED BY	:	Bisset Boehmke McBlain Attorneys
For Defendant	:	Adv. Freund SC assisted by Adv. Mayosi
INSTRUCTED BY	:	Norton Rose Attorneys
DATES OF HEARING	:	17 April 2018
DATE OF JUDGMENT	:	03 May 2018

(Amended on 14 May 2018 in terms of rule 42(1)(b) to correct reference of SAMWU(South African Municipal Workers Union) where it appeared on the papers as South African Metal Worker's Union.)