THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 267/2020

In the matter between:

COMPCARE WELLNESS MEDICAL SCHEME **Appellant**

and

REGISTRAR OF MEDICAL SCHEMES **First Respondent**

COUNCIL FOR MEDICAL SCHEMES **Second Respondent**

CHAIRPERSON OF THE APPEAL BOARD OF THE COUNCIL FOR MEDICAL SCHEMES **Third Respondent**

UNIVERSAL HEALTHCARE ADMINISTRATORS (PTY) LTD **Fourth Respondent**

Neutral citation: *Compcare Wellness Medical Scheme v Registrar of Medical Schemes and Others* (267/2020) [2020] ZASCA 91 (17 August 2020)

Coram: Cachalia, Schippers and Plasket JJA and Ledwaba and Matojane AJJA

Heard: No hearing. Decided without a hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 17 August 2020.

Summary: Section 38*(d)* of the Constitution – organ of state acting in the public interest – reviewing its own decision – Promotion of Administrative Justice Act 3 of 2000 applies – Medical Schemes Act 131 of 1998 – Registrar of Council of Medical Schemes has no discretion to allow a medical scheme to change its name to a name that is likely to mislead the public – the Registrar has no power to impose allow a name-change subject to conditions.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fabricius J as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Plasket JA (Cachalia and Schippers JJA, Ledwaba and Matojane AJJA concurring)

[1] The Medical Schemes Act 131 of 1998 (the Act) was enacted, inter alia, 'to make provision for the registration and control of certain activities of medical schemes'.[1] Section 3 of the Act created the Council for Medical Schemes (the Council). Its functions include protecting the interests of beneficiaries of medical schemes.[2] In terms of s 18(1), the Minister is required to appoint a Registrar of Medical Schemes (the Registrar). This officer is the Council's executive officer and has the function of managing the Council's affairs.[3] To this end, the Act vests in the Registrar a wide range of powers, one of which is relevant to this appeal. It is the power, in terms of s 23, to register or refuse to register a medical scheme's name or a change to a medical scheme's name. This section provides:

'(1) The Registrar shall not register a medical scheme under a name, nor change the name of a medical scheme to a name-

(a) which has already been registered;

[1] Long title.
[2] Section 7*(a)*.
[3] Section 18(2).

(b) which so closely resembles the name of a medical scheme already registered that the one is likely to be mistaken for the other; or

(c) which is likely to mislead the public.

(2) A medical scheme shall not use or refer to itself by a name other than the name under which it is registered or a literal translation or an abbreviation thereof which has been approved by the Registrar.

(3) A medical scheme may, with the consent of the Registrar, in conjunction with its registered name, use, or refer to itself by, the name of a medical scheme with which it has amalgamated or which it has absorbed or, in the case of a change of name, the name by which it was previously known.

(4) A medical scheme shall not change its name without the prior written consent of the Registrar.'

[2] The appellant, Compcare Wellness Medical Scheme (Compcare), applied to the Registrar, the first respondent, for approval of a change of name. The Registrar refused approval because he was of the view that the new name was likely to mislead the public. His decision was upheld on appeal by an appeal committee of the Council.[4] Compcare then appealed to the Appeal Board established by s 50 of the Act.[5] The Appeal Board upheld Compcare's appeal and ordered the Registrar to give effect to the name-change but attached conditions that Compcare was required to comply with.

[3] The Registrar and the Council brought an application in the Gauteng Division of the High Court, Pretoria for the review and setting aside of the Appeal Board's

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[4] Section 49 of the Act provides:

'(1) Any person who is aggrieved by any decision of the Registrar under a power conferred or a duty imposed upon him or her by or under this Act, excluding a decision that has been made with the concurrence of the Council, may within 30 days after the date on which such decision was given, appeal against such decision to the Council and the Council may make such order on the appeal as it may deem just.

(2) The operation of any decision which is the subject of an appeal under subsection (1) shall be suspended pending the decision of the Council on such appeal.

(3) The Registrar or any other person who lodges an appeal in terms of subsection (1) may in person or through a representative appear before the Council and tender evidence or submit any argument or explanation to the Council in support of the decision which is the subject of the appeal.'

[5] In terms of s 50(1), the Appeal Board is made up of three persons appointed by the Minister. Section 50(3) provides that '[a]ny person aggrieved by a decision of the Registrar acting with the concurrence of the Council or by a decision of the Council under a power conferred or a duty imposed upon it by or under this Act, may within a period of 60 days after the date on which such decision was given and upon payment to the Registrar of the prescribed fee, appeal against such decision to the Appeal Board'. In terms of s 50(16), the Appeal Board has the power to 'confirm, set aside or vary' the decision appealed against or to 'order that the decision be given effect to'.

decision. Fabricius J granted that relief. He then granted Compcare leave to appeal to this court.

Background

[4] Compcare is a medical scheme that is registered in terms of the Act. When it submitted a number of rule changes and a name-change application, to the Registrar for his approval, the name-change application was somehow overlooked. It was dealt with later on its own. The proposed change of name was motivated in detailed written submissions addressed to the Registrar.

[5] Compcare wished to change its name to Universal Medical Scheme. As its administrator was Universal Healthcare Administrators (Pty) Ltd, a part of the Universal group of companies, Compcare appeared to be alive to the fact that the proposed name had the potential, at the very least, to mislead the public. Indeed, its motivation for the change was to take advantage of the Universal brand, which it considered to be much stronger and attractive than its own Compcare brand. Because it foresaw that the public may be misled by the new name, it undertook in its submissions to take a number of steps to attempt to mitigate that possibility.

[6] It informed the Registrar that if approval was granted, 'the Universal group of companies . . . will grant a royalty free license to the Scheme to use the "Universal" name and brand, whereafter the Scheme will operate under the name "Universal Medical Scheme" and will use the Universal logo'. It then gave the first of its undertakings, namely that 'all Scheme communication channels, platforms and materials will be branded as Universal Medical Scheme – clearly indicating that it is the Scheme as an entity that is being dealt with' and that the 'Scheme's administrators will always be identified as "Universal Administrators" or "Universal Healthcare Administrators"'.

[7] Later in the submissions, Compcare gave the following undertakings:

'6.12 The independence and autonomy of the Scheme and its Board are of paramount importance. Thus under the shared "Universal" brand attributes, the Scheme and its administrator will have separate and distinct governance structures, which will include

separate legal advisors, separate auditors and a clear communications policy to ensure that the respective roles and responsibilities of the Scheme and its administrator (and its managed health care organization) are clearly delineated and that there is no confusion created in the minds of members or the general public that Universal Administrators carries on the business of a medical scheme, and that members and the general public are not otherwise misled in any manner.

6.13 Independence will be ensured through the brand architecture and the Scheme will be branded as an independent entity. A brand is a name, symbol, design or mark that enhances the value of a product beyond its functional purposes. It is a complex entity as consumers do not just buy a product, but also the image and experience associated with a product. Brand architecture is the way in which a set of brands are managed, differentiated and applied in the market. . .

6.14 All Scheme communication channels, platforms and materials will be branded with the Universal Medical Scheme logo – clearly indicating that it is the Scheme as an entity that is being dealt with. "Universal Medical Scheme" will always be used when referring to the Scheme. The Scheme will also retain its own communications channels, including but not limited to brochures, a website, client service line and letterhead. The same principles will apply in respect of communications of Universal Administrators.

6.15 The Board will continue to use every reasonable step available to educate its members and to reinforce previous training in respect of the demarcation between the Scheme and its administrators.'

[8] It then said that, in its view, 'there is no ascertainable harm or prejudice to members or to the general public if a medical scheme and its administrators share a common brand'. It thought that the contrary was true – that 'to the extent that a shared, trusted brand helps to increase the growth and sustainability of small and medium open medical schemes, this promotes price and quality competition to the benefit of members and the general public'.

[9] It is apparent from the Appeal Board's reasons that it was of the view that the name that Compcare wanted to take was likely to mislead the public. With reference to the submissions, the Appeal Board said that Compcare had 'tendered certain measures it would implement upon the application being granted to ensure that the public would not be misled by the proposed name'. Then, again in relation to the

undertakings, the Appeal Board, in explaining why it intended to uphold the appeal, said:

'The measures proposed by the appellant to ensure that the public is not likely to be misled are reasonable, and if diligently implemented as undertaken, are likely to go a long way towards averting the harm sought to be prevented by section 23(1)(c). The proposed measures weighed heavily with us in favour of the appellant. It would therefore be appropriate, in the Order we make, to ensure that the appellant lives up to its undertaking to implement them. This is because we believe that, absent these measures, it is, as the Act says, "*likely*" that the public will be misled; that much is recognized by the appellant itself. Surely, it must have been exactly as a result of that recognition that the appellant tendered the above measures in support of its application. Once the name change is approved, as we believe it should be, on the strength of those measures, the appellant cannot thereafter abandon them or fail to implement them as diligently as it has undertaken to.'

[10] The Appeal Board concluded its reasons as follows:

'We are satisfied that the measures tendered by the appellant to ensure that the public would not be misled, are reasonable. We are therefore of the view that the decisions of the Registrar and the Appeal Committee should be set aside. The following Order is therefore made:

11.1 The appeal is upheld.

11.2 The decisions of the respondent and the Appeal Committee of the Council for Medical Schemes are set aside.

11.3 The Registrar of the Council for Medical Schemes is hereby directed to approve the applicant's change of name from "*CompCare Wellness Medical Scheme*" to "*Universal Medical Scheme*" in terms of section 23 of the Medical Schemes Act, 131 of 1998.

11.4 The approval for the change of the name is subject to the following conditions:

11.4.1 The appellant shall fully and diligently at all times implement the measures set out in paragraphs 7.1, 7.2, 7.3 and 7.4 above.

11.4.2 The Registrar's instrument of approval shall state that the approval is subject to the appellant fully and diligently at all times implementing the measures set out in paragraphs 7.1, 7.2, 7.3 and 7.4 above, which measures shall also be stipulated in the instrument of approval.'

[11] In the court below, Fabricius J held that the Appeal Board had misdirected itself by upholding the appeal and ordering the Registrar to approve the name-change subject to conditions. He thus granted the application brought by the Registrar and the

Council to review and set aside the Appeal Board's decision. He also dismissed a counter-application for the dismissal of the review application that Compcare brought.

The issues

[12] Two issues arise for decision. The first is jurisdictional. It is whether the Appeal Board's decision is reviewable at the instance of the Registrar and the Council in terms of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA), or in terms of the principle of legality that is part of the founding Constitutional value of the rule of law. The second issue is substantive. It is whether the ground of review relied upon by the Registrar and the Council has been established, as the court below found.

Source of jurisdiction: the PAJA or the principle of legality

[13] The two major 'pathways' to the review of administrative-type actions are s 6 of the PAJA and the principle of legality. The PAJA applies generally to the review of administrative action as that term is defined in it. The principle of legality applies when an exercise of public power does not fall within the PAJA's definition of administrative action.[6] It is necessary to determine which of these pathways to review applies because that decision determines the basis for the court's review jurisdiction. That decision should not, generally speaking, be avoided.[7]

[14] In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*[8] the Constitutional Court held that when an organ of state, acting in its own interest, applies to set aside its own administrative action, the PAJA does not apply. The court's reasoning, which has not been without trenchant criticism,[9] was that s 33 of the

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[6] Hoexter *Administrative Law in South Africa* (2 ed) (2012) at 118 describes the PAJA as the 'primary or default pathway to review'. At 121, she says of the principle of legality that it 'provides a general justification for the review of exercises of public power and operates as a residual source of review jurisdiction'. See too *National Director of Public Prosecutions and Others v Freedom Under Law* [2014] ZASCA 58; 2014 (4) SA 298 (SCA) paras 28-29.

[7] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2016] ZASCA 143; 2017 (2) SA 63 (SCA) paras 35-36.

[8] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC).

[9] See Boonzaier 'A Decision to Undo' (2018) 135 *SALJ* 642; De Beer 'A New Role for the Principle of Legality in Administrative Law: *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*' (2018) 135 *SALJ* 613. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) para 112, Cameron and Froneman JJ acknowledged the criticism and conceded that the decision may have to be revisited in due course.

Constitution – the fundamental right to just administrative action – that is given effect to by the PAJA, is for the exclusive benefit of private persons. Organs of state are not bearers of the fundamental right to just administrative action. When they wish to review their own decisions, they consequently must do so in terms of the principle of legality.

[15] In this case, the Registrar and the Council claimed standing to review the Appeal Board's decision on the basis of the public interest. Section 38 of the Constitution, which concerns who has standing to enforce fundamental rights, provides:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.'

[16] In the founding affidavit, the Registrar stated that he and the Council 'regulate medical schemes in the public interest' and that they had brought the application 'in the public interest, as envisaged by section 38(d) of the Constitution'. He then stated:

'16.1 As I indicate below, the decision of the Appeal Board directs the Registrar to perform conduct that is *ultra vires*. I respectfully submit that it is in the public interest that a decision requiring the Registrar to act unlawfully should be set aside on review.

16.2 Furthermore, the Registrar is acting in the interests of the public in light of the provisions of section 23(1)(c) of the Act which contemplates the possibility of a proposed name change causing harm to the public.'

[17] Compcare contented itself with a bare denial that the Registrar and the Council acted in the public interest or that the name-change would cause prejudice to the public. Fabricius J appears to have accepted that the Registrar and the Council had standing in terms of s 38*(d)* of the Constitution. In keeping with the generous approach

to representative standing that the Constitutional Court in particular has mandated,[10] and on the basis of the Registrar's averments that I have quoted, I find that they indeed have standing to act in the public interest.

[18] In the *State Information Technology Agency* case, the Constitutional Court was only concerned with an organ of state acting in its own interest and reviewing its own decision. It was not concerned with 'a scenario where an organ of state that is in a position akin to that of a private person (natural or juristic) may be seeking to review the decision of another organ of state' or with 'a situation where — in seeking a review of its own decision — an organ of state is purporting to act in the public interest in terms of s 38 of the Constitution'.[11]

[19] The second of these issues was dealt with in *Hunter v Financial Sector Conduct Authority and Others*.[12] A natural person had claimed standing in terms of s 38*(d)* of the Constitution to challenge an exercise of power that the court found was administrative action. Khampepe J held, as to the consequence of acting in the public interest:[13]

'As a general rule, PAJA must therefore apply unless the review is brought by a public functionary in respect of its own unlawful decision. In this case, it is Ms Hunter (and not the FSCA itself) who seeks relief against the registrar's alleged unlawful decisions. Ms Hunter is not acting on behalf of the FSCA. She is acting in the public interest. Anybody who constitutes "the public" on whose behalf she has assumed the responsibility to act is entitled to challenge the fairness of the administrative action that has aggrieved her in terms of PAJA. She, having stepped straight into their shoes, enjoys all the rights and obligations they each would ordinarily have shouldered had they chosen to be litigants. PAJA must therefore apply to Ms Hunter's claim.'

[20] In this case, the decision of the Appeal Board is an administrative action as defined in the PAJA: it is a decision of an administrative nature, taken in the exercise

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[10] See for example, *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) paras 32-35.
[11] Note 8 para 2.
[12] *Hunter v Financial Sector Conduct Authority and Others* [2018] ZACC 31; 2018 (6) SA 348 (CC); 2018 (12) BCLR 1481 (CC).
[13] Para 49.

of a public power by an organ of state in terms of empowering legislation that has the potential to adversely affects rights, has a direct, external legal effect and is not excluded by any of sub-sections *(aa)* to *(ii)* of s 1 of the PAJA.[14] When the Registrar and the Council brought their application in the public interest, they did so in order to safeguard the fundamental right of each member of the public to just administrative action. That being so, they stepped into the shoes of the members of the public on whose behalf they litigated and, in this sense were, despite being organs of state, bearers of fundamental rights to just administrative action. The PAJA consequently applies to the review of the Appeal Board's decision. It ought to have been applied by the court below in relation to the argument that the Registrar and the Council had delayed unduly in launching their review – an issue that is not persisted with by Compcare – and in relation to the substance of the review. While a review in terms of the principle of legality produced the same result in this case, that may not always be so. For instance, the common law that applies to legality reviews differs from the PAJA in respect of the exhaustion of internal remedies and there are some differences between the common law delay rule and the PAJA's delay rule.

The substantive issue: the review of the Appeal Board's decision

[21] Baxter made the point that administrative law 'rests upon the principle of legality' with the consequence that where a person's interests have been prejudiced by 'administrative action or inaction not authorized by law' he or she may be awarded a 'suitable remedy'.[15] He went on to explain the workings of this first principle:[16]

'Public authorities possess only so much power as is lawfully authorized, and every administrative act must be justified by reference to some lawful authority for that act. Moreover, on account of the institutional nature of law the public authority *itself* exists as an office or body

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[14] For the definition of administrative action, see the PAJA, s 1. See too *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) paras 21-25.

[15] Lawrence Baxter *Administrative Law* (1984) at 299.

[16] At 384. See too *De Villiers v Pretoria Municipality* 1912 TPD 626, 645-646 in which Bristowe J set out the principle thus:' This conclusion seems indeed to be a necessary corollary from the principle that a statutory corporation established for a particular purpose has no power *qua* corporation outside the sphere of activity especially or impliedly prescribed for it by the Legislature. Its acts outside those limits are therefore void, not so much because the Legislature has prohibited them, as because the powers which it has conferred upon the being which it has created, do not extend to them. For the purpose of such acts the corporate *persona* is in fact non-existent'. On the principle of legality being the first principle of both administrative law and the rule of law, see Hoexter (note 6) at 255-256.

created by law. A valid exercise of administrative power requires both a *lawful authorization* for the act concerned and the exercise of that power by the proper or *lawful authority*.'

[22] Woolf, Jowell, Donnelly and Hare[17] say of the first of a list of legal standards that public bodies are required to meet in order for their acts to be valid:
'Public bodies must have legal authority for their actions. This may be derived from statute, the common law or (in the case of some central government functions) a prerogative power. Public bodies must act within the scope of that legal authority.'

[23] As the source of the principle of legality is the rule of law, which is a principle of the common law, was an implicit value of the interim Constitution and is an express value of the final Constitution, the same position that Baxter and Woolf, Jowell, Donnelly and Hare outlined continues to apply now. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[18] Chaskalson P, Goldstone and O'Regan JJ held that it was 'central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'.[19]

[24] Section 33(1) of the Constitution, a provision which gives effect to the founding value of the rule of law, guarantees for everyone the rights to lawful, reasonable and procedurally fair administrative action. Section 6(2)*(a)*(i) of the PAJA is one of a number of provisions that give effect to the right to lawful administrative action. It provides that a court may review and set aside an administrative action if it was taken by an administrator who 'was not authorized to do so by the empowering provision'. This is the principal ground of review that is implicated in this case.

[25] Before turning to whether the Appeal Board exceeded its lawful authority, it is necessary to deal briefly with one factual issue: whether the proposed new name for

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[17] Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review* (8 ed) (2018) para 1-001.
[18] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17: 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).
[19] Para 58. This dictum has since been approved by the Constitutional Court in numerous judgments. See for example *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11: 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) para 148.

Compcare was likely to mislead the public. In my view, the answer is in the affirmative. Compcare itself appeared to accept that this was so by giving mitigatory undertakings, and the Appeal Board accepted that too: its order is based on the premise that the new name was likely to mislead the public, and so required conditions to be added to minimize that consequence.

[26] Both Compcare and the Appeal Board were correct. The very basis for the name-change, which was explicitly stated in Compcare's submissions, was to enable Compcare to ride on the coat tails of the Universal group of companies and derive benefit from the Universal brand. Compcare, in other words, wanted to create in the minds of the public the impression that it was part of the Universal Group. All that a string of disclaimers was likely to achieve was greater confusion. In the result, the Registrar's finding that the proposed new name was likely to mislead the public was rational and cannot be faulted. The same may be said of the Appeal Board's finding to the same effect.

[27] Two issues arise in relation to the empowerment of the Registrar to accept or reject a change of name in terms of s 23(1)*(c)* of the Act, and by extension, of the Appeal Board to order him to do so. They are whether the Registrar has a discretion to allow a name-change even though it is likely to mislead the public and, related to this, whether he has the power to approve a name-change subject to conditions. If the Act does not authorize one or both, the Appeal Board, in making its order, exceeded its powers – it would have taken administrative action that it was not authorized to take.

[28] Section 23(4) provides that a medical scheme may not change its name without the consent of the Registrar. Section 23(1) then limits the power of the Registrar by stipulating what types of names he may not approve – those that have already been taken, those that resemble so closely names that have already been registered that confusion between them is likely and those that are likely to mislead the public. While in respect of the first category, the Registrar's decision will no doubt be determined with reference to his records, decisions in respect of the second and third categories inevitably require a measure of judgment on his part. Once he has made a decision

that a name proposed by a medical scheme is one contemplated by either a 23(1)*(a)*, *(b)* or *(c)*, however, the Act is clear: he may not register that name or allow a change to that name.

[29] There is no room within the structure of s 23(1) for a discretion. There is no indication in the section that could lead one to conclude that a discretionary power to deviate from its express terms could have been intended, or that it is necessary to attain its purposes, or is incidental to the express provisions. To the contrary, the recognition of an implied discretion would create a conflict within the section: the Registrar would be expressly prohibited from registering names that he decided were prohibited by s 23(1), but then at the same time allowed to exercise a discretion to do so nonetheless. One only has to consider the case of an application to register a name that is already registered to highlight the absurd results that such an interpretation of the section could spawn.

[30] The second issue that arises for decision is whether, despite a name being one, for instance, that is likely to mislead the public, conditions may be imposed to reduce the risk of that eventuating. Compcare's argument is that the Registrar may impose conditions in these circumstances because the imposition of conditions is not precluded by s 23(1). This is not the correct approach. In *Burghersdorp Municipality v Coney*[20] it was argued that a municipality had power to do anything it was not prohibited from doing. Davis J was of the view that this submission was 'startling', holding that it was in conflict with the 'current of authority'.[21]

[31] In that conclusion, Davis J was undoubtedly correct. In *Principal Immigration Officer v Medh*,[22] this court was required to decide on the validity of a decision of a minister to exempt the respondent from the status of a prohibited person subject to conditions. De Villiers JA approached the issue thus:[23]

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[20] *Burghersdorp Municipality v Coney* 1936 CPD 305.
[21] At 308. See too *Malherbe v South African Medical and Dental Council* 1962 (1) SA 825 (N) at 829G-830A.
[22] *Principal Immigration Officer v Medh* 1928 AD 451.
[23] At 457-458.

‘In dealing with the power of exemption the section is silent as to conditions to be imposed. But an exemption conditional upon maintaining his domicile can hardly be called an exemption. A person is either exempted from the class of prohibited immigrants or he is not. There is no intermediate position. The Minister is given the power to take a prohibited immigrant out of the class of prohibited immigrant or not, as he pleases. But if he decides in favour of the former course, he must take that person out of the class entirely and once and for all. It might be, however, said that power to grant exemption includes a power to attach whatever conditions the Minister might consider reasonable. But the argument begs the question. The powers of the Minister must be found within the section creating them, and according to that section the Minister only has power either to exempt or not: there is no third course. In the absence of specific provisions to that effect, such power cannot be construed as embracing the wider power of attaching conditions. If it had been the intention of the Legislature to confer upon the Minister the additional power of attaching conditions to the exemption, it should have said so, as it has done in the case of temporary permits as well as in sec. 31(2), Act 38 of 1927.’

[32] The starting point of the enquiry in this case is s 23(1). For a power to impose conditions to exist, it must be created by the Act. Section 23(1) does not expressly empower the Registrar to impose conditions, assuming for purposes of the argument that he has a discretion to register a name that offends s 23(1). I can see no possible basis for somehow implying it in the section. In much the same way as there was no ‘third course’ in *Principal Immigration Officer v Medh*, so too in this case: the Registrar’s choices are either to approve a name or to refuse to approve it. There is much to be said too for the argument that if the legislature had intended the Registrar to have the power to impose conditions, it would have said so, as it did in s 24(1) which deals with the registration of medical schemes. This section provides that the Registrar ‘shall, if he or she is satisfied that a person who carries on the business of a medical scheme which has lodged an application in terms of section 22, complies or will be able to comply with the provisions of this Act, register the medical scheme, with the concurrence of the Council, and impose such terms and conditions as he or she deems necessary’.

[33] I conclude therefore that the Appeal Board’s decision cannot stand and that the court below was correct to set it aside because: (a) the Registrar had no lawful power

to approve Compcare's proposed change of name once he had concluded that it was a name that was likely to mislead the public; (b) he also had no lawful power to approve such a change of name subject to conditions; and (c), as a result, the Appeal Board exceeded its powers by purporting to order the Registrar to approve a name that was likely to mislead the public, subject to conditions.

The order

[34] I make the following order:

The appeal is dismissed with costs, including the costs of two counsel.

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C Plasket

Judge of Appeal

APPEARANCES

For the appellant:	M Du Plessis SC and S Pudifin-Jones Instructed by: ENSafrica, Johannesburg Webbers, Bloemfontein
For the first and second respondents:	A Cockrell SC and A J Lapan Instructed by: Lawtons Inc, Johannesburg Symington & De Kok, Bloemfontein