

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 5068/2021

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
25/8/2022	
_____	_____
DATE	SIGNATURE

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION NATIONAL MEDICAL SCHEME (SAMUMED	APPLICANT
AND	
CITY OF EKURHULENI	FIRST RESPONDENT
MOSO CONSULTING SERVICES (PTY) LTD	SECOND RESPONDENT
THE REGISTRAR OF MEDICAL SCHEMES	THIRD RESPONDENT
THE FINANCIAL SECTOR CONDUCT AUTHORITY	FOURTH RESPONDENT
THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	FIFTH RESPONDENT
THE SOUTH AFRICAN MUNICIPAL WORKERS' UNION	SIXTH RESPONDENT
INDEPENDENT MUNICIPAL AND	

ALLIED WORKERS UNION	SEVENTH RESPONDENT
BONITAS MEDICAL FUND	EIGHTH RESPONDENT
HOSMED MEDICAL SCHEME	NINTH RESPONDENT
KEY HEALTH MEDICAL SCHEME	TENTH RESPONDENT
LA HEALTH MEDICAL SCHEME	ELEVENTH RESPONDENT
THE EMPLOYEES OF THE CITY OF EKURHULENI	TWELFTH RESPONDENT
THE SOUTH AFRICAN LOCAL GOVERNMENT	THIRTEENTH RESPONDENT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

- [1] In essence, this dispute concerns a collective agreement entered into between the South African Local Government Bargaining Council and SALGA, IMATU and SAMWU in 2015. The Court is faced with an application from the South African Municipal Workers' Union National Medical Scheme ("**SAMWUMed**") wherein it seeks declaratory relief coupled with interdictory relief based on the fact that it was a party to the collective agreement, and due to the appointment of Moso Consulting Services ("**Moso**"), as sole broker for the employees of the City of Ekurhuleni ("**COE**"), its rights having been infringed in terms of the collective agreement. A further legal point is the question relating to the legal standing of the SAMWUMed in terms of the collective agreement. The matter also concerns the interpretation of the appointment of medical scheme brokers in terms of the Medical Schemes Act 131 of 1998 and its Regulations.
- [2] No relief or cost order is sought against the third and fourth respondents, who are cited herein by virtue of the regulatory interests which they have in this matter, or against the fifth to thirteenth respondents, who are cited herein by virtue of any interests which they have or may have in this matter.

[3] The COE (first respondent) and Moso (the second respondent) oppose the relief sought.

[4] The third to thirteenth respondents are not opposing the application.

Parties

[5] The applicant is SAMWUMed:

- (a) a self-administered medical scheme duly registered in terms of section 24 of the Medical Schemes Act 131 of 1998 of the Republic of South Africa (“**The MSA**”);
- (b) which is, in terms of section 26(1)(a) of the MSA, a body corporate capable of suing and being sued and of doing or causing to be done all such things as may be necessary for or incidental to the exercise of its powers or performance of its functions in terms of its rules from time to time;
- (c) which conducts its business as medical scheme in a closed sector, namely local government and associated agencies’ employees;
- (d) which has approximately 75,000 members and beneficiaries nationwide.

[6] The first respondent is the COE, a municipality duly established as such in terms of the Local Government: Municipal Structures Act 117 of 1998 and related legislation and which has more than 600 employees who are members of SAMWUMed.

[7] The second respondent is Moso, company duly registered and incorporated pursuant to the provisions of the Company Laws of the Republic of South Africa and an authorised financial service provider in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (“**the FAIS Act**”), under FSP no 10108.

[8] The third respondent is The Registrar of Medical Schemes (“**the Registrar**”), who is herein cited in his official capacity, duly appointed as such in terms of section 18 of the MSA.

[9] The fourth respondent is The Financial Sector Conduct Authority (“**the FSCA**”), a juristic person duly established in terms of section 56 of the Financial Sector Regulation Act 9 of 2017 (“**the FSR Act**”).

- [10] The fifth respondent is The South African Local Government Association (“**SALGA**”), a voluntary association representing the interests of local governments; and an employer organization of which the COE is a member, and which is a party to the collective agreement concluded between the relevant parties.
- [11] The sixth respondent is South African Municipal Workers Union (“**SAMWU**”), a registered trade union and a party to the collective agreement referred to below.
- [12] The seventh respondent is the Independent Municipal and Allied Trade Union (“**IMATU**”), a registered trade union and a party to the collective agreement referred to below.
- [13] The eighth respondent is Bonitas Medical Fund, a medical scheme duly registered in terms of section 24 the MSA and which is one of the accredited medical schemes in terms of the collective agreement referred to below.
- [14] The ninth respondent is Hosmed Medical Scheme, a medical scheme duly registered in terms of section 24 the MSA and which is one of the accredited medical schemes in terms of the collective agreement referred to below.
- [15] The tenth respondent is Key Health Medical Scheme, a medical scheme duly registered in terms of section 24 the MSA; which is one of the accredited medical schemes in terms of the collective agreement referred to below.
- [16] The eleventh respondent is La Health Medical Scheme; a medical scheme duly registered in terms of section 24 the MSA and which is one of the accredited medical schemes in terms of the collective agreement referred to below.
- [17] The twelfth respondent is, collectively, the Employees of the COE.
- [18] The thirteenth respondent is the South African Local Government Bargaining Council, a bargaining council established as such in terms of the provisions of the Labour Relations Act, Act 66 of 1995 (“**The Bargaining Council**”).

Litigation history

- [19] SAMWUMed served its application on COE and Moso respectively on 8 and 23 February 2021. Service was effected on the balance of the respondents during February 2021.
- [20] The COE served a notice to oppose on 15 February 2021 and the answering affidavit was due on 8 March 2021.
- [21] Due to the COE's failure to deliver its answering affidavit the application was set down on the unopposed roll of 3 May 2021. A few days prior to the hearing, COE's attorneys of record sought a postponement in order to deliver the answering affidavit, and they undertook to do so by 7 May 2021.
- [22] On 3 May 2021 the following order was made by Moorcroft AJ:
- “1. The application is postponed *sine die*;
 2. The first respondent is ordered to deliver its answering affidavit, if any, by 7 May 2021;
 3. The first respondent is ordered to pay the wasted costs occasioned by the postponement, including counsel's fees, on the opposed scale.”
- [23] The COE did not file the answering affidavit as ordered by the Court and instead it pursued a “*settlement agreement*” with SAMWUMed, which “*settlement proposals*” were rejected by SAMWUMed as early as April 2021.
- [24] Moso filed its intention to oppose the application on 19 May 2021.
- [25] The matter was again set down on the unopposed roll on 10 August 2021 as no answering affidavit was received. In the meantime, Moso since filed its answering affidavit, this necessitated the matter to be removed from the unopposed roll. Also, at this time the COE had not filed its answering affidavit as ordered by Moorcroft AJ on 3 May 2021.

[26] On 29 November 2021 the COE once more approached SAMWUMed to accept their “*settlement proposals*” as contained in the already rejected offer.

[27] SAMWUMed again rejected the “*settlement offer*” and the matter was set down for hearing on 14 February 2022.

[28] However, on 4 February 2022 the COE addressed a letter to SAMWUMed informing them that they will file its answering affidavit “*during the course of the next week*”, it was further intimated that the matter will therefore have to be postponed as to enable SAMWUMed to file its replying affidavit.

[29] The COE filed its answering affidavit only a day before the hearing. This was followed by an application for condonation for the late filing of the answering affidavit.

[30] On 17 February 2022 the matter came before Makume J and the following order was made after hearing arguments by all parties:

- “1. The application for a postponement is hereby granted.
2. The application for leave to condone the late filing of the First Respondent’s Answering Affidavit is granted.
3. The Applicant shall file its Replying Affidavit by the 25th of February 2022. Heads of Argument shall be filed by the 15th of March 2022.
4. The parties shall approach the Deputy Judge President to allocate a Judge to hear this matter as a special motion matter on a priority basis.
5. The First Respondent is ordered to pay the Applicant and Second Respondent’s wasted costs including counsel’s fees on an attorney and client scale.”

[31] Makume J made the following remark in his judgment:¹

“I am mindful of the fact that the Service Level Agreement concluded between the City of Ekurhuleni and Moso, the second Respondent will come to an end in June 2022. However, this does not mean that this matter should not be ventilated fully in the interest of justice.”

¹ Paragraph [20].

[32] Following the above mentioned order by Makume J, the matter was set down on the opposed roll on 9 June 2022.

Factual Matrix

[33] On 16 September 2011 a broker agreement² was concluded between SAMWUMed and Moso, the broker agreement was in force for a period of 18 months. Following the conclusion of the said agreement SAMWUMed forwarded a welcome letter to Moso stating the following:

“We have pleasure in advising that you have been registered as a Broker of the SAMWU NATIONAL MEDICAL SCHEME effective from 01 October 2011.”

[34] On 9 September 2015 a Collective Agreement was concluded in the Bargaining Council between SALGA, IMATU and SAMWU. (“**the collective agreement**”). The Minister of Labour, in terms of Section 32 of the Labour Relations Act, 66 of 1995, made a determination in terms of which the collective agreement came into operation in respect of non-parties thereto. Therefore, in terms of *inter alia* sections 31 and 32 of the Labour Relations Act, 66 of 1995, the COE (which is a member of SALGA), is bound by the collective agreement.

[35] During April 2019 SAMWUMed concluded a further written broker agreement with Moso (“**the broker agreement**”) which agreement commenced on 13 November 2018. The said agreement contained a “territory clause” pertaining to the COE.

[36] Prior to 2020, SAMWUMed was accredited by the Bargaining Council as one of the five accredited medical schemes as stipulated in the collective agreement and as such, hundreds of employees of the COE become members of SAMWUMed.

[37] During January 2020, the COE and Moso concluded a service level agreement (“**the SLA**”), wherein Moso was appointed as the service provider for The Provision of Medical Aid Broker Services to the City of Ekurhuleni. This was confirmed in an

² Case lines 031/1.

appointment letter issued on 17 December 2019. The effective date of the SLA concluded was from 1 January 2020 to 30 June 2022.

[38] However, on 13 January 2020, the COE addressed a letter to SAMWUMed stating the following:

“Our letter dated 11 June 2019 refers.

You are hereby informed that the City of Ekurhuleni Municipality (CoE) has appointed two Medical Aid Brokerage Service Consultants, namely Moso Consulting Services (Pty) Ltd and Alexander Forbes Health (Pty) Ltd to service all employees and pensioners of the City of Ekurhuleni Municipality and to provide consulting services to the CoE with effect from 01 January 2020. The aim being to provide a professional, efficient and consistent service to CoE.

CoE has concluded a service level agreement with the appointed medical aid brokers and their contract will effectively run for the period 01 January 2020 until 30 June 2022.

Your medical aid Scheme has been allocated to Alexander Forbes Health (Pty) Ltd.

An appeal is made to you to work together with the appointed broker, to support them and ensure that they are well versed with your medical aid scheme rules so that they can be able to service the CoE, its employees and pensioners in a professional way. Also, it will be appreciated if you can ensure that these brokers are paid broker fees for the services rendered in terms of the Medical Aid Schemes Act No131 1996 or as amended.

It would be appreciated if you can rescind all existing medical aid brokerage contracts that are currently in place for CoE with immediate effect to make way for Alexander Forbes Health (Pty) Ltd to take over. No other medical aid consultants will be allowed to service employees of CoE unless they are contracted to Alexander Forbes Health (Pty) Ltd.”

You are hereby informed that the City of Ekurhuleni Municipality (CoE) has appointed two Medical Aid Brokerage Service Consultants, namely Moso Consulting Service.”

[39] SAMWUMed was opposed to the COE’s appointment of two brokers to exclusively render services to *all* the COE’s employees, including SAMWUMed’s own existing members and prospective members.

[40] Alexander Forbes Health (Pty) Ltd (“**AFH**”), however relinquished or somehow fell out of the picture, and Moso remained as the only exclusive broker “appointed” by the COE to, on the one hand, act as broker for all the COE employees and pensioners, and on the other, for all five schemes.

[41] Notwithstanding, SAMWUMed’s dissatisfaction of Moso being appointed as broker, it applied for accreditation as medical scheme in terms of the collective agreement for the 2021 period, which application was granted in September 2021. The accreditation afforded SAMWUMed the right to market its scheme and its benefit options to COE’s employees and pensioners during the window period of 1 October 2020 to 30 November 2020, for the year 2021. It also granted SAMWUMed the opportunity to render ongoing services to its members thereafter.³

[42] On 2 September 2020, Lungile Mtwana (“**Mr Mtwana**”), employed by SAMWUMed as business development specialist, attended an online meeting with Moso, represented by Lehlohonolo Mokgethi and Young Lethakha, during which it was contended by Moso that:

- (a) AFH had been appointed as broker on behalf of SAMWUMed by the COE, but that AFH relinquished their appointment, and as such, SAMWUMed would be represented by Moso; and
- (b) In terms of guidelines released by the COE ahead of the “freedom of association” period, the COE had advised that going forward only applications stamped by Moso would be processed by the COE.

³ The said accreditation was contained in Circular 12/2020, which was issued by the Bargaining Council on 2 September 2020.

[43] On 3 September 2020, in anticipation of the October to November window period, the COE directed further correspondence to the five accredited medical aid schemes which read as follows:

- “1. Only COE appointed brokers are to facilitate YER roadshows supported by Medical Schemes.
2. All New-applications, additions and terminations should be processed by COE appointed brokers Only.
3. Only application forms submitted by COE appointed brokers, will be stamped by payroll.
4. All Application forms should have the mandatory Record of Advice of the COE appointed brokers.
5. Appointed brokers and Medical Schemes should not use marketing and promotional items during the YER.
6. Key Account Officers are to Inform appointed brokers of servicing schedules.
7. Medical Schemes and appointed brokers are required to follow COE COVID-19 protocols.
8. COE will issue permits for a specific number of YER representatives from the Medical Schemes and appointed brokers.”

[44] Following the said correspondence, on 12 October 2020, Ms Stefanie Storbeck (“**Ms Storbeck**”) of the human resources department (payroll office) of the COE directed an email with the following content to SAMWUMed:

“Good day
Moso is now the Sole Broker for all the medical funds.
Their stamp must be on all the documents.
I can’t even accept an application from the medical funds

Kind regards
Stefanie Storbeck Bonitas, Key Health, SANWUMED”

[45] The COE also indicated that the window period for new applications and enlisting of new dependents would open on 1 October 2020 and will close on 30 November 2020, and that the window period for change of benefit options would close on 25 November 2020.

[46] During the window period, SAMWUMed’s internal consultants were present at the COE’s various venues, they were allowed to, freely and unhindered, provide information about SAMWUMed and its benefit options to members and prospective members. They collected new application forms, new dependent forms and change of option forms from members and prospective members.

[47] Since 27 November 2020 brokers appointed by SAMWUMed submitted application forms to Ms Storbeck of the COE, who accepted a number of SAMWUMed application forms, but only as a result of some employees/members having put pressure on her to do so.

[48] Early December 2020, Ms Storbeck stopped accepting application forms from SAMWUMed.

[49] As a result of the above, SAMWUMed launched the application.

Relief claimed by SAMWUMed

[50] SAMWUMed seeks declaratory relief coupled with interdictory relief, as well as contractual relief in the context of certain provisions of the MSA, the collective agreement and a broker agreement.

[51] The relief sought is as follows:

- “1. An order declaring that the first respondent is in breach of the collective agreement concluded on 9 September 2015;
2. An order compelling the first respondent to comply with the collective agreement concluded on 9 September 2015, more specifically to allow the applicant to freely market its scheme and benefit options and to render services to its members and all prospective members who are employees of the first respondent, unhindered and by way of the applicant’s own internal consultants or independent brokers appointed by the applicant, should it so wish;
3. An order compelling the first respondent to accept member application forms and other documents and communications directly from the applicant, and to duly process such applications and related documents submitted by the applicant;

4. An order declaring that the second respondent is not entitled to payment of broker fees by the applicant in respect of the employees of the first respondent, in the absence of a written broker agreement having been concluded between the applicant and the second respondent and in the absence of the second respondent having actually rendered broker services;
5. An order interdicting and restraining the first and second respondents:
 - 5.1 from taking any steps that would prevent or hinder the applicant to market its scheme and benefit options and render services to its members and all prospective members who are employees of the first respondent by way of the applicant's own internal consultants or independent brokers appointed by the applicant, should it so wish;
 - 5.2 from holding out that the second respondent is the exclusive broker for the five medical schemes accredited in terms of the collective agreement concluded on 9 September 2015, and that no other brokers or consultants will be allowed to service employees of the first respondent;
 - 5.3 from refusing to accept member application forms and other documents and communications submitted to the first respondent by the applicant, and from refusing to duly process such applications and related documents;
 - 5.4 from insisting that all medical scheme member application forms and other related documents and communications be submitted to the second respondent, as opposed to the first respondent;
 - 5.5 from insisting that payment of broker fees be made by the applicant to the second respondent in the absence of a written broker agreement between the applicant and the second respondent and/or in the absence of the second respondent having actually rendered broker services;
 - 5.6 from approaching members of the applicant and requesting them to execute service notes in favour of the second respondent, in the absence of a written broker agreement between the applicant and the second respondent and/or in the absence of the second respondent having actually rendered broker services to members of the applicant;
6. That the first respondent be ordered to pay the costs of this application;
7. Should any party/person oppose the present application, ordering such party/person to pay the costs of this application jointly and severally with the first respondent;
8. *Alternatively*, to prayers 1 to 7 above:
 - 8.1 that an interim interdict with immediate effect be and is hereby issued in terms of prayer 5 above, pending the final determination of action proceedings and/or arbitration proceedings and/or other proceedings between the applicant and the

first and second respondents, which proceedings shall be instituted or commenced with within 20 days from date of this order;

- 8.2 ordering the first respondent to pay the costs of this application; and
- 8.3 should any party/person oppose the application, ordering such party/person to pay the costs of this application jointly and severally with the first respondent.”

Counter application – Moso

[52] On 7 June 2021 Moso filed its counter application wherein it seeks the following relief:

- “1. That it be declared that the provisions in the agreement between the applicant and the second respondent that limits the area within which the second respondent can render broking services:
 - 1.1 Does not preclude the second respondent from rendering services outside the territorial area defined therein;
 - 1.2 The second respondent is entitled to render brokerage services to the applicant’s members throughout the Republic of South Africa;
2. That the appointment of the second respondent as a broker by the first respondent was:
 - 2.1 The subject of public procurement; and
 - 2.2 lawful;
3. Costs against the applicant.”

Condonation

[53] The delivery of SAMWUMed’s replying affidavit to the COE’s answering affidavit did not coincide with the time periods contained in the order dated 17 February 2022. The replying affidavit ought to have been delivered on 25 February 2022, but was delivered six court days later on 7 March 2022. When it became apparent that SAMWUMed would not be able to finalise and deliver its replying affidavit within the said time period, its attorneys proactively engaged the COE’s attorneys and sought their consent to an extension of the time period. The COE’s attorneys adopted the position that the COE cannot agree to an extension, but the COE did not raise any prejudice if condonation is granted for the late delivery of the replying affidavit.

[54] The relevant facts and grounds for condonation have been set out in SAMWUMed’s replying affidavit, and I am therefore of the view that, seeing as no prejudice has been caused by the six-day delay, the application for condonation be granted.

Common Cause

[55] In the matter all facts as summarized above are not in dispute.

[56] It is also *common cause* that the SLA concluded between the COE and Moso came to an end on 30 June 2022.

Issues between SAMWUMed and COE

[57] The issues to be decided between SAMWUMed and COE are:

- (a) Whether the applicant lacks *locus standi* in that it had derived nothing more than a “privilege” from the collective agreement.
- (b) Whether SAMWUMED is allowed to freely market its products and whether it has been denied this “privilege”.
- (c) Whether the SAMWUMED has met the prerequisites for granting of interdicts.

The main collective agreement

[58] During September 2015 a collective agreement was concluded between the South African Local Government Bargaining Council (“**the Council**”), SALGA, IMATU and SAMWU. The parties agreed that the agreement shall commence of the date of signature and will remain in force until 30 November 2020.

[59] The said collective agreement concluded was endorsed by the Minister in terms of section 32 of the Labour Relation Act, Act 66 of 1995 (“**LRA**”), to the extent that it be binding on all employees of COE.

[60] For purposes of the judgment, I quote the relevant clauses pertaining to my discussion in full below.

[61] In terms of clause 4 of the objects of the collective agreement included the following:

- (a) To establish uniform conditions of service for employees covered by the collective agreement;⁴
- (b) To endeavour to ensure effective and efficient employment relations that will enhance service delivery;⁵
- (c) To promote fair treatment of employees,⁶ and
- (d) To promote and maintain industrial peace.⁷

[62] Clause 9 of the collective agreement refers to employee benefits, specifically medical aid; and membership to medical aid⁸ and of importance in this regard are the following terms agreed upon:

- (a) The Bargaining Council shall annually accredit medical schemes which qualify for employer contributions.⁹
- (b) The employer shall, on behalf of the employee, make contributions to accredited medical schemes.¹⁰
- (c) Scheme members will be afforded a choice on an annual basis before 1 January of each year, to move to a council accredited medical scheme.¹¹
- (d) An employee must belong to an accredited medical scheme to qualify for a medical aid subsidy.¹²
- (e) An employee who elects not to belong to an accredited medical scheme, will not be entitled to a medical aid subsidy.¹³

[63] The collective agreement also made provision for the procedure for selection and accreditation of medical schemes, which procedure is set out in clause 15. The criteria for the recognition of medical schemes, amongst others, are the following:¹⁴

⁴ Clause 4.1.

⁵ Clause 4.3.

⁶ Clause 4.4.

⁷ Clause 4.5.

⁸ Clause 9.1.

⁹ Clause 9.1.1.1.

¹⁰ Clause 9.1.1.2.

¹¹ Clause 9.1.1.4.

¹² Clause 9.1.1.6.

¹³ Clause 9.1.1.7.

¹⁴ Clause 15.2.

- (a) The medical scheme applying for admission to the Council (hereinafter referred to as “applicant scheme”) must be registered in terms of Section 24 (1) of the Medical Schemes Act (MSA), and
- (b) The applicant scheme must meet all the legal requirements as prescribed in the MSA and regulations issued in terms of the MSA and determinations of the Registrar from time to time.

[64] The selection process of an accredited medical scheme for purposes of the collective agreement is clearly set out in clause 15.3 and the following is of importance:

“The Council will undertake the implementation of the above agreed to criteria as follows:

15.3.1.1 Medical schemes presently accredited shall be notified in writing, inviting them to apply for accreditation and shall be advised of the terms of application and of any other rules applicable;¹⁵

15.3.1.2 Medical schemes will be given until 15 August of each Year to submit their applications for accreditation, in compliance with the Council criteria above. The failure to comply with the submission deadlines without substantive motivation shall result in the disqualification of that scheme... .¹⁶

15.3.1.3 The Executive Committee will be responsible for overseeing the process and finalizing the accreditation by 30 September and inform medical schemes of the outcome of the accreditation process as soon as possible thereafter;¹⁷

...

15.3.1.5 Notification of a decision of the Executive Committee regarding accreditation shall be in writing and shall be forwarded at least one month in advance of any freedom of association campaign.”¹⁸

[65] In terms of the collective agreement accredited medical schemes may market their schemes annually between October and November (“**the window period**”) of the year proceeding.¹⁹

¹⁵ Clause 15.3.1.1.

¹⁶ Clause 15.3.1.2.

¹⁷ Clause 15.3.1.3.

¹⁸ Clause 15.3.1.5.

¹⁹ Clause 15.3.2.

[66] As appears from clauses 15.3.2 to 15.3.6 of the collective agreement, scheme members who wish to transfer from one accredited scheme to another, have to do so prior to 1 January of each year.

[67] Clause 15.6 (Code of conduct) of the collective agreement stipulates the following:

- (a) An accredited medical scheme shall at all times present its own scheme and its benefits in a fair and reasonable manner,²⁰
- (b) An accredited medical scheme shall not misrepresent or discredit another accredited medical scheme or its benefits in any way,²¹
- (c) All presentations to members and prospective members shall be based on the benefit structure and contributions levels of that accredited medical scheme that will apply as at 1 January in the following year,²²
- (d) Accredited medical schemes may only present benefits as contained in their approved rules. Scheme representatives may not engage in the sale of any other non-medical scheme product whilst conducting marketing as contemplated in the collective agreement.²³

[68] Clause 15.7 addresses any breach of the Code of Conduct in that any breach of conduct or any terms of the agreement may be reported to the General Secretary of the Council. On receipt of the complaint, the General Secretary shall submit the complaint to an ombudsperson selected from the Council's National Panel of Arbitrators for adjudication.

Question of locus standi of SAMWUMed raised by COE

[69] COE argued that SAMWUMed lacks the necessary legal standing to rely upon the terms of the collective agreement for the relief sought in the application.

[70] In support of its argument counsel on behalf of the COE raised the following points regarding SAMWUMed's *locus standi*:

²⁰ Clause 15.6.1

²¹ Clause 15.6.2

²² Clause 15.6.3

²³ Clause 15.6.4.

- (a) SAMWUMed is not party to the collective agreement and it was not a signatory to it;
- (b) SAMWUMed is not a member of any employee or employer organisation as envisaged in the LRA, and it does not act on behalf of either the employees or the employers falling within the organisations recognised by the collective agreement;
- (c) The collective agreement does not give SAMWUMed a right to enforce its terms against any member of the employer organisation; and
- (d) the COE does not have any obligations and duties contained in the collective agreement dischargeable in favour of SAMWUMed.

[71] The contention was made that SAMWUMed's averments are lacking in order to sustain a cause of action against COE based on contract.

[72] COE further argued that SAMWUMed has not specifically pleaded any term of the agreement giving rise to the COE's obligation towards it; this argument was based on the following:

- (a) SAMWUMed has failed to identify a term of the agreement the COE is alleged to have breached;
- (b) SAMWUMed has failed to plead a term of the agreement entitling it to a specific remedy contained in the collective agreement in the event of any breach of the agreement occurring. Broker services, embarked upon by the COE, have no direct relation to the applicant's privilege to market its services as provided for in the collective agreement. Therefore, there is no co-relation between the actions of the COE to procure broker services, and the alleged breach of the applicant's right to market its services.

[73] The COE contended that it has not breached the terms of the collective agreement, but in fact, has always acted within the confines of the agreement, particularly when marketing of medical aid schemes takes place during window periods.

[74] SAMWUMed placed huge emphasis on the fact that during the postponement application on 16 February 2022, COE stated that it had conceded the "*material*

remedies” sought by SAMWUMed. This was furthermore recorded in a letter by COE’s attorneys dated 29 November 2021, where the following was stated;

“The proposed terms of settlement by our client records the material remedies your client seeks in the notice of motion.”

[75] Furthermore, it argued that the draft order attached to its postponement application, confirmed the material parts of the relief sought by SAMWUMed. This was confirmed in the COE’s founding affidavit in the postponement application dated 11 February 2022.

[76] SAMWUMed argued that the COE seeks to make a 180 degree turn by contending that SAMWUMed has no rights as an accredited medical scheme, but only “a privilege”. The assertion was made that SAMWUMed was granted a “right” in terms of the collective agreement and such “right” should be honoured. It further contended that SAMWUMed has the necessary legal standing in terms of the collective agreement concluded in 2015.

[77] It is evident that the COE has placed SAMWUMed’s *locus standi* in dispute. The test is whether the applicant has a direct personal interest in the suit to be considered “his cause”.²⁴ In *Minister of Safety and Security v Lupacchini and Others*²⁵ two connotations of the expression were aptly identified. It was said that in its primary sense, it refers to the capacity to litigate or that it has the capacity to sue or to be sued.

[78] *Locus standi* is thus an issue which needs to be determined preliminarily in a judicial process.²⁶ In other words, the issue of *locus standi* has to be decided *in limine* before the merits.²⁷ That the parties have the necessary legal standing or *locus standi* must accordingly appear *ex facie* the founding pleadings.

[79] It is trite that our courts will not be unduly technical with regard to *locus standi* as each case should be considered on its own merits. And whilst the issue of standing is always

²⁴ *per* Searle, JP in *Rescue Committee, DRC v Martheze* 1926 CPD 300.

²⁵ [2015] JOL 33825 (FB).

²⁶ *Watt v Sea Plant Products* [1998] (4) All SA 109 (C) at 113-114.

²⁷ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) at [58].

determined in light of the factual and legal context of each case, it is also true that there is no rule of law that allows a court to confer *locus standi* upon a party who otherwise has none, on the ground of expediency or to obviate impractical and undesirable procedures.²⁸

[80] The question of *locus standi* in a sense is procedural, but it is also a matter of substance. It concerns the sufficiency and directness of a person's interest in litigation in order for that person to be accepted as a litigating party. Generically, it is for the party instituting proceedings to allege and prove its *locus standi*. The *onus* of establishing the issue rests on that party. It is thus necessary for a party in all cases to allege in its pleadings facts sufficient to show that it has *locus standi* to bring an action. This applies to all proceedings, whether brought by way of application or summons.²⁹

[81] It is clear from the facts and circumstances of this case that SAMWUMed seeks to perform an act and/or seeks something to be performed or rectified in terms of the collective agreement concluded between COE and its employees.

[82] In order to establish whether SAMWUMed has *locus standi* one has to answer the question as to what the purpose of collective bargaining is. Collective bargaining is a crucial form of social dialogue. It's true nature recognizes "the desirability for joint decision making, joint problem solving and joint responsibility in conducting relations between employers and employees."³⁰ In addition, it is a key method used to regulate the relationship between employers and employees in the workplace and a means to settle disputes through joint decision making. The true value of collective bargaining is that it generally produces peace within the working environment, also to provide a level playing field between employers and employees and furthermore, it preserves the essence of freedom of association.³¹

²⁸ *Gross and Others v Pentz* 1996 (4) SA 617 (A) at 632E-F.

²⁹ *Wilson v Zondi* 1967 (4) SA 713 (N) at 717B.

³⁰ Collective Bargaining and Labour Disputes Resolution; is SADC Meeting the Challenge? Fumane Malebona Khabo. ILO Sub- Regional Office for Southern Africa, Harare: ILO, 2008 (Issue Paper No. 30) https://www.ilo.org/africa/information-resources/publications/WCMS_228800/lang--en/index.htm (accessed 26 June, 2019).

³¹ Freedom of association is "a basic human right with universal scope enabling the enjoyment of other rights, a process with substantive content, and opens the door to participatory actions against forced labour, the protection of children from abuses and responsive measures based on non – discriminatory and equality beneficial to all." *Giving Globalization a Human Face*. International Labour Conference 101st Session, 2012.

[83] The LRA aims *inter alia* to promote orderly collective bargaining and to advance the democratization of the workplace.³² This is in keeping with the right of trade unions, employers and employers’ organisations to bargain collectively as enshrined in section 23(5) of the Constitution of South Africa, 1996.³³

[84] In *Medihelp v Minister of Finance NO*³⁴ the Supreme Court of Appeal said:

“[5] The nub of the appellant's case was pleaded as follows:

‘The defendant, despite the granting by the plaintiff of membership to the affected civil servants (and their surviving spouses) and in breach of its obligations in terms of the Agreement and General Notice, deducted from the monthly subscription payments the total sum of R9 997 256.75 being the subscriptions of the 94 affected civil servants listed in Annexure “MH3” in respect of past subscriptions paid.’

In the result it was alleged that the respondent was indebted to the appellant in the amount of R9 997 256.75, as well as *mora* interest thereon.

[6] In the special plea the respondent pointed out that, on its own pleadings, the appellant was not a party to the Agreement and the General Notice was directed to the affected civil servants. It thus concluded that ‘there being no privity of contract between the Plaintiff and the Defendant, the Plaintiff has no *locus standi* to assert any rights or obligations which attach to an agreement to which it is not a party.’

[7] A person might lack standing to sue or be sued in either of two circumstances. The first is where the person is in law not capable of suing or being sued, such as an unassisted minor or a person suffering from a mental disorder. The second is where the person

Report III (Part 1B). ILO: Geneva
https://www.ilo.org/wcmsp5/groups/public/---ednorm/---/wcms_174846.pdf (accessed 13 June 2019).

³² Section 1 of the LRA states:

“The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are—

(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;

...”.

³³ Section 23(5) of the Constitution states:

“Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).”

³⁴ [2020] ZASCA 29.

indeed has such capacity, but has insufficient interest in the proceedings. See *Lupacchini NO and Another v Minister of Safety and Security* [2010] ZASCA 108; [2011] 2 All SA 138 (SCA); 2010 (6) SA 457 (SCA) para 13.

- [8] In respect of the latter circumstance the general rule is that a party claiming relief in respect of any matter must establish a direct interest in that matter. A direct interest is one that is not academic, abstract or hypothetical. An interest which all citizens have, would generally be too remote to found standing. An actual and existing interest in the matter is required. See *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* [1988] 2 All SA 379 (A); 1988 (3) SA 369 (A) at 388B-H and *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 534B.
- [9] Standing is thus determined without reference to the merits or demerits of the claim in question. A contract or administrative decision may, for instance, patently be invalid, but a party may have insufficient interest in the matter to rely thereon for relief. A finding that a party has no standing to sue or be sued generally brings an end to the action or defence. It follows that it is not correct to find a lack of *locus standi* where a party is of a class of persons that may in principle obtain the relief claimed, but fails to plead a cause of action in law.
- [10] What the special plea raised, was that the appellant's alleged right to receive payment from the respondent was solely based on the Agreement and the General Notice. But, on its own showing, the appellant was not a party to the Agreement and the undertaking contained in the General Notice was not directed to it. In terms of these documents the respondent was bound to the affected civil servants and not to the appellant."
- [85] Significantly, the Supreme Court of Appeal noted that the Minister's special plea of *locus standi* was based on an Agreement and General Notice, it found that the Agreement and undertaking contained in the General Notice was not directed to Medihelp. Van der Merwe AJ stated that in terms of the Agreement and the General Notice the Minister was bound to the affected civil servants and not Medihelp.

[86] Additionally, the doctrine of privity of contract³⁵ should be taken into consideration in this matter. In *Capital Alliance Life Ltd v Simonsen*,³⁶ the court held that the doctrine of privity of contract states that parties who have no connection to a contract cannot sue or be sued on the contract. Furthermore, in *Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction & Others*³⁷ the court found that in the absence of privity of contract between two parties, the applicant did not have the necessary *locus standi* to demand specific performance of alleged contractual obligations from the respondent.

[87] In *Solidarity v South African Rugby Union and Others*³⁸ the following was said:

“A second preliminary point raised by the respondents challenged the applicant's *locus standi* to bring the application.

The *locus standi* of a trade union is clearly stated in section 200 of the Labour Relations Act. It enables a union to act in its own interest in any dispute to which any of its members is a party. The applicant failed to establish that the employees referred to in the application were its members. It therefore failed to establish that it had *locus standi*. The second point *in limine* was therefore upheld.”

[88] In accordance with the provisions of section 23 of the LRA, collective agreements are binding on the parties. The purpose of section 24 of the LRA is to resolve disputes where a party to an agreement is alleged to have been in breach of the provisions of that agreement by failing to interpret or apply its terms either correctly or at all.³⁹ The principles applicable to the resolution of such disputes are trite as restated in *Western Cape Department of Health v MEC Van Wyk & Others*.⁴⁰ These are that:

³⁵ See Christie *The Law of Contract* 4ed at 298:

“The basic idea of contract being that people must be bound by the contracts they make with each other; it would obviously be ridiculous if total strangers could sue or be sued on contracts with which they were in no way connected. The doctrine which prevents this ridiculous situation arising is usually known as the doctrine of privity of contract. Parties who are not privy to a contract cannot sue or be sued on it.”

³⁶ [2005] 8 BPLR 640 (N).

³⁷ [2011] JOL 27763 (GSJ).

³⁸ [2019] JOL 41780 (LC).

³⁹ *Public Servants Associations on behalf of Liebenberg v Department of Defence & Others* (2013) 34 ILJ 1769 (LC), at paragraph 2.

⁴⁰ (2014) 35 ILJ 3078 (LAC) at para 22

- “i. When interpreting a collective agreement, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract, and he/she is therefore required to consider the aim, purpose and all the terms of the collective agreement;
- ii. The primary objects of the LRA are better served by an approach which is practical to the interpretation of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.
- iii. A collective agreement is a written memorandum which is meant to reflect the terms and conditions to which the parties have agreed at the time that they concluded the agreement.
- iv. The courts and arbitrators must therefore strive to give effect to that intention, and when tasked with an interpretation of an agreement, must give to the words used by the parties their plain, ordinary and popular meaning if there is no ambiguity. This approach must take into account that it is not for the Courts or arbitrators to make a contract for the parties, other than the one they in fact made;⁴¹
- ...
- vi. Collective agreements are generally concluded following upon protracted negotiations, and it is expected of the parties to those agreements to remain bound by their provisions. It therefore follows that such agreements cannot be amended unilaterally.”⁴²

[89] It is incumbent on the basis of the *stare decisis* that this Court to be guided by the Supreme Court of Appeal and the LRA and I am unable to deviate from the principles laid down. The primacy of the collective agreement concluded between COE and its employees cannot be ignored in terms of the LRA.⁴³ The question of *locus standi* must be interpreted in terms of the terms of the collective agreement. The collective agreement will be applicable to all issues between the employer (COE) and its employees.

⁴¹ See *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012) 2 All SA 262 (SCA).

⁴² *Dioma and Another v Mthukwane NO and Others* [2020] ZALCJHB 138 at [36].

⁴³ In *National Bargaining Council for the Road Freight Industry and Another v Carlbank Mining Contracts (Pty) Ltd and Another* (2012) 33 ILJ 1808 (LAC) the Court held that section 199 of the LRA must be read together with section 23(3) of the LRA and that the purpose of the two provisions together aim at “advancing a primary object of the LRA, namely the promotion of collective bargaining at sectoral level and giving primacy to collective agreements above individual contracts of employment.” Section 199 provides, *inter alia*, in essence, that “contracts of employment may not disregard or waive collective agreements”.

[90] In the present matter, SAMWUMed may have a direct interest in this matter (given their claim that their right to freely market their scheme has been impacted), but attempting to enforce these interests through the collective agreement, which they were not party to, is misplaced.

[91] I am of the view that SAMWUMed was not a party to the collective agreement between COE and its employees. The collective agreement clearly states the obligations and rights pertaining to medical scheme benefits between COE and its employees which are as follows:

1. The Council shall annually accredit medical schemes which qualify for employer contributions;
2. The employer shall on behalf of the employee make contributions to the accredited medical scheme;
3. An employer who elects not to belong to an accredited medical scheme will not be entitled to the medical aid subsidy.

[92] It is crystal clear that SAMWUMed was not a party to the said agreement. This is further strengthened by Clause 15 of the collective agreement, which set out the criteria and requirements in selecting accredited medical schemes. It is important to note that the Executive Committee is responsible for overseeing the process and finalizing the accreditation by 30 September of each year and will furthermore inform the medical schemes of the outcome of the accreditation process. [Emphasis]

[93] Furthermore, any breach of the Code of Conduct or any terms of the collective agreement may be reported to the General Secretary (“GS”) of the Council and the GS of the Council shall submit the complaint to an ombudsperson selected from the Council’s National Panel of Arbitrators.

[94] Thus, when a medical scheme is accredited in terms of the collective agreement, the choice of membership vests in the employee. The chosen accredited medical scheme and the member/employee concludes the terms and conditions of the members’ benefits. Therefore, SAMWUMed accepts a mandate from the employee and as such, act on behalf of the employee. In return, the COE pay a subsidised amount, as per the collective agreement, on behalf of its employee to the medical scheme, appointed by

the employee. It is evident that SAMWUMed has a financial interest which rests on the employees' decision to appoint it as his/her medical scheme. The mere fact that SAMWUMed has a financial interest in its obligations towards the employee, clearly points to an indirect interest.

[95] The position would have been totally different if SALGA, IMATU or SAMWU launched the said application. The legislative provision which deals with a Trade Union's *locus standi* to act in its own interest is contained in section 200 of the LRA and expressly provides that a registered Trade Union may act in its own interest in any dispute to which any of its members is a party.⁴⁴

[96] In *National Education Health and Allied Workers Union obo Adeyoka v Central University of Technology: Free State and Others*⁴⁵ it was held:

“It is therefore clear that a registered trade union or registered employers' organization is only entitled to be a party to any Court proceedings if one or more of its members is a party to those proceedings. This section does not purport to vest the registered trade union with the authority to act on behalf of its members in any proceedings in any Court.”

[97] All boils down to the fact that SAMWUMed was not a party to the collective agreement and as such, has no direct or substantial interest in the matter and therefore has no *locus standi*.

[98] On this basis the application stands to be dismissed.

Has SAMWUMed been denied its right to freely market its products and benefits to employees of COE.

[99] SAMWUMed does not dispute that it was able to exercise the rights afforded to it pursuant to its accreditation in terms of the collective agreement. Counsel for SAMWUMed acknowledged that it was allowed to freely market the scheme and the

⁴⁴ “(1)A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party
(a) in its own interest;
(b) on behalf of any of its members;
(c) in the interest of any or its members.

(2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this act if one or more of its members is a party to those proceedings.”

⁴⁵ (2009) 30 ILJ 1261 (O) at paragraph [7].

benefit options to the employees of COE during the window period. It was furthermore able to render the ongoing services required by its members.

[100] Thus, SAMWUMed was allowed to freely market the scheme and its benefit options therefore the COE was not in breach of the procedures contained in the collective agreement.

Issues between SAMWUMed and Moso

[101] The issues to be decided between SAMWUMed and Moso are:

1. Whether Moso's appointment by the COE was the subject of lawful public procurement;
2. Whether the written broker agreement allows Moso to perform broker services to SAMWUMed's members outside the defined geographical area stipulated in the broker agreement, and whether the broker agreement can circumscribe the territory in which a broker may render broking services;
3. Whether SAMWUMed's conduct of "broker noting" members through its own internal consultants, is unlawful and precludes the granting of relief;
4. Whether a case for an interdict has been made out by the applicant.

Legality of the SLA concluded between COE and Moso

[102] Moso contends that its appointment by the COE was the subject of public procurement, and that it was lawful.

[103] However, during argument Moso indicated that the SLA ends on 30 June 2022 which renders the relief sought in prayer 2 of the counter claim to be moot.

[104] Therefore, Moso did not persist with the said relief and on that basis, it is unnecessary for me to consider this issue any further.

Broker agreement between Moso and SAMWUMED and the Territorial Clause The broker agreement concluded in April 2019

[105] SAMWUMed argued that in terms of the broker agreement, Moso is entitled to render broker services to the members of SAMWUMed in the City of Johannesburg's

territory, but not in the COE's territory. Furthermore, in terms of clause 6 of the broker agreement, Moso is not permitted to render broker services to members of SAMWUMed outside of the "Territory" agreed upon with SAMWUMed, save with the prior written consent of SAMWUMed.

[106] Counsel on behalf of SAMWUMed contended that the conduct of Moso is not only in breach of the broker agreement, but it is also in breach of the MSA. The MSA provides that no person may be compensated by a medical scheme for acting as a broker unless such person enters into a prior written agreement with the medical scheme concerned.

[107] SAMWUMed further alleged there is no provision in the MSA or the Regulations which restricts the contractual freedom of a medical scheme to agree to a contractual provision in terms of which a broker is appointed within a defined geographical area only. It asserted that it is important that such right be honoured and upheld, since medical schemes are guided by specific needs, demographics and practices in different areas. By way of example, a broker cannot be appointed to service members in a geographical area where the broker has no or insufficient resources, support or infrastructure. That would result in sub-standard services being rendered to the members. It is incumbent upon the scheme to regulate the appointment of brokers and to ensure that brokers appointed are capable of rendering appropriate services in the areas concerned.

[108] SAMWUMed argued that the relief in the counter application ought to be dismissed.

[109] Moso on the other hand, argued that the existence of a broker agreement between SAMWUMed and Moso, for purposes of payment of commission, is a statutory requirement in terms of Section 65 of the MSA read with Regulation (28). It further contended that the actual argument of SAMWUMed is that such agreement only applies to the territory of the Greater Johannesburg region and does not apply to Ekurhuleni.

[110] Moso contended that, despite the fact that its appointment by SAMWUMed in terms of the written broker agreement is to perform broker services within a defined

geographical location, it does not preclude Moso from rendering broker services to SAMWUMed’s members outside such area, throughout the Republic of South Africa.

[111] Counsel on behalf of Moso argued that whilst the alleged principle that SAMWUMed purports to uphold and fight for is employee’s freedom of choice, the paradox lies in that its attempts to circumscribe territory is antithetical to that principle and results in it actually stifling their very ability to exercise free choice. This illustrates its stance to be entirely self-serving. It is only content to uphold employee’s freedom of choice of broker when it is the recipient of that benefit.

[112] Moso argued that the principle of legality does not empower SAMWUMed to prescribe territory — the empowering provisions do not allow for that, and the general scheme of our law gives clients free choice of broker, which a scheme cannot override, and the attempts to do so are unlawful, such that the “territory” provision cannot be enforced, and prayer 1 of counter application must succeed.

[113] The MSA in section 1 of Chapter 1 provides the following definitions:

“broker services means-

- (a) the provision of service or advice in respect of the introduction or admission of members to a medical scheme; or
- (b) the ongoing provision of service or advice in respect of access to, or benefits or services offered a medical scheme;...”

and

“broker means a person whose business, or part thereof, entails providing broker services, but does not include—

- (i) an employer or employer representative who provides service or advice exclusively to the employees of that employer;
- (ii) a trade union or trade union representative who provides service or advice exclusively to members of that trade union; or

- (iii) a person who provides service or advice exclusively for the purposes of performing his or her normal functions as a trustee, principal officer, employee or administrator of a medical scheme,

unless a person referred to in subparagraph (i), (ii) or (iii) elects to be accredited as a broker, or actively markets or canvasses for membership of a medical scheme”.

[114] Section 65(6) of the MSA provides that a broker may not be directly or indirectly compensated for providing broker services by any person other than a medical scheme; a member or prospective member, or the employer of such member or prospective member, in respect of whom such broker services are provided; or a broker employing such a broker.

[115] Regulation 28 (1) and (6)-(9) under the MSA stipulates the payment and compensation of brokers as follows:

“(1) No person may be compensated by a medical scheme in terms of section 65 for acting as a broker unless such person enters into a prior written agreement with the medical scheme concerned.

...

(6) The ongoing payment by a medical scheme to a broker in terms of this regulation is conditional upon the broker—

- (a) continuing to meet service levels agreed to between the broker and the medical scheme in terms of the written agreement between them; and
 - (b) receiving no other direct or indirect compensation in respect of broker services from any source, other than a possible direct payment to the broker of a negotiated professional fee from the member himself or herself (or the relevant employer, in the case of an employer group).
- (7) A medical scheme shall immediately discontinue payment to a broker in respect of services rendered to a particular member if the medical scheme receives notice from that

member (or the relevant employer, in the case of an employer group), that the member or employer no longer requires the services of that broker.

- (8) A medical scheme may not compensate more than one broker at any time for broker services provided to a particular member.
- (9) Any person who has paid a broker compensation where there has been a material misrepresentation, or where the payment is made consequent to unlawful conduct by the broker, is entitled to the full return of all the money paid in consequence of such material misrepresentation or unlawful conduct.”

[116] It is not in dispute that a broker agreement was concluded between SAMWUMed and Moso during April 2015 and in terms of Item 5 of the said broker agreement it was stated that the agreement commenced on 13 November 2018 and continues until cancelled by either party with 30 days’ written termination notice. Alternatively, the broker agreement can be terminated for reasons of breach as contemplated in clause 10 of the agreement.

[117] It is furthermore not in dispute that in terms of clause 1.2, “The Scheme” means SAMWUMed and “Territory” is defined to mean:

“... the geographical location or employer group in respect of which the Broker is authorised by the Scheme, in the Scheme’s sole and absolute discretion to market the Services and to obtain remuneration in respect thereof, the particulars of which Territory are further set forth in annexure ‘A’ hereto.”

[118] In terms of annexure “A” to the broker agreement, the territory does not include the territory of the COE.

[119] In fact, the territory is described as:

“Greater Johannesburg Branch — Metropolitan
City of Johannesburg and its municipal entities namely:

- City Parks and Zoo
- City Power

- Joburg Roads Agency
- Joburg Property Company
- Pikitup
- Metrobus Company
- Joburg Water”

[120] The question in this matter is whether a medical scheme (which SAMWUMed qualifies as) can, in the mandatory written agreement between it and a broker circumscribe the territory within which a broker may offer its services.

[121] The question has been the subject of prior disputes before the Council for Medical Schemes (“CMS”), one of which was in the matter of LA Health Medical Scheme and Moso.⁴⁶ The dispute arose when LA Health Medical Scheme refused to pay commission to Moso for broker noting on behalf of Ekurhuleni because it was not authorised to render services in the territory.

[122] The dispute was adjudicated upon by the CMS in April 2021, and the CMS ruled in favour of Moso — that it was allowed to render services in Ekurhuleni and that LA Health Medical Scheme could not circumscribe territory. The CMS held there that a medical scheme may not circumscribe territory in terms of an agreement as the Medical Schemes Act and its Regulations do not empower such a course.

[123] The following paragraphs of the decision are of importance in this matter:

“23. Although the scheme insists that it has the sole and absolute discretion to prescribe the geographical location or employer group in respect of which brokers it operates, it is unclear where the scheme derives this power as this discretion is not found anywhere in the act of the regulations...

24. The scheme contends that it is contractually bound to adhere to SALGBC’s code of conduct for marketing of accredited medical schemes and that its failure to do so, could result in its loss of SALGBC accreditation. While the registrar accepts that medical schemes are entitled to enter into various agreements pursuant to the business of a medical scheme, it is important to note that the scheme cannot contract or bind itself to

⁴⁶ See Complaint Ruling dated 1 April 2021 and the erratum thereto dated 6 April 2021.

the extent that creates conflict with the governing legislation. As stipulated in section 2 of the act, the provisions of this act shall prevail where ever there is any conflict between this act and the provisions of any other law (save for the Constitution in relation to matters dealt with in the act. Therefore, any powers parameters, rights and obligations exercise in any manner is regulated by the act, must be done so within the confines of the act and its regulations, failing which they become unlawful.

25. The scheme rightfully accepts that members and/or employees are free to appoint a broker of their choice, and that its obligation to pay the broker commission on behalf of the member subject to the contractual terms agreed upon with the broker.
26. The scheme also argues that CoE has no right to act as agent on behalf of its employees by appointing and imposing a broker upon employee without their consent. This implies that a broker cannot be imposed on a member once they have made a decision to be serviced by a broker of their own choice. In our view, this same principle should be applied to the scheme as well.
27. In conclusion having considered all the evidence before us, the above stated provisions of the act and regulations, as well as the terms of the written agreement between the Scheme and the Complainant, it is clear that the scheme has no legal authority to prescribe the geographical location and/or employer group within which a broker may render services nor does it have an entitlement to preclude a broker from rendering services to members perceived to all outside a prescribed geographical location and/or employer group. It is therefore our ruling that the Scheme's decision to dishonour the Complainant's broker appointments is unlawful and unjustified."

[124] An attempt to limit territory is one that very clearly infringes upon the right of free choice to a broker.⁴⁷

[125] The conduct of SAMWUMed in limiting territory also amounts to a breach of the provisions of the Financial Advisory and Intermediary Services Act 37 of 2002 ("**FAIS Act**") and the Code of Conduct promulgated in terms of that Act.

⁴⁷ See *Hlela and Others v SA Taxi Securitisation (Pty) Ltd and Others* [2014] ZASCA 112 at paragraphs [18]-[20] and [31].

[126] The MSC and the regulations requires that brokers must be accredited, pay the annual fee, they must be well-informed (about the products in question), that they must render services and that they must maintain an agreed service standard in the course of doing so. Provided that they cover those requisites, they are entitled to be paid commission.

[127] This is to be considered together with the principle of free choice of broker (per, *inter alia*, the authorities above and the FAIS Act and Code of Conduct to it).

[128] Be that as it may, the COE was undoubtedly entitled to appoint or replace a broker on behalf of its employees. The COE is an organ of state and is entitled to procure broker services.

[129] Furthermore, the COE is responsible for ensuring that the terms of the collective agreement are adhered to and to protect the interest of its employees. Therefore, the appointment of Moso to enhance service delivery for employees who contribute towards medical aid schemes is within the COE's purview and qualifies as acting in the best interests of its employees which is the purpose of the collective agreement.

[130] However, had SAMWUMed been doubtful as to whether Moso was lawfully appointed, it could have lodged a complaint with the Council. Furthermore, the COE's decision to procure broker services qualifies as an administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"). As such, SAMWUMed could have sought to challenge the COE's decision and have it reviewed and set aside in terms of PAJA.

Prerequisites for granting of an interdict

[131] An applicant seeking a final interdict has to establish on a balance of probabilities that the following requirements have been met:

1. A clear right,
2. An injury actually committed or reasonably apprehended, and
3. The absence of a similar or adequate remedy.

[132] Firstly, I have found that SAMWUMed was not a party to the collective agreement concluded in 2015 between COE and its employees. Therefore, SAMWUMed has no

locus standi in the application before me. Thus, SAMWUMed has not demonstrated a clear right giving it power to enforce the terms of the collective agreement against the COE and any signatory party thereto.

[133] Secondly, SAMWUMed's application for interdictory relief is premised on the infringement of its purported right to market its products, and that the SLA does not prescribe for Moso to undertake marketing services of medical schemes. On its own version, SAMWUMed conceded that they were provided the opportunity to market their medical scheme freely during the said window period as prescribed in the collective agreement. The averments regarding the apprehension of injury or actual injury suffered by SAMWUMed has not been demonstrated on the papers. In fact, it was allowed to submit membership forms of members to COE, except that the said applications had to be submitted through Moso in terms of the SLA concluded.

[134] It is evident that the appointment of Moso had no external effect of depriving SAMWUMed of its rights to market its scheme to the employees of the COE.

[135] Furthermore, SAMWUMed does have alternative remedies if it was of the view that the COE and Moso infringed on its rights to market their scheme. These remedies are the following:

(a) Section 47 of the MSA, which provides as follows:

“47. Complaints. —

- (1) The Registrar shall, where a written complaint in relation to any matter provided for in this Act has been lodged with the Council, furnish the party complained against with full particulars of the complaint and request such party to furnish the Registrar with his or her written comments thereon within 30 days or such further period as the Registrar may allow.
- (2) The Registrar shall, as soon as possible after receipt of any comments furnished to him or her as contemplated in subsection (1) either resolve the matter or submit the complaint together with such comments, if any, to the Council, and the Council shall thereupon take all such steps as it may deem necessary to resolve the complaint.”

- (b) In terms of the collective agreement clause 15.7.1 any breach of the Code of Conduct or any of the terms of this agreement may be reported to the General Secretary of the Council. The General Secretary shall submit the complaint to an ombudsperson selected from the Council's National Panel of Arbitrators.
- (c) Furthermore, had SAMWUMed been adversely affected by the appointment of Moso as service provider to the COE and its employees, it could have challenged the appointment of Moso in terms of PAJA, which it failed to do.

[136] Insofar as the claim for the interdictory relief against COE and Moso goes, in my view, SAMWUMed failed to establish that the requirements for interdictory relief have been met.

[137] The counter application by Moso is inextricably linked to the application of SAMWUMed. Once it is found that SAMWUMed has no legal standing to launch the application it follows that there is no need to deal with the counter application.

Cost

[138] It remains to deal with the costs of this application. The SAMWUMed, as the unsuccessful party, must bear the costs of the application. Much was made by counsel for the applicant of the council's change in stance regarding the discussions pertaining to an order being made during February 2022 by consent between all parties. SAMWUMed argued that COE and Moso's belated entry into the fray justifies a punitive cost order.

[139] The contention is not without merit as it resulted in an extended paper trail including, as I have alluded to, an application for condonation. It however, did not have any bearing on the hearing of the matter. In the exercise of my discretion I have decided, in fairness to the applicant, that some allowance in respect of the extra costs resulting from the council's belated entry into the proceedings, should be made.

[140] The most practical and just manner of achieving this, in my view, is to limit the applicant's liability for the counsel's costs to the costs incurred in respect of the hearing of this matter, as is reflected in the order I propose to make.

Order

[141] In the premises of the above, the following order is made:

1. Condonation for the late filing of the replying affidavit by the applicant is granted.
2. The application is dismissed.
3. The first and second respondent's costs of the application, shall be limited to the hearing of the matter.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 25 August 2022.

DATE OF HEARING: 9 JUNE 2022

DATE JUDGMENT DELIVERED: 25 AUGUST 2022

APPEARANCES:

Attorney for the Applicant: Malatj & Co Attorneys
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Attorney for the first Respondent: BM Kolisi Attorney
Counsel for the first Respondent: Mr K Mnyandu

Attorney for the second Respondent: Wadee Attorneys
Counsel for the second Respondent: Mr Y Alli