



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

CASE NO: 2022/015979

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

20 September 2022

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In the *ex parte* application of:

THE REGISTRAR OF MEDICAL SCHEMES

Applicant

and

HEALTH SQUARED MEDICAL SCHEME

Respondent

In re:

HEALTH SQUARED MEDICAL SCHEME

Applicant

and

THE REGISTRAR OF MEDICAL SCHEMES

First Respondent

THE COUNCIL FOR MEDICAL SCHEMES

Second Respondent

SOUTH AFRICAN NEPHROLOGY SOCIETY

Third Respondent

CHRISTO LUKAS MARX

Fourth Respondent

ELVIRA REGINA GRUMMET

Fifth Respondent

JUDGMENT

CRUTCHFIELD J:

[1] On 8 September 2022, I granted an interim order for the appointment of a curator to the respondent, Health Squared Medical Scheme ('the Scheme'), pursuant to an application for such appointment delivered by the applicants, The Registrar of Medical Schemes and The Council of Medical Schemes (referred to jointly as 'the Registrar'), on 1 September 2022 ('the curatorship application').

[2] The Registrar's primary objective in bringing the curatorship application was to procure the migration of the Scheme's members to alternate medical aid schemes on the best possible terms.

[3] The Registrar brought the curatorship application against the backdrop of an application launched urgently by the Scheme for leave to apply for the winding up of the Scheme's business ('the leave application') and ancillary relief, in terms of s 51(2) of the Medical Schemes Act, 131 of 1998 ('the MSA'), set down for hearing during the week of 30 August 2022.

[4] The first and second respondents in the leave application, being The Registrar of Medical Schemes and The Council for Medical Schemes ('the Council') respectively, did not oppose the leave application at the hearing of that application.

[5] On 30 August 2022, I granted the South African Nephrology Society and two additional parties leave to intervene in the leave application as the third, fourth and fifth respondents respectively.

[6] On 2 September 2022, I granted an order in terms agreed upon by the Scheme and the intervening parties, ('the leave order'). The Registrar did not oppose the granting of the leave order.

[7] In the light of the provisions of the leave order as regards members of the Scheme experiencing 'grave life-threatening risks', the leave order provided that any appointment of a curator to the Scheme, be it provisional or final, will not serve to overrule, curtail or diminish any of the rights of the class of patients suffering 'grave life-threatening risks', referred to in the resolution dated 31 August 2022 taken by the Board of the Scheme and attached to the leave order.

[8] The Scheme announced on 18 August 2022 that it intended applying for its voluntary winding-up on 1 September 2022, and that claims of members submitted after 31 August 2022, would not be honoured by the Scheme ('the announcement'). The Scheme launched the leave application by way of urgency on 18 August 2022, setting the leave application down for hearing on 30 August 2022.

[9] The announcement effectively afforded members of the Scheme less than two weeks' notice of the impending termination of their medical aid benefits, obviously insufficient time in which to procure replacement medical benefits from alternate medical aid providers. As a result, the Scheme's announcement, particularly the timing thereof, served to prejudice significantly the Scheme's members, exposing them inter alia to delays and waiting periods in the event that they were able to obtain substitute medical aid benefits.

[10] One of the issues raised by the Scheme in opposing the curatorship application was that the alleged urgency and the lateness with which the Registrar launched it, served to deny the Scheme its right of *audi alteram partem*.

[11] The parties came before me on Friday, 2 September 2022, at which time the Scheme had delivered an affidavit requesting further time, some three days, in which to file an answering affidavit. The Registrar opposed the postponement of the curatorship application and delivered a replying affidavit. I heard counsel for the Scheme and the Registrar in respect of the curatorship application, the postponement thereof and the leave order.

[12] I reserved a decision on the outcome of the curatorship application and the Scheme's request for further time to deal with it and gave the parties leave to deliver such heads of argument and authorities as they wished to.

[13] A postponement of the curatorship application would have resulted in it not being determined until the week of 20 September 2022, as the Registrar would have required an opportunity to reply to the Scheme's answering affidavit and additional heads of argument would have been required of the parties.

[14] The issue of significant concern to me was the vulnerable position of the members and beneficiaries under the Scheme, a position caused by the draconian conduct of the Scheme in affording the members extremely limited notice of the termination of their medical benefits and not advising the members timeously of the perilous state of the Scheme's financial position. The inadequate notice by the Scheme to the Registrar resulted in the Registrar struggling to assist members to arrange their migration to alternate medical aid schemes.

[15] Ultimately the reason for the interim order appointing a curator was an attempt to protect the position of the beneficiaries to the extent possible in the prevailing circumstances.

[16] The rights of the Scheme's members to such protections as should result from the granting of the interim curatorship application, would not withstand a delay until 20 September 2022, as a result of which I declined to postpone the curatorship application and granted the interim order. The protection of the beneficiary's interests,' in the light of the sudden termination of their medical benefits by the Scheme, could not wait until 20 September 2022.

[17] Whilst the MSA permits the Registrar to bring the curatorship application *ex parte* as the Registrar did, I heard counsel for the Scheme and had regard to the Registrar and the Scheme's affidavits and heads of argument that served before me.

[18] In considering the Scheme's argument that it was deprived of its right to *audi alteram partem*, much of that relied upon by the Registrar in the curatorship application was a repetition of allegations already made before this Court in the Registrar's answering affidavit in the leave application, to which the Scheme replied. In addition, the Scheme filed heads of argument in the curatorship application.

[19] In so far as the Scheme complained that the Registrar's counsel made incorrect statements from the Bar, regrettably that did occur but was acknowledged by the Registrar's counsel and the Scheme's counsel had an opportunity to deal with the impugned statements. I did not place reliance upon the discredited statements.

[20] The leave order permitted the Scheme to apply to the High Court for the winding-up of the Scheme's business as contemplated in s 51(5)(e) and 53 of the MSA, with notice to such parties required to be notified in terms of the Companies Act, 61 of 1973,

as well as the first respondent, the Registrar of Medical Schemes, who will receive at least 15 days' notice of the winding-up application, which application shall not be enrolled for hearing before 27 September 2022.

[21] The grounds for the leave application were twofold, firstly, that the Scheme was not in a sound financial condition, that its financial condition was deteriorating rapidly, and, secondly, that it was in the best interests of the relevant stakeholders that the Scheme be permitted to apply for its winding up.

[22] Whilst the Registrar initially sought permission to bring the winding-up application in terms of s 51(1) read with s 53 of the MSA, the Registrar did not persist therewith, instead electing to bring the curatorship application.

[23] The Registrar, in the application for curatorship, stated *inter alia* that "a rule *nisi* is sought in this *ex parte* application only in the event that the main application for leave to wind up the Scheme is not granted or if the main application is postponed for any reason." At the hearing on 2 September 2022, the Registrar moved away from this position, no doubt because there was no opposition to the leave application and because the Scheme and the intervening parties agreed on the terms of the leave order.

[24] The Registrar applied in terms of s 56 of the MSA and s 5 of the Financial Institutions Act, 28 of 2001 ('FIA'), for the appointment of a curator to take control of and manage the Scheme. The grounds upon which the Registrar placed reliance were common cause between the parties, namely; that the Scheme was in an unsound financial position that was fast deteriorating, and that the Scheme's business was not able to be saved. Furthermore, that the Scheme was unable to comply with the statutory minimum solvency ratio requirements of s 35(1) of the MSA read with regulation 29 of the General Regulations pursuant to the MSA.

[25] Section 56 of the MSA provides that notwithstanding the provisions of s 53 (in respect of a winding up), the Registrar may apply for the appointment of a curator to take control of and to manage the business of the Scheme, if he / she is of the opinion that it is in the interests of the beneficiaries of the Scheme to do so if the Scheme is not in a sound financial condition.

[26] The test under s 56(1) of the MSA, the subjective opinion of the Registrar that a curator should be appointed to a scheme, is to be based on grounds that bear objective scrutiny.

[27] Section 5 of the FIA provides that a court may grant an application for the appointment of a curator if it would be desirable and in the interests of the beneficiaries to do so and on good cause shown.

[28] Thus, a Court must be satisfied on the basis of the evidence placed before it that it is desirable to appoint a curator. Something is desirable if it 'is "worth having, or wishing for". The Court must assess whether curatorship is required in order to address identified problems in the business of the financial institution ... it must determine whether appointing a curator will address those problems and have beneficial consequences for investors. It must also consider whether there are preferable alternatives to resolve the problems. Ultimately what will constitute good cause in any particular case will depend on the facts of that case.'¹

[29] Provided that the Court is satisfied that the Registrar's concerns are legitimate and that the appointment of a curator will assist in resolving those concerns, it will ordinarily be appropriate to grant the appointment of the curator.²

¹ *Executive Officer FSP v Dynamic Wealth Limited & Others* 2012 (1) SA 453 (SCA) para [4] ('*Dynamic Wealth*').

² *Dynamic Wealth id* para [6].

[30] It will become apparent hereunder that the Registrar's concerns, in my view, are legitimate and the appointment of a curator will assist in resolving them.

[31] The interests of the beneficiaries are of critical or 'paramount' importance.³

[32] The Registrar pointed to *Dynamic Wealth*⁴ to the effect that the inability or unwillingness of an institution to comply with the Registrar's requirements applicable to the protection of funds is a reason for the appointment of a curator.

[33] The failure of the Scheme to take the appropriate and necessary steps to rectify the minimum solvency level and to inform its members and the Regulator of the Scheme's financial position and impending winding-up timeously, such that they were able to procure alternate medical aid cover without penalties, would fall within the position stated in *Dynamic Wealth* and are an indication of the Scheme's trustees' failure to meet their fiduciary obligations to the Scheme's beneficiaries.⁵

[34] Whilst there was no argument that the Scheme's financial position could be saved by the appointment of a curator, the terms of the leave order resulted in a delay between the date of the granting of the leave order and the envisaged granting of the winding up application and appointment of a trustee to the Scheme. The delay will afford an interim independent curator an opportunity to ensure sound governance of the Scheme in the interim period, investigate the affairs of the Scheme that led to its demise, understand the reasons for the Scheme's failure to achieve and maintain the statutorily prescribed solvency ratio and report to the Registrar on its findings.

³ *Barnard & Others v Registrar of Medical Schemes* 2015 (3) SA 204 (SCA) at paras [12] and [47] ('Barnard').

⁴ *Dynamic Wealth* note 1 above.

⁵ Ss 57(6)(a) and 57(6)(b) of the MSA.

[35] The above-mentioned are legitimate concerns, as is the pressing need to migrate beneficiaries to alternate medical aid schemes on the best terms possible. There can be no doubt that that is a legitimate concern on the part of the Registrar.

[36] The aforementioned serves the interests of the members and beneficiaries in that they, together with the service providers to the Scheme, and the Registrar have a right to receive information and to be informed why the Scheme is to be wound up, why they were afforded such limited notice of the termination of their medical benefits and to enable the migration of the beneficiaries to alternate medical schemes.

[37] That right to receive information includes, in my view, the right to receive information from a neutral source such as the Regulator and not only from the Scheme and the trustees themselves.

[38] Timely notice to members of the probable impending winding-up would have enabled those members to secure alternate medical cover at an appropriately early time and would have afforded the Registrar a meaningful opportunity to assist them.

[39] The above mentioned reasons assume greater importance when considered within the context that the trustees of the Scheme must have known from January 2022, if not earlier, that the Scheme's financial position was precarious. Despite that knowledge on the part of the trustees, the notice to the beneficiaries was draconian in its timing and consequences. The statutory requirements⁶ of desirability, the interests of the beneficiaries and good cause are all met by the interim appointment of a curator.

[40] In the circumstances, I considered it appropriate that the Regulator take such steps as are available to procure the transfer of members of the Scheme to other

⁶ Section 5 FIA.

medical aids and that an interim curator be appointed in order to achieve such objective and to report to the Regulator on the reasons for the failure of the Scheme.

[41] Assuming the appointment of a liquidator, s 56 of the MSA provides⁷ for the coexistence of the curator along with the liquidator, permitting the curator *inter alia* to investigate and report to the Registrar on the winding-up and to ensure the migration of the beneficiaries to alternate medical schemes.

[42] The protection of the beneficiaries by way of ensuring that their claims up to 31 August 2022 are met by the Scheme, is necessary and a further reason for the interim appointment of a curator.

[43] The leave order provided for the co-existence of the curator alongside any liquidator appointed by a Court.

[44] Given that the Scheme applied for leave to wind up voluntarily, the interim appointment of a curator will assist in ensuring that there is adequate investigation and disclosure to the Registrar, as to the reasons for the failure of the Scheme and the necessity, or otherwise, to remain involved in the liquidation process.

[45] In respect of the allegations of a lack of corporate governance by the Scheme, which the Scheme denies, the interim appointment of a curator will serve in my view to protect the trustees. This because the interim curator will take such steps as are available to her / him to investigate those allegations. In the event that there is no basis for the allegations, that will be brought to the attention of the Registrar and the trustees will be cleared of such responsibility.

⁷ “The Registrar may, notwithstanding the provisions of ... section 53, apply ...”

[46] Insofar as the Scheme argued that the Registrar has powers other than the appointment of a curator by which to bring an errant scheme into compliance,⁸ the powers referred to under s 42 to 45, do not address the position where a scheme has applied for leave to voluntarily wind itself up and where the interests of beneficiaries are vulnerable and paramount. The provisions referred to do not adequately address the position in which the Scheme finds itself already in a precarious financial position that is not able to be saved.

[47] As to the Scheme's argument that the interim order will have final effect, that will not be the case in the event that the Court, on the return day, discharges the Rule.

[48] In the circumstances, I granted the following order:

1. A *rule nisi* is issued calling upon the respondent and any interested persons to show cause, in terms of Part B of the application, on Tuesday 20 September 2022, at 10:00, or so soon thereafter as the matter may be heard, why an order should not be made in the following terms:

1.1 That the respondent is placed under curatorship as contemplated in section 56(1) of the Medical Schemes Act, 1998 and sections 5(1) and 5(2) of the Financial Institutions (Protection of Funds) Act, 28 of 2001;

1.2 That Mr Joe Seoloane be appointed as the curator of the respondent;

⁸ *Registrar of Medical Schemes v Sizwe Medical Fund* Case no 28986/20 North Gauteng Division 23 November 2020.

1.3 That the curator, appointed as aforesaid, be and is hereby:

1.3.1 authorised to take immediate control of, and in the place of the respondent's board of trustees and principal officer, to manage the business and operations of, and concerning, the respondent, together with all assets and interests relating to the business of the respondent, in accordance with the provisions of the Medical Schemes Act, 131 of 1998, and the respondent's rules;

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

1.3.3 directed to give consideration to the best interests of the members of the respondent and, in particular, to attend to facilitating and negotiating the transfer of the respondent's members to other medical schemes prior to the impending winding-up of the respondent, on such favourable terms as may be appropriate in the circumstances and to report to the

applicant thereon on a weekly basis;

1.3.4 directed to exercise the powers vested in him with a view to managing the business of the respondent and, not without the leave of any liquidator who may be appointed to the respondent, to alienate or dispose of any property of the respondent, save to the extent, and for the purposes, set out hereunder;

1.3.5 directed to take control of the cash, cash investments, shares and other securities, as well as of all other assets owned, held or administered, by or on behalf of the respondent until a liquidator is appointed to wind-up the respondent's business;

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

1.3.7 authorised to pay claims or other benefits to the respondent's members, as may have been received before 27 September 2022 when the

respondent will apply for a winding-up order, including in respect of the class of beneficiaries referred to in the resolution taken by the board of trustees of the respondent, dated 31 August 2022 (Appendix 1 to the order);

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

1.3.9 authorised to institute or prosecute any legal proceedings on behalf of the respondent and to defend any action against the respondent subject to the direction of the liquidator once appointed to wind-up the respondent's business;

1.3.10 authorised to invest such funds as are not required for the immediate purposes of the business, with an institution or financial

nstrument as he may regard as financially sound and appropriate until such time as a liquidator is appointed to attend to the winding-up of the respondent;

1.3.11 authorised to take control, and to operate or close existing bank accounts, of the respondent, whether conducted in South Africa or off-shore, and to open and operate any new bank accounts in the name of the respondent as might be reasonably required for purposes of the curatorship and subject to the further direction of a liquidator who may be appointed pursuant to a winding-up of the respondent;

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

1.3.13 authorised to apply, at any time during his term of office, on 48 hours' notice or on an *ex parte* basis, for any amendment or amplification of the powers granted to him in terms hereof, in

the event that it is necessary to amend or amplify such powers for the effective exercise of his powers and responsibilities;

1.3.14 authorised to be entitled to reasonable remuneration and disbursements, as might be allowed by agreement with the applicant, alternatively, failing such agreement, as may be determined later by this court, and that such remuneration shall be paid by the respondent and shall be a first charge upon the respondent's assets.

1.4 Directing the curator to report on his curatorship to the applicant on a monthly basis and to include in his report a statement of his findings and recommendations concerning the respondent's affairs and the continuation, if necessary, of the curatorship.

2 Directing that the powers of the curator, whether provisional or final, shall not extend to overruling, curtailing or in any way diminishing the rights of the class of patients referred to in the resolution taken by the board of trustees of the respondent, dated 31 August 2022 (Appendix 1 to the order) and as referred to in any order as may be granted by this Honourable Court, under case number 2022/015979, in relation to the protection and benefits of such category of patients as referred to in such resolution and in such court order, for the period terminating on 30 September 2022.

- 3 Pending the outcome of the return date to confirm the appointment of the curator with the powers, duties and mandate as set out above, the relief sought in prayers 1.1 to 1.5 above shall operate as an interim order with immediate effect.
- 4 Directing that the application, together with the interim order obtained therein, be served on the respondent and any other interested party.
- 5 Directing that the costs of this application be reserved for determination by the court hearing Part B of this application.

CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **20 September 2022**.

COUNSEL FOR THE FIRST
AND SECOND APPLICANTS:

Ms AJ Leppan.

INSTRUCTED BY: Diale Mogashoa Attorneys.

COUNSEL FOR THE RESPONDENT: Mr E Kromhout.

INSTRUCTED BY: Malatji & Co Attorneys.

DATE OF THE HEARING: 2 September 2022.

DATE OF JUDGMENT: 20 September 2022.