REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 75753/2019

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE 19/02/2021 DATE

In the matter between:

COTTY, BRUCE ANDREW	First Applicant
FERGUSON, WILLIAM STORM	Second Applicant
RODINIS, MOIRA	Third Applicant
AFONSO, LUBELIA	Fourth Applicant

and

REGISTRAR OF THE COUNCIL FOR MEDICAL SCHEMES	First Respondent
COUNCIL FOR MEDICAL SCHEMES	Second Respondent
DISCOVERY HEALTH MEDICAL SCHEME	Third Respondent
MEDSHIELD MEDICAL SCHEME	Fourth Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 19 February 2021

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] The first to third applicants applied separately and individually to the third respondent ('*Discovery*') for funding for the treatment of certain conditions and the fourth applicant had applied to the fourth respondent ('*Medshield*'). Discovery and Medshield (collectively referred to as '*the Medical Schemes*') refused to approve the funding which refusals were raised with the Registrar appointed in terms of the Medical Schemes Act 131 of 1998, as amended ('*the Act*'). The Registrar dismissed the complaints whereafter the four applicants appealed against such dismissals to the Appeal Committee ('*Appeal Committee*') of the Council for Medical Schemes ('*the Council*') in terms of section 48 of the Act. The Appeal Committee ruled in favour of the applicants, whereafter Discovery and Medshield invoked section 50 of the Act and appealed against such rulings to the Appeal Board of the Council.

[2] Pursuant to the filing of their appeals in terms of section 50 of the Act, the Medical Schemes took the view that the decisions of the Appeal Committee had been suspended by the appeals and accordingly did not comply with the rulings made by the Appeal Committee.

[3] The applicants contended that the filing of an appeal in terms of section 50 of the Act did not suspend the decisions of the Appeal Committee. They contended that

unlike section 48(2) and section 49(2) of the Act, section 50 of the Act does not have a built-in mechanism in terms of which filed appeals suspend the operation and execution of rulings or decisions appealed against.

[4] It is common cause between the parties that what is determinative of the declaratory relief sought by the applicants is whether the lodging of an appeal in terms of section 50(3) of the Act suspends the decision which is the subject of that appeal, pending a decision by the Appeals Board. It was also common cause that if the applicants fail in their application for declaratory relief, it would follow that the ancillary relief should fail as the sole basis advanced for the review sought is that there was a material error of law, premised on the applicants' interpretation of the Act.

The arguments in a nutshell

[5] The applicants argue that notwithstanding the appeal proceedings brought in terms of section 50(3) of the Act, the decisions which are the subject of such appeals must be immediately implemented. Should the appeal be upheld, the implementation of the decision concerned can thereafter be reversed as the medical scheme may then "recoup" the amount wrongly paid by the medical scheme from the member concerned or the supplier of health services. There would be no disruption to medical schemes by the implementation of such decisions pending appeal, so the argument goes, as should a scheme so wish, the scheme may apply for an *interim* interdict to stay implementation of the decision pending the Appeal Board decision.

[6] The Medical Schemes (and the Regulator) contend that their interpretation is consistent with the common law principle that a decision is suspended pending an

appeal and that the application of that principle is entirely consistent with the applicable provisions of the Act; the complaints and appeal process contemplated by Chapter 10 of the Act; the role and powers of the Council and the Appeal Board; and the structure of the Act. Significantly, they point out, the Act reserves the power to the Appeal Board itself to order that the decision concerned be given effect to.[1] In contrast, they point out, the Registrar of Medical Schemes ('*the Registrar*') and the Council have no such power.[2] Immediate implementation of decisions which are subject to appeal and have yet to be finally determined in terms of the Act would, they contend, denude the Appeal Board of its power to determine whether a decision be given effect to. The result of a finding that a decision by the Council in terms of section 48(8) must be implemented immediately, and despite any pending appeal, is that by the time the Appeal Board makes its decision, it would find itself only able to make a finding that the decision concerned ought not to have been given effect to. The Appeal Board has no such power. Nor does the Appeal Board have any power to order the correction of the improper implementation of such decision.

Statutory interpretation

[7] As all agree, the relief sought turns on the correct interpretation, effect and application of section 50 of the Act.

[8] The Constitutional Court summarised the correct approach to statutory interpretation in the following terms:

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[1] Section 50(16) provides:

> "The Appeal Board may, after hearing the appeal –
>
> (a) confirm, set aside or vary the relevant decision; or
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> (b) order that the decision be given effect to."

[2] Section 48(8) provides:

> "The Council may after hearing the appeal confirm or vary the decision concerned, or rescind it and give such other decision as it may deem just."

> "It is well established that statutes must be interpreted with due regard to their purpose and within their context. ...Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament."[3]

[9] The Supreme Court of Appeal also set out in definitive terms the correct approach to interpretation:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. **A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.** Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. **The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.**"[4] (own emphasis added)

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[3] *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) at para 18 (judgment of Mhlantla AJ).

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18; *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) at para 30.

[10] Although the starting point remains the words of the document, the process is a unitary exercise:

> "Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, **but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being**. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise."[5] (own emphasis added)

The Medical Schemes Act

[11] The long title of the Act provides that the purpose of the Act is:

> "To consolidate the laws relating to registered medical schemes; to provide for the establishment of the Council for Medical Schemes as a juristic person; to provide for the appointment of the Registrar of Medical Schemes; to make provision for the registration and control of certain activities of medical schemes; to protect the interests of members of medical schemes; to provide for measures for the co-ordination of medical schemes; and to provide for incidental matters."

[12] Chapter 1 and 2 of the Act provide for definitions, and the application of the Act, respectively.

[13] Chapter 3 of the Act provides for the establishment and functions of the Council for Medical Schemes. The establishment of the Council, which is a juristic person, is provided for by section 3; the functions of the Council are set out in section 7;[6] and its powers in section 8.[7] Section 18 of the Act provides for the

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[5] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12.

[6] "The functions of the Council shall be to-

(a) protect the interests of the beneficiaries at all times;

appointment of the Registrar who "*shall be the executive officer of the Council and shall manage the affairs of the Council*"[8] and *"shall act in accordance with the provisions of this Act and the policy and directions of the Council*"[9]

[14] Chapters 4 and 5 provide for medical schemes themselves and the rules of medical schemes respectively. In terms of section 26(11) a medical scheme may only carry on the business of a medical scheme.[10] Importantly, a medical scheme does not operate for profit.[11] As the Constitutional Court has put it:

(b) control and co-ordinate the functioning of medical schemes in a manner that is complementary with the national health policy;
(c) make recommendations to the Minister on criteria for the measurement of quality and outcomes of the relevant health services provided for by medical schemes, and such other services as the Council may from time to time determine;
(d) investigate complaints and settle disputes in relation to the affairs of medical schemes as provided for in this Act;
(e) collect and disseminate information about private health care;
(f) make rules, not inconsistent with the provisions of this Act for the purpose of the performance of its functions and the exercise of its powers;
(g) advise the Minister on any matter concerning medical schemes; and
(h) perform any other functions conferred on the Council by the Minister or by this Act."

[7] "The Council shall, in the exercise of its powers, be entitled to-
(a) appoint such staff as the Council may deem necessary ...;
(b) hire, purchase or otherwise acquire such moveable or immovable property ...;
(c) enter into an agreement with any person including the State or any other institution ...;
(d) insure itself against any loss, damage, risk or liability which it may suffer or incur;
(e) approve business plans and the budget for the Council and the functions performed by the Registrar;
(f) approve the registration, suspension, and cancellation of registration, of medical schemes or a benefit option;
(g) invest, loan, advance on interest and place on deposit, moneys not needed immediately for the current expenditure of the Council or the functions performed by the Registrar ...;
(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 provision of this Act;
(i) authorise the Registrar from time to time to sign any contract, cheque or other document which binds the Council or which authorises any action on behalf of the Council;
(j) determine the terms and conditions of service of any person appointed by the Council ...; and
(k) in general, take any appropriate steps which it deems necessary or expedient to perform its functions in accordance with the provisions of this Act."

[8] Section 18(2).

[9] Section 18(3).

[10] Section 26(11) provides:

> "... a scheme must survive on what it gets in. And the statute requires that it balances its books while doing so. It demands that schemes keep afloat in a fraught, competitive insurance, reinsurance and healthcare market."[12]

[15] It follows that the higher the administrative costs and disbursements paid by the medical scheme, the higher the premiums which members of the medical scheme must contribute. As this Court has put it:

> "...A medical scheme is at bottom simply a mechanism whereby the contributions of members are gathered in a fund and then paid out to finance medical treatments for those same members and, of course, the administration of the medical scheme. All the money in a medical scheme has as its source the contributions of those members. ..."[13]

[16] Accordingly, it is incorrect to suggest that the promotion of the interests of a particular member at the cost of a medical scheme promotes the objectives of the Act and access to healthcare. Medical Schemes are the mechanism used by the Act to increase access to healthcare by the members of the scheme. Costs incurred by the medical scheme result in cost to the medical scheme's members.

"No medical scheme shall carry on any business other than the business of a medical scheme and no medical scheme shall enrol or admit any person as a member in respect of any business other than the business of a medical scheme."

The *"business of a medical scheme"* is defined as meaning:

"the business of undertaking, in return for a premium or contribution, the liability associated with one or more of the following activities:

(a) Providing for the obtaining of any relevant health service;

(b) granting assistance in defraying expenditure incurred in connection with the rendering of any relevant health service; or

(c) rendering a relevant health service, either by the medical scheme itself, or by any supplier or group of suppliers of a relevant health service or by any person, in association with or in terms of an agreement with a medical scheme."

[11] Section 26(5) provides:

"No payment in whatever form shall be made by a medical scheme directly or indirectly to any person as a dividend, rebate or bonus of any kind whatsoever."

[12] *Genesis Medical Scheme v Registrar Medical Schemes and Another* 2017 (6) SA 1 (CC) at para 24.

[13] *Council for Medical Schemes and another v Bonitas Medical Fund* [2015] 3 All SA 688 (GP) at para 18.

[17] A medical scheme is subject to "*rigorous statutory and institutional control*".[14] The rules of the scheme must be approved by the Registrar for the purposes of registration, and are binding on both the medical scheme and its members.[15] Section 26(4) specifically provides that a medical scheme may not make a payment other than (a) payments by a medical scheme of any benefit, payable under the rules of a medical scheme; (b) costs incurred by the medical scheme in the carrying on of the business as a medical scheme; or (c) amounts invested by the board of trustees in accordance with the applicable sections of the Act.

[18] Where a member is not entitled to payment in terms of its rules, the medical scheme is precluded by the Act from effecting payment to that member. That remains so notwithstanding a decision by the Council in terms of section 48(8). It is only following an order by the Appeal Board in terms of section 50(16)(b) that the decision be implemented, that the medical scheme may give effect to such decision.

[19] In terms of section 27(1) of the Act the Registrar may, with the concurrence of the Council, after investigation and after having afforded the medical scheme, or its legal representative, an opportunity of being heard, cancel the registration of a medical scheme if, amongst other listed transgressions, the medical scheme, after written notice from the Registrar, persists in violating any provision of the Act.

[20] Chapters 6, 7, 8 and 9 of the Act provide for Benefit Options; Financial Matters; Documents; and Powers of the Registrar.

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[14] *Supra* at note 12.

[15] Section 32 provides:

> "The rules of a medical scheme and any amendment thereof shall be binding on the medical scheme concerned, its members, officers and on any person who claims any benefit under the rules or whose claim is derived from a person so claiming."

[21] Chapter 10 of the Act is headed "*Complaints and Appeals*". As the applicants put it, with reference to DL Pearmain:

> "The overall purpose of Chapter 10 is to provide, inter alia, medical schemes and their members with a dispute resolution platform that is quick, cost-effective and efficient."[16]

[22] Section 47 provides for complaints to the Registrar; section 48 for appeals against decisions relating to the settlement of a complaint or dispute to the Council; and section 49 for appeals against decisions by the Registrar to the Council.

[23] Section 50 of the Act establishes and sets out the powers of the Appeal Board.

[24] In terms of section 50(3) any person aggrieved by a decision of either the Registrar acting with the concurrence of the Council or by a decision of the Council may within 60 days of such decision and upon payment of a prescribed fee, "*appeal against such decision to the Appeal Board*".

[25] For the purposes of these proceedings the dispute resolution process is illustrated, for example, by Mr Cotty's complaint [17]. In this regard, Mr Cotty applied to Discovery for funding of a Xen-stent treatment. Discovery declined the funding. Mr Cotty complained to the Registrar in terms of section 47 of the Act. Mr Cotty sought an order from the Registrar that Discovery be ordered to pay, or co-pay for the Xen-stent. The Registrar found in favour of Discovery and held that it was not required to pay for the Xen-stent. Mr Cotty appealed against the Registrar's decision

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[16] DL Permain, *The Law of Medical Schemes in South Africa [Revision Service 6, 2019] (The Law of Medical Schemes)*, p 3-65.

[17] By the time this matter was heard, Mr Cotty's application (he being the first applicant) had been heard by the Appeal Board and sadly, the second applicant had passed away. The application proceeded in respect of the third and fourth applicants only.

to the Council in terms of section 48 of the Act.[18] The Appeals Committee upheld Mr Cotty's appeal and ordered that Discovery fund the Xen-stent treatment within fourteen days of the Appeals Committee ruling. Discovery lodged an appeal in terms of section 50 against the Council's section 48 decision.

[26] The following should be noted regarding section 50: Section 50(1) of the Act provides for the appointment of the Appeal Board by the Minister of Health. The chairperson must be appointed on account of his or her knowledge of the law, and the two other members of the Appeal Board on account of their knowledge of medical schemes. Members hold office for three years.[19] Unlike the Council, which has many other duties and also hears (i) appeals relating to the settlement of a complaint or dispute in terms of section 48 or (ii) appeals regarding decisions of the Registrar in terms of section 49, the sole purpose of the Appeal Board is to hear and determine appeals against any decision of the Registrar acting with the concurrence of the Council or any decision of the Council.

[27] The Appeal Board has certain powers similar to those of a High Court, such as to summon witnesses and call for the production of books, documents and objects [sections 50(9), (10) and (11)]. The evidence and address before the Appeal Board are held in public.[20]

[28] Section 50 provides for a wide administrative appeal.[21] The Appeal Board's powers are not limited to review, and the considerations which it may take into

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[18] It should be noted in this regard that section 48 provides for appeals to the Council. It does not provide for appeals to the "*Appeals Committee of the Council*". Section 9(1)(b) of the Act does, however, provide that the Council may appoint "*from amongst its members or any other persons, any other committee in regard to any matter falling within the scope of the Council's functions and powers under this Act.*"

[19] Section 50(6).

[20] Section 50(13).

[21] *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at [90]:

account are in fact wider than an appeal court in the High Court. Section 50(15) provides that the parties are entitled to representation by a legal practitioner. A decision by the Appeal Board in terms of section 50(16) is the culmination of, and brings finality to, the internal dispute resolution processes contemplated by the Act.

[29] Section 50(16) provides that the Appeal Board may, after hearing the appeal:

> "(a) confirm, set aside or vary the relevant decision; or
> **(b) order that the decision be given effect to."** (own emphasis provided)

[30] The Council does not have any power equivalent to that of the Appeal Board in terms of section 50(16)(b) to "*order that the decision be given effect to*".[22]

[31] The status of the Appeal Board is confirmed by sections 50(21) to 50(23) and the criminal consequences which follow from interruption of the proceedings; the obstruction of the Appeal Board in the performance of its functions; failure to attend and give evidence if summoned by the Appeal Board; or for giving false evidence.

[32] The powers of the Appeal Board were considered by this Court in *Profmed Medical Scheme v Madumise NO and Another*[23]. In holding that the power of the Appeal Board to summon witnesses was not limited to that of an appeal court in terms of section 22 of the Supreme Court Act, Patel J held:

> "[23] Further, the interpretation of the statute must be undertaken in context. Section 48 deals with an appeal to the Council. This includes an appeal from a

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"A wide appeal is one in which the appellate body may make its own enquiries and even gather its own evidence if necessary - *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 592A - E. In both kinds of appeal the primary function is one of reconsideration of the merits of the decision in order to determine whether it was right or wrong, or perhaps vitiated by an irregularity to the extent that there has been a failure of justice. Where the appellate body is placed in exactly the same position as the original decision-maker it will be able to correct lesser irregularities and will enjoy a power of rehearing *de novo*."

[22] Section 48(8) provides that the Council may "... after hearing the appeal confirm or vary the decision concerned, or rescind it and give such other decision as it may deem just."

[23] [2005] 3 All SA 484 (T).

> hearing of the Disputes Committee. The Council may for the purposes of an appeal request any person, who in its opinion may be able to give material information concerning the subject of the appeal, to appear before it at a time and place specified in the written request and to be examined. It may administer an oath and may call any person present at the hearing of the appeal as a witness and examine him/her. **However, no powers of subpoena are given to the Council. This should be contrasted to the powers given to the Appeal Board to summon witnesses, with particular reference to service in the same manner as a summons for the attendance of a witness at a criminal trial in a High Court (section 50(10)), the requirement that a witness shall, if required to do so by the chairperson of the Appeal Board, before giving evidence take an oath (section 50(11)), and the payment of witness fees to a person subpoenaed on the same basis as a witness summoned to give evidence at a criminal trial in a High Court (section 50(12)).**
>
> [24] Thus, in context it is envisaged that ultimately evidence can be compelled under oath. However, **the procedure to compel such evidence can only take place at the appeal stage in terms of section 50, there being no other machinery at the Disputes Committee stage or the appeal to Council stage.** Therefore, the failure to call a witness at any of the other stages in the process culminating in the appeal to the Appeal Board does not preclude the Appeal Board from summoning such witnesses to give evidence. There is nothing to preclude the Appeal Board, in the process of its investigation, from recalling a witness who has already given evidence during any of the prior stages in the process." (own emphasis added)

[33] The judgment by Patel J confirms that the Appeal Board has more extensive powers *vis a vis* appeal proceedings than the Council and that the internal dispute resolution process contemplated by Chapter 10 culminates in an appeal to the Appeal Board.

[34] Chapter 11 of the Act provides for judicial matters and includes provisions regarding applications to the High Court; judicial management; winding up of a scheme; and compromise.

[35] Chapter 12 is headed "*General*" and includes general provisions on the governance of medical schemes. In this regard, it is important to note that the business of the medical scheme must be managed by a board of trustees, fifty per cent of whom must be elected from amongst members.[24]

[36] The duties of the trustees include ensuring that proper controls are in place to protect member funds[25] and ensuing that the rules, operation and administration of the medical scheme comply with the provisions of the Act and all other applicable laws.[26]

[37] The board of trustees must also take all reasonable steps to ensure that the interests of beneficiaries in terms of the rules of the medical scheme and the provisions of the Act are protected at all times, act with due care, diligence, skill and good faith and act with impartiality in respect of all beneficiaries.[27]

Common law position considered

[38] In *Dhanabakium v Subramanian and Another*[28] the Court restated the legal position that:

> "It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the common law."[29]

[39] Section 50 of the Act does not expressly provide that the lodging of an appeal in terms of section 50(3) does, or does not, suspend the decision which is the subject of the appeal.

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[24] Sections 57(1) and (2).
[25] Section 57(4)(c).
[26] Section 57(4)(h).
[27] Section 57(6).
[28] 1943 AD 160.
[29] *Id* at 167.

[40] In the case of court orders, the effect at common law of noting an appeal is to suspend the operation of the decision appealed against. The issue in this case is whether the common law principle applies to administrative decisions. The respondents referred me to a host of authorities to the effect that the common-law principle applicable to the suspension of court orders constitutes, at the very lowest, a presumption in the case of administrative decisions and this presumption in the case of administrative decisions may be negatived (or cemented) by the implications of the statute in question. The applicants argued that insofar as such judgments found the common law as interpreted by the respondents, such judgments were clearly wrong.[30]

[41] I turn then to consider the authorities.

[42] In *Mpanza v Minister of Native Affairs And Others,*[31] the Court was faced with an administrative decision in terms of which Mr Mpanza was ordered, not by a Court but by an administrative official, to leave his home in Orlando Township, Johannesburg to go and live on a farm in Ixopo, Natal. When Mr Mpanza did not comply with the order, he was arrested. On the same day of his arrest, a petition was filed asking the Court to prevent Mr Mpanza's removal from Johannesburg until his appeal had been heard. The Court granted the petition and agreed that Mr Mpanza's rights could not be interfered with, as the appeal had not yet been concluded.

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[30] For a lower court to be entitled to deviate from other courts, and in particular higher courts, Mr Seroto relied on *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at paras 69 - 80. Before venturing there and interrogating the correctness of such proposition, I need to analyse the authorities to determine whether the common law was found correctly. If so, this inquiry becomes unnecessary.

[31] 1946 WLD 225.

[43] The Court considered various translations of *Voet*'s writings. But the effect of all the translations which the Court considered are to the same effect, some of which are the following:

> 'The effect of an appeal is, that the judgment is suspended, and that all things ought to be left in their previous condition, and that in accordance with the inscription of this title nothing should be changed ...
>
> Nor does it make any difference whether the appeal noted has been accepted or not: for it has been received, there must be abstention from taking any steps because the appeal has been received; if it has not been received, nevertheless there should be such abstention lest any prejudice should be caused whilst it is being deliberated whether or not the appeal should be received...
>
> Nor does it make any difference whether an appeal has already been lodged or whether the fatal time of ten days for noting an appeal has not yet passed, with a result that it is still possible for an appeal to be made, although no appeal has yet been made ...
>
> The same matter is dealt with in the Hollandsche Consultatien, Part 3, No. 53, secs. 1 and 5. This authority says that the noting of an appeal has a suspensive as well as a resolutive effect and that this rule applies equally to criminal as well as to civil matters. Sec. (5) provides that a Judge who puts into effect a criminal sentence despite the pending appeal is regarded as guilty of public violence and is required to undergo the same punishment. A very serious view was apparently taken of this rule of the common law.
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> Hunter's Roman Law, 2nd ed p. 1048, says: "Until the appeal is decided the rights of the parties must not be changed ..."....
>
> The conclusion to which I have come is that when an appeal is noted the operation of the administrative action described in sec. 5(3) is to be suspended pending the decision of the case on appeal.'

[44] In *R v Sithole*,[32] it was held that an administrative order is inoperative until either there has been an appeal, or the time for it has elapsed, or in any event until the administrative decision has been approved on appeal.

[45] In *Sithole* the Court said the following:[33]

> "I now go back to the third proposition which deals with the situation that arises when there has been a cancellation. I have already indicated that a person cannot be said to be an unauthorized person merely because a cancellation order has been made under sec.13(1) **... because such an order is inoperative until either there has been an appeal or the time for it has elapsed,** or in any event until the order of cancellation has been approved by the chief native commissioner... .
>
> As I see the scheme of this complicated and difficult legislation, once an inquiry has been held under the provision of sec.13, and a cancellation order has been made, and approved by the chief native commissioner on appeal or otherwise, **and the period for the appeal has elapsed**, then the person remaining in occupation commits an offence under sec. 24(1)(c)... ." (own emphasis provided).

[46] The *Sithole* judgment was followed by a full bench[34] in *R v Ndedwa*, where it was held that "*it cannot be said that the decision in Sithole's case is clearly wrong.*"[35]

[47] The decisions of the Courts in *Ndedwa* and *Sithole* were based on an interpretation of the legislative provisions applicable in those cases. Both decisions, in effect, endorsed the approach that it was undesirable for an official to execute a decision before the expiry of the appeal period, to then stop such action and undo

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[32] *R v Sithole* 1955 (1) SA 312 (N) at 315F – 316A.

[33] Ibid.

[34] Full Bench – referring to 2 Judges; Full Court - referring to 3 Judges.

[35] *R v Ndedwa and Another* 1959 (3) SA 24 (E) at 29D.

what had been done as soon as an appeal is lodged or an appeal is upheld by an appeal tribunal. *Ndedwa* is authority for the proposition that at common law, if a time within which an appeal must be lodged is stipulated in the enacting legislation, as is the case in section 50 of the Act, the legal force of an administrative act will be suspended for that time only if an appeal has in fact been lodged. This common law rule, however, does not apply if it is expressly excluded by the relevant statute – in that event, the statute usually empowers the administrator to suspend the legal force of its own acts pending the final determination of an appeal.[36]

[48] In *Leburu En Andere v Voorsitter, Nationale Vervoerkommissie, en Andere*,[37] the Court held that the mere noting of an appeal against an act, instruction or decision of a local road transportation board, which amounts to an administrative decision or action, did not automatically suspend such act, instruction or decision or the operation thereof. The Court noted that the Legislature did not intend the common law rule of automatic suspension to apply in the context of the legislation in issue. This was because a section in the legislation in issue empowered the National Transport Commission to grant or refuse, at its discretion, an application for suspension pending the determination of an appeal. Importantly however, the Court had approached the matter on the basis that there is a common law rule of automatic suspension of an act, instruction or decision by the mere noting of an appeal. It found, however, that the relevant legislation was intended to oust the application of that common law rule in the context of that legislation because the Legislature empowered the relevant authority to decide, in its discretion, whether or not to suspend the act, instruction or decision.

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[36] *S v Abraham* 1964 (2) SA 336 (T); *Malherbe v South African Medical And Dental Council* 1962 (1) SA 825 (N).

[37] 1983 (4) SA 89 (T).

[49] In *Marinpine Transport (Pty) Ltd v Local Road Transportation Board, Pietermaritzburg, And Others*, it was held that:[38]

> "In matters of this sort [where an appeal is lodged against an administrative decision], unless extraordinary circumstances prevail, it is always desirable that the *status quo* be maintained until such time as a final decision is made. Seldom is execution before appeal permitted. Disputes over transportation certificates are seldom any different from any other form of dispute ventilated in court and **it is a time-honoured principle that, in the absence of extraordinary circumstances, the court, as the chairman did here, will always maintain the *status quo* until the last word has been spoken by the final court of appeal.** The potential difficulties and the objections to any other course are so obvious that it is unnecessary to say anything further." (own emphasis provided)

[50] More recently in *Max v Independent Democrats*,[39] Davis J specifically considered whether the general rule under our common law, that the noting of an appeal suspends a judgment, applies to an administrative appeal. In holding that the "*rule of automatic suspension*" should apply, Davis J held the following:

> "...Baxter *Administrative Law* at 381 writes thus:
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> > **'In the case of private disputes the effect at common law of noting an appeal is to suspend the operation of the decision appealed against. But the right of appeal against decisions taken in terms of statutory powers is dependent upon the enabling statute. The common-law principle can constitute no more than a presumption in the case of administrative decisions, and this presumption may well be negatived by the implications of the statute**. Take the Road Transportation Act, for example. A dissatisfied party may appeal to the NTC against the decision of a local road transportation board. Application may also be made to the chairman of the NTC who has the power to suspend the decision of the local board pending the outcome of the appeal. The fact that such power was conferred on the chairman has led a court to the conclusion that the common-law principle (that a decision appealed against is automatically suspended) could not have been intended to apply in cases where such a

[38] 1984 (1) SA 230 (N) at 232B-D.

[39] *Max v Independent Democrats and Others* 2006 (3) SA 112 (C) at page 120H.

> suspension order is not made - for otherwise there would be no necessity for conferring the suspending power on the chairman.'

Mr *Budlender* also referred to De Ville *Judicial Review of Administrative Action in South Africa* at 334 where the author contends:

> 'Where an appeal is allowed against an administrative decision **the decision appealed against will (unless the statute in question provides otherwise) take effect only once the period for appeal has expired (and the person affected has not made use of the opportunity) or the decision has been confirmed on appeal** (where the person affected makes use of the opportunity to appeal).
>
> The lodging of an appeal against an administrative decision thus suspends the decisions being appealed against until such time as that decision is taken on appeal.'

On Mr Budlender's line of argument, the lodging of an appeal against an administrative decision suspends the effect of the decision being appealed against until such time as the decision is taken on appeal.

Reference was also made in this particular context to the decision in *Leburu en Andere v Voorsitter, Nasionale Vervoerkommissie, en Andere* 1983 (4) SA 89 (W). In this case, the Court dealt with a decision of the local road transportation board to grant certain applicants public transportation permits. The second respondent noted an appeal to the national transportation commission against the decision and at the same time applied for the suspension of the operation of those sections appealed against. The Court ultimately found that a provision in the Road Transportation Act 75 of 1977 (s 8(3)(b)) indicated that **the common-law rule of automatic suspension did not apply in this case. However, in the process of that finding, the Court assumed that the common-law rule of automatic suspension ordinarily found application in respect of the decision of the administrative tribunal appealed against**.

Mr *Budlende*r also referred to a *dictum* of Broome J in *Marinpine Transport (Pty) Ltd v Local Road Transportation Board, Pietermaritzburg, and Another* 1984 (1) SA 230 (N) at 232B – D... ." (own emphasis added)

[51] The applicants contend that it has already been held that section 50 of the Act does not suspend the decision which is the subject of the appeal. In this regard they submit that the judgments in *Bonitas SCA*[40] and *Resolution Health*[41] support such proposition.

[52] In *Bonitas* the Supreme Court of Appeal considered whether a decision of the Registrar to order an inspection in terms of section 44(4)(a) of the Act is appealable in terms of section 49(1). The paragraph relied on by the applicants states the following:

> "[11] Before us, Counsel for the scheme recognised the need for urgent investigation and the element of surprise. He argued, however, that that could be achieved by expedition of an appeal to the council or by taking the decision to order an inspection with the concurrence of the council. **There is no provision in the MSA for the suspension of the operation of a decision of the council pending an appeal to the appeal board.** But both of these proposals require that a meeting of the council be convened. This is hardly practical. In terms of section 4(1) of the MSA, the council shall consist of up to 15 members appointed by the Minister of Health. In making the appointments, the Minister is enjoined to, inter alia, take into account expertise in law, accounting, medicine, actuarial sciences, economics and consumer affairs. It can therefore safely be accepted that the members of the council are mostly not available on a full-time basis. This is underscored by the provisions of section 10 of the MSA. ..." (own emphasis provided)

[53] The applicants' reliance on *Bonitas* (and in particular the emboldened sentence) for their argument that an appeal under section 50 does not suspend the operation of the decision on appeal is misconceived, as the Court was concerned with the question of whether a decision to conduct an inspection under section 44 of the Act was a decision for the purposes of an appeal under section 49(1). The Court

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[40] *Bonitas Medical Fund v The Council for Medical Schemes and Another* [2016] 4 All SA 684 (SCA).

[41] *Resolution Health (Pty) Ltd and Another v The Council for Medical Schemes and Others* [2009] ZAGPPHC 106.

held it was not. It follows that the question of whether or not an appeal against such a decision would suspend its operation never arose. Whatever the Court said in that regard was clearly *obiter*. The remark that there is no provision in the Act which suspends a decision on appeal under section 50 is simply a statement of fact, not opinion. The question is not whether such a provision exists, but whether on a proper interpretation of the Act, having regard to the common law presumption that an appeal suspends administrative decisions, an appeal under section 50 has that effect.

[54] Most importantly though, is that the Supreme Court of Appeal was of the view that the lodging of an appeal in terms of section 50(3) would indeed suspend the decision on appeal. Paragraph [10] states:

> "In terms of section 49(2) of the MSA, the operation of a decision which is the subject of an appeal under section 49(1), is suspended pending the decision of the council on the appeal. **And in terms of section 50(3), a person aggrieved by a decision of the registrar acting with the concurrence of the council or by a decision of the council, may within 60 days after the date on which such decision was given, appeal to the appeal board established by section 50(1)**. Thus, if a decision to order an inspection in terms of section 44(4)(a) were to be subject to an appeal, **the inspection could be effectively stymied by simply noting an appeal**. This would be subversive of the intended effective intervention and militates strongly against the interpretation contended for by the scheme." (own emphasis provided)

[55] In *Resolution Health* the applicants had applied to the Council for accreditation as a managed healthcare organization and as administrator of a medical scheme.[42] The applicants were granted '*temporary accreditation*', subject to the resolutive conditions that substantive applications for accreditation were to be

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[42] Section 58 of the Act requires that a person providing administration services to a medical scheme must be accredited by the Council. Regulation 15 of the regulations promulgated in terms of the Act requires that managed healthcare services must be registered.

lodged within thirty days, and that such applications were to be granted.[43] The substantive applications were refused on 29 May 2009 and the temporary accreditation lapsed.[44] The applicants lodged an internal appeal against the refusal of the applications in terms of section 50 of the Act.[45] That appeal in terms of section 50 was still pending at the time of the urgent high court application which is the subject of the judgment. The applicants sought an order that the temporary accreditation had not lapsed, alternatively an order that the Council grant the applicants accreditation "*until all the envisaged processes have been finalized*".[46]

[56] It is within the above context that paragraph 34 of the judgment states:

> "It is common cause that the fact that an appeal against the refusal of the accreditation of renewal thereof is pending in terms of section 50 of the Act to a statutory appeal board does not suspend the refusal of the accreditation (if such were possible in law), nor does it provide for an interim authorization to render the services accreditation for the delivery of which has been refused by the first respondent."

[57] Accordingly, it is apparent that no view is expressed by the court regarding the common law principle that an appeal suspends the decision which is the subject of that appeal. The common cause view of the parties referred to in the judgment - that a section 50 appeal did not somehow create an accreditation which the Council had refused - is quite distinct from and lends no support to the interpretation advanced by the applicants - that a decision by the Council in terms of section 48 of the Act directing a medical scheme pay a member, must be implemented prior to the outcome of the section 50 appeal proceedings concerned. As the applicants

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[43] *Supra* at note 42, para 6.
[44] Id at paras 7 and 9.
[45] Id at para 8.
[46] Id at para 10.

concede, the Court itself did not even consider the common law principle that an administrative appeal suspends a decision pending appeal, let alone make any decision in that regard.

[58] In any event, the result in *Resolution Health* is consistent with the common law rule and the application of section 18(1) of the Superior Courts Act 10 of 2013 to appeals against the refusal to confirm a *rule nisi* or grant an order conferring some benefit. An appeal cannot give rise to a confirmation of the rule, nor to an order conferring the benefit.[47] An appeal cannot restore what never was.

[59] The applicants also submit that "*the alleged rule of practice advocated by the respondents has also been resoundingly rejected in the context of the Labour Relations Act, 1995 (LRA) by the Labour Court and the Labour Appeal Court.*" However, the judgments relied on by the applicants do not support this submission. In the *CCMA v Registrar of Labour Relations and Others* judgment[48] an order was sought "*suspending the bringing into effect of the cancellation of the second respondent (UPUSA) as a trade union by the first respondent (the Registrar) pending the outcome of the appeal*". Paragraph 20 of the judgment states:

> "The CCMA argued that unless the statute provides otherwise where there is a right of appeal against an administrative decision, such a decision will be automatically suspended pending the finalisation of the appeal. The argument is based on the view expressed by De Ville *Judicial Review of Administration Act in South Africa* at 334 and a number of cases which were relied upon by the CCMA. **Because of the view taken on the approach to be adopted in this matter I do not deem it necessary to canvas those views in this judgment.**" (own emphasis added)

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[47] *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) at para [6] and *Huayou (Hong Kong) Co., Limited v C. Steinweg Bridge (Pty) Limited and Others* [2017] ZAGPJHC 472 (15 December 2017) at paras [24] – [27] and the cases referred to therein.

[48] [2010] 11 BLLR 1151 (LC).

[60] In paragraph 23, the judgment states that the view expressed by Baxter and De Ville about "*... matters of this nature makes a loose and general point*". After considering the applicable provisions of the Labour Relations Act the judge held "*[i]t is therefore my view, firstly, that the general common-law rule practice (sic) that an appeal stays the enforcement of a judgment pending the outcome of an appeal does not apply to decisions made by the Registrar in terms of section 106 of the LRA.*"[49] Accordingly, the judgment by Molahlehi J accepted that the common law does, in general, stay an administrative decision but held on an analysis of the statute concerned that the cancellation of a trade unions registration was not stayed pending the outcome of an appeal in terms of section 111(3) of the Labour Relations Act.

[61] Similarly, the Labour Appeal Court ('*LAC*') judgment relied on by the applicants (*NEWU*)[50] also recognised the common law principle that an administrative appeal ordinarily suspends the decision which is the subject of the appeal proceedings. As the applicants appear to accept the LAC in fact endorsed the approach of Baxter set out above.[51] As Davis J put it:[52]

> "[18] The question therefore arises as to whether the Labour Court can adopt a procedure which it considers appropriate when an appeal is lodged against a failed appeal of a deregistration decision (i.e. a decision made by an administrative functionary within the contemplation of the LRA). Notwithstanding the decision in *Max supra*, the common law rule does not appear to have been automatically applied to appeals from administrative decisions. As Baxter Administrative Law notes:

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[49] *Id* at para 39.

[50] *National Entitled Workers Union (NEWU) and Another v Director Commission for Conciliation Mediation and Arbitration and Others* [2011] ZALAC 10.

[51] Applicants' HOA, p. 54, para 111.

[52] Mlambo JP and Mocumie AJA concurring.

> "The common law principle can constitute no more than a presumption in the case of administrative decisions, and this presumption may well be negative by the implication of the statute.""

[62] Davis J went on to state, with reference to his judgment in *Max v Independent Democrats*:

> '[20] There is room to suggest that *Max's* case, at best for appellant, seems to provide equivocal authority for the submission that the common law rule automatically applies though it is clear from the facts of that case that the court there was mindful of the irreparable harm to Max even if he was eventually successful in the matter. It is for these reasons that it is necessary, as Baxter has observed, to return to an examination of the implications of the applicable statute to determine whether the common law principle is applicable to the present dispute."

[63] Ultimately having regard to the applicable statute in that matter and the nature of the decision, Davis J held that the common law principle that an appeal suspends the implementation of the decision concerned was not applicable to a decision to suspend registration of a trade union.

[64] Having considered the aforegoing authorities, I conclude that there is a common law principle which provides that, subject always to the applicable legislation concerned, an administrative appeal suspends the decision which is the subject of the appeal.

[65] It therefore becomes necessary that the Act be considered to determine whether the ordinary common law principle is applicable and that an appeal in terms of section 50(3) suspends a decision by the Council in terms of section 48(8).

The Act considered

[66] The applicants submit that had it wished to, the legislature could easily have included express language in section 50, as it did in sections 48 and 49 of the Act. Section 48 and 49 both provide that the respective appeal proceedings to the Council "*shall be suspended pending the decision of the Council on such appeal*".

[67] However, there are clear differences between section 50 and sections 48 and 49 which made it unnecessary to include equivalent language. In this regard, it is apparent from the structure of Chapter 10, that a section 50 appeal is the final step in the internal dispute resolution process. A decision in terms of section 48 or 49 cannot be taken on review, as they remain subject to the internal remedy provided for by section 50.[53] The Appeal Board is an independent body with powers akin to the High Court. As noted by Patel J, the process contemplated and powers of the Council in terms of section 48 are more limited than that provided for by section 50. Section 50 proceedings provide for a wide appeal. However, the nature of processes contemplated by sections 47 to 49 are less clear and constitute only preliminary steps in the dispute resolution process. Furthermore unlike section 50 proceedings, in which an independent board considers the appeal processes, sections 48 and 49 could be interpreted as, rather than constituting an independent appeal, merely providing an opportunity for the Council to reconsider decisions taken with the Council's concurrence or decisions taken by the Registrar on its behalf. In terms of section 18 of the Act, the Registrar is the executive officer of the Council; manages the affairs of the Council; and must act in accordance with the directions of the Council. There may accordingly be doubt whether the procedures provided for by

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[53] Section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 provides that no court shall review an administrative action unless any internal remedy provided for in any other law has first been exhausted.

sections 48 and 49 of the Act constitute appeals in the ordinary sense, to which the common law principle that such proceedings suspend decisions pending the outcome of the proceedings, applies. Accordingly, unlike section 50, which clearly constitutes an administrative appeal, the legislature deemed it prudent to provide expressly that the proceedings provided for by sections 48 and 49 suspend the decisions concerned pending the outcome of the processes provided for.

[68] The ordinary presumption that an appeal suspends a decision provides an explanation as to why it was unnecessary to include any express provision in this regard in section 50 of the Act.

[69] What remains inexplicable, if express language regarding the consequence of an appeal could easily have been included in section 50, is why the legislature did not expressly provide that an appeal in terms of section 50 does not suspend such decision, if that were its intention. The legislature was obviously alive to the significance of appeal proceedings and whether such proceedings suspend the decisions.

[70] Thus while the ordinary common law principle provides an explanation of why it was unnecessary to include express language in section 50 - suspending decisions pending the outcome of an appeal - there is no equivalent explanation as to why there is no express clause providing that section 50 does not suspend a decision pending an appeal to support the applicants' interpretation.

[71] Rather than support the interpretation advanced by the applicants, the very policy considerations which inform the provision that decisions should not be implemented pending the outcome of the section 48 and 49 processes would be

equally apposite to section 50. That is that suspension of a decision which is the subject of a complaint or dispute, and the maintenance of the *status quo* for the short period provided during the contemplated speedy internal dispute resolution process, to ensure certainty is pragmatic, cost-effective, sensible and will prevent the unnecessary complication of implementing a decision incorrectly made and then trying to undo such implementation.

[72] The entire structure of Chapter 10 is that decisions should not be implemented prior to the final decision by the Appeal Board.

[73] In this regard, section 50(16)(b) of the Act, which provides that the Appeal Board may order that the decision on appeal be given effect to, strongly suggests both that until such order is made, the decision on appeal is not enforceable, and that the Appeal Board is the only body which is statutorily empowered to enforce decisions on appeal.

[74] Furthermore, the Act does not confer any discretion or power on any person or body, be it the Registrar or the Council for Medical Schemes, to direct that a decision subject to appeal in terms of section 50 be enforced. There is no process in the Act for any such application to be made. There is no provision in the Act providing for the enforcement of section 48 or section 49 decisions pending appeal in terms of section 50 or any penalty in this regard.

[75] The purpose of section 50 is to provide a quick, cost-effective and efficient remedy to medical schemes and their members. That purpose would be undermined by an interpretation which would require that within the efficient remedy contemplated, it is necessary to first implement and then reverse the decision

concerned. The need for parties to then have to bring a costly application (a cost to the medical scheme and the member) to stay such proceedings would also be contrary to that objective.

[76] Furthermore, the reversal of a decision of the Council by the Appeal Board will not necessarily restore the parties' *status quo ante*. For example, the payment of medical services or goods for the benefit of a member by a medical scheme pursuant to a decision by the Council will not automatically become repayable if the decision is set aside by the Appeal Board. At common law, the only claim which the medical scheme would have would be under the *condictio indebiti*. But that claim cannot be brought against the supplier of the goods or services because it will not have been unduly enriched by the payment. After all, it will have provided value for the payment. That leaves the member, who may not have been enriched to the extent of the payment or may simply not be able to repay the medical scheme.

[77] An interpretation requiring that the Council's decision be immediately implemented, notwithstanding that the Appeal Board has not yet made a decision, would promote neither the objects of the Act nor access to healthcare.

[78] The applicants' interpretation would have a disruptive effect on the medical schemes industry. Notwithstanding that the Act provides for a quick, cost-effective and efficient remedy, a scheme must immediately implement decisions by the Council relating to issues such as funding policies, scheme rules and operational procedures. These would accordingly have to be changed for the purposes of immediately implementing the Appeals Committee Ruling, only to then revert back to the pre-Appeals Committee status following successful appeal to the Appeals Board. A medical scheme would be required to fund certain medication or treatment

pending the outcome of section 50 appeal proceedings, and thereupon, if it were found by the Appeal Board that the medical scheme should not have funded such medication or treatment, the medical scheme in question would have to recover the monies it had paid out to such members. This would accordingly have an adverse impact on members of the scheme as a whole. It can never have been the intention of the Act to place funds at risk by forcing a medical scheme to fund certain medication or treatment which the medical scheme is not liable for, and then to have to recover such funds in due course after succeeding with an appeal in terms of section 50.

[79] The administrative costs of the medical scheme would increase as it would be necessary in each instance to make special administrative arrangements during the appeal period, as well as further administrative costs following successful appeal. The additional financial and operational burdens would require additional financial and human resources, which will ultimately lead to higher contributions for scheme members in an already constrained economic environment.

[80] Accordingly, the interpretation favoured by the applicants would ultimately harm access to healthcare and would be contrary to the objectives of the Act.

[81] The applicants suggest that medical schemes "*would not be without remedy if the Court endorses the applicants' advocated interpretation.*" In this regard, the applicants submit that "*... section 59(3)(a) gives them ample recourse against the applicants.*"[54] And to secure the effectiveness of the appeal, medical schemes may

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[54] Section 59(3)(a) provides:

> "Notwithstanding anything to the contrary contained in any other law a medical scheme may, in the case of—

apply for *interim* relief. The recourse provided by section 59(3)(a) is very limited. The amount paid to the member or the supplier may only be recovered by way of a deduction from any benefit due to the member or the supplier. But there may be no benefit due to the supplier or member from which the undue payment may be deducted. The proliferation of proceedings to recover amounts wrongly paid to members or to obtain *interim* relief pending the Appeal Board decision is completely contrary to the quick, efficient and cost-effective resolution of disputes contemplated by Chapter 10 of the Act.

[82] The applicants have also sought to rely on the maxim *expressio unius est exclusio alterius* as a basis for their claim that "*the legislature is presumed to have acted intentionally in specifying that the launching of appeals in terms of section 48 and 49 automatically stay the decisions that are the subject of those appeals while notably omitting to mention that concept for decisions subject to appeal in terms of section 50.*"

[83] The maxim, which provides that the express mention of one thing is to the exclusion of the other should, as the applicants accept, be applied with caution, and has been dismissively described by Hoexter JA as a "*last refuge*".[55] The maxim is typically used for the interpretation of a word or phrase which is capable of more than one interpretation – the express mention of one of the possibilities excludes the other.[56] The applicants seek to rely on the maxim not to interpret a phrase but rather to draw conclusions in one section of the Act on the basis of language used elsewhere in the statute relating to a different process. There is nothing to suggest

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(a) any amount which has been paid *bona fide* in accordance with the provisions of this Act to which a member or a supplier of health service is not entitled to."

[55] *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (1) SA 21 (A) at 37G – H.

[56] *Bruwer v Nova Risk Partners Ltd* 2011 (1) SA 234 (GSJ) para 27.

that the express provisions in section 48 and 49, suspending decisions, implies that the immediate implementation of decisions which are the subject of appeal in terms of section 50 is required and the maxim *expressio unius est exclusio alterius* provides no support for any conclusion to the contrary.

[84] For all the reasons advanced herein, I therefore conclude that there is nothing in the Act that displaces the common law principle that the administrative appeal (timeously taken) suspends the decision which is the subject of the appeal. I therefore conclude that the ordinary common law principle is applicable and that an appeal in terms of section 50(3) suspends a decision by the Council in terms of section 48(8).

The Review

[85] The relief sought by the applicants, set out in paragraph 2 of the amended notice of motion, is the review and setting aside (alternatively, declaring unlawful and invalid) of the decision of the Council for Medical Schemes (the second respondent), communicated to the applicants by way of an email dated 7 May 2019.

[86] The applicants' review is premised on its interpretation of the Act, which I have already found to be incorrect, and accordingly the review must fail as must the interdictory relief sought in the amended notice of motion.

[87] Assuming I am wrong on this score, I would dismiss the review for the following reasons: The "*impugned decision*" referred to by the applicants, which is the subject of the review, is an email sent by Thamsanqa Diniso, Senior Investigator: Compliance and Investigations, of the Council for Medical Schemes, to Ebenezer Iheanyi of Elsabe Klinck & Associates dated 7 May 2019 ('*the email of 7 May 2019*').

[88] The email of 7 May 2019 states the following:

> "Dear Ebbie
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> Your letter dated 30 April 2019 bears reference.
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> After careful consideration of your request that the Office should urgently enforce the Appeals Committee ruling in the matter between Ms Rodinis and Discovery Health Medical Scheme, we regret to inform you that we are not in a position to accede to your request. ..."

[89] The letter of 30 April 2019 sent by Ebenezer Iheanyi of Elsabe Klinck & Associates ('*Ms Klinck's letter of 30 April 2019*'), addressed to Mr Diniso, headed "*Rodinis // Discovery Health Medical Scheme: CMS 65705: Urgent enforcement of compliance with the Appeal's Committee Ruling*" states the following:

> "1. We have been supporting Ms Moira Rodinis, in the above matter. Kindly note that we are not a firm of attorneys, and are consultants in the health sector. We therefore do not have any powers to take any legal action on behalf of any client.
>
> ...
>
> 4. The failure to implement the Ruling of the Appeal Committee of the Council for Medical Schemes (CMS) dated 13 March 2019, in which the appeal was upheld, the decision directed the Scheme to fund the treatment for the member, in full retrospectivity for the date that it initially refused to do so, and that such was to be done within 14 days of the receipt of the ruling seriously violates Ms Rodinis' rights in law.
>
> 5. **The CMS is under a constitutional duty to ensure the realisation of Section 7 of the MSA deals with the functions of the council. Section 7(a) states that it is a function of the council to protect the interests of the beneficiaries of medical schemes 'at all times'.**
>
> 6. **We strongly believe that the right, and lawful course of action is for CMS to enforce this ruling, and to ensure that Ms Rodinis' interests and rights**

> **are protected, in particular in view by the indefinite date on which the matter may be heard by the Appeal Board.** ..." (own emphasis provided)

[90] As the Constitutional Court has put it "[*t*]*he concept of 'administrative action', as defined in s 1(i) of PAJA is the threshold for engaging in administrative-law review.*"[57] The requirement propels a reviewing court to undertake a close analysis of the nature of the power under consideration.[58] Section 1 of the Promotion of Administrative Justice Act 3 of 2000 ('*PAJA*') defines "*administrative action*" as denoting "*any decision taken, or any failure to take a decision... .*". PAJA further defines "*decision*" as meaning: "*any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision... .*"

[91] The letter of 7 May 2019 merely informed Ms Klinck that the Council was not able "*to accede to your request.*" The Act does not confer any discretion or power on any person or body, be it the Registrar or the Council to direct that a decision subject to appeal in terms of section 50 "*be enforced*"; the Council has no power, whether in terms of the Act or otherwise, to enforce a decision of the Council pending the outcome of an appeal in terms of section 50.

[92] The *lacunae* in this regard in fact highlights that the interpretation advanced by the applicants is not sustainable. It is clear from the absence of any provisions one might expect if the Act had required that a decision in terms of section 48(8) be implemented prior to a decision of the Appeal Board, that no such implementation is contemplated. It is not clear from Ms Klinck's letter of 30 April 2019 what the letter

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[57] *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 33.
[58] Id at para 34.

contemplated the Council should do to "*enforce*" the section 48(8) decision pending the Appeal Board decision.

[93] The first and second respondents cannot exercise powers which they do not have or act in a manner contrary to the provisions of the Act.[59] The applicants did not have any right to make the demand as they did. It was a demand that the Council do something which the Council had no authority to do. In the circumstances, it is clear that the letter of 7 May 2019 did not constitute a decision taken in terms of legislation or any empowering provision. The letter accordingly did not constitute administrative action subject to review in terms of PAJA.

[94] The review should accordingly be dismissed for these reasons too.

Costs

[95] Relying on the *Biowatch* principle [60] and because the applicants were asserting their rights to health care, Mr Seroto submitted that the general rule that costs should follow the result should not have application in the event of the applicants being unsuccessful. He did not go further (properly so) and argue that despite being unsuccessful, the respondents should be ordered to pay the costs.

[96] Discovery and Medshield advised during the hearing that they did not seek costs against the applicants and the first and second respondents left the issue in the hands of the court.

[97] The award of costs is a matter which is within my discretion but one which must be exercised judicially. The application was not frivilous or vexatious and I

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[59] *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at para 1.

[60] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC).

agree that the shield afforded by the *Biowatch* principle, should have application given the nature of the rights being asserted.

Order

[98] I accordingly make the following order:

The application is dismissed with no order as to costs.

I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the applicants: Adv T Seroto
Instructed by: Assenmacher Brandt Attorneys

Counsel for the first and second respondents: Adv JJ Brett SC and Adv L Kutumela
Instructed by: Khumalo Masondo Attorneys Inc.

Counsel for the third respondent: Adv CDA Loxton SC and Adv D Smith
Instructed by: Knowles Husain Lindsay Inc.

Counsel for the fourth respondent: Adv K Tsatsawane SC
Instructed by: Knowles Husain Lindsay Inc.

Date of hearing: 2 February 2021
Date of Judgment: 19 February 2021