**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 35478/2020**

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

**25 MARCH 2021** .....

DATE SIGNATURE

In the matter between :-

| | |
|---|---|
| THE REGISTRAR OF MEDICAL SCHEMES | APPLICANT |
| And | |
| KEYHEALTH MEDICAL SCHEME | FIRST RESPONDENT |
| JAN HENDRIK GREYLING | SECOND RESPONDENT |
| PIETER BENNET | THIRD RESPONDENT |
| JOHANNES HENDRIKUS GROBBELAAR | FOURTH RESPONDENT |
| DAUW PETRUS JACOBUS KRUGER | FIFTH RESPONDENT |
| EDWARD PETER SHARMAN | SIXTH RESPONDENT |
| PROF. SUSAN BOUILLON | SEVENTH RESPONDENT |
| JC (CHRIS) LANDSBERG | EIGHTH RESPONDENT |

DATE OF HEARING: This matter was enrolled for hearing on 15 February 2021, with appearance on Microsoft teams. DATE OF JUDGMENT: This judgment was hand down electronically by circulation to parties by email/caselines. The date and time of hand-down is deemed to be 25 March 2021.

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**JUDGMENT**

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Kollapen J

## Introduction

[1] On 16 September 2020 this Court, at the instance of the applicant, granted an order placing the respondent under provisional curatorship in terms of the provisions of Section 56(1) of the Medical Schemes Act No 131 of 1998 ('the MS Act') and appointing Mr Johannes Malose Seoloane as provisional curator.

[2] The order of 16 September 2020 was granted on the basis of urgency, was brought ex parte and was considered and granted in camera.

[3] The trustees of the respondent, acting collectively as the board of the respondent alternatively in their personal capacities seek to intervene in these proceedings and seek the reconsideration and setting aside of the order of 16 September 2020 alternatively the discharge of the rule nisi.

[4] The applicant opposes the reconsideration application and seeks the confirmation of the rule nisi while the respondent represented by the provisional curator opposes the intervention application and also seeks confirmation of the rule nisi.

## The parties and background

[5] The Applicant is the Registrar and chief Executive Officer of the Council for Medical Schemes ("the CMS"), appointed by the Minister of Health in terms of section 18 of the Medical Schemes Act 131 of 1998 ("the MS Act").

[6] The respondent is KEYHEALTH MEDICAL SCHEME ("KeyHealth"), a medical Scheme duly registered as such in terms of section 24 of the MS Act. It has in excess of 30 000 members, 67 000 beneficiaries, an annual income in excess of R2 billion and reserves of about R 965 million. It is by all accounts an entity with a significant footprint and turnover.

[7] The applicant in bringing the proceedings which culminated in the order of 16 September 2020, relied on the provisions of the Financial Institutions (Protection of Funds) Act No 28 of 2001 ('the FI Act ') as well as the MS Act.

[8] Section 5 of the FI Act provides as follows:-

> *"(1) The registrar may, on an ex parte basis, apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, an institution.*
>
> *(2) Upon an application in terms of subsection (10 the court may –*
>
> *(a) on good cause shown, provisionally appoint a curator to take control of, and manage the whole or any part of, the business of the institution on such conditions and for such a period as the court deems fit: and,*
>
> *(b) simultaneously grant a rule nisi calling upon the institution and other interested parties to show*

*cause on a day mentioned in the rule why the appointment of the curator should not be confirmed."*

[9] Section 56(1) of the MS Act in turn provides as follows:-

*"The Registrar may, notwithstanding the provisions of section 52 and 53, if he or she is of the opinion that it is in the interest of the beneficiaries or that it is desirable to do so, because material irregularities have come to his or her notice, or because a medical scheme is not in a sound financial condition or as a result of an inspection of the affairs of the medical scheme, apply, with concurrence of the Council, to the High Court, for the appointment of a curator to take control of and to manage the business of that medical scheme."*

[10] On 5 June 2019 the applicant, acting in terms of Section 44(4)(a) of the MS Act appointed Morar Incorporated (Morar) to conduct an inspection of the of the respondent. The applicant does not say what evidence of irregularities and/or non-compliance triggered the appointment of Morar who produced a draft report out of its inspection on 21 November 2019.

[11] While the draft report considered some 21 different issues and concluded in respect of most of them that there was no substance to the allegations it investigated, it found in respect of others that there were material irregularities and these were in respect of the contract of the Chief Executive Officer of the respondent, irregularities in the election of scheme officers and risk taking practises which favoured new members who were young and healthy. In addition, it also dealt with conflict of interest allegations. I will return to all of these matters.

[12] Extracts from the draft report were made available to the respondent for comment and a fairly substantive response to the report was submitted to Morar on 23 January 2020. Morar then produced a final report on 7 February 2020. While Morar annexed a copy of the respondent's response to the interim report to the final report of 7 February 2020, the final report does not appear however from its text and content to engage the response of the respondent in respect of the findings and recommendations that are made.

[13] The final report of Morar was not shared with the respondent and in response to a query submitted, the respondent was simply informed by the applicant in about March 2020 that the final report was being considered by the applicant and that once the process was completed the applicant would inform the respondent accordingly. There was no further information provided to the applicant.

[14] Instead court papers were drafted in July 2020 and the matter was apparently enrolled for 25 August 2020, the order ultimately being granted on the 16 September 2020. The respondent became aware of the order granted on 16 September 2020 when the Sheriff of this Court attended its offices in order to execute the order on 18 September 2020.

[15] A notice of opposition was filed by the trustees of the respondent on 1 October 2020 as well as a Notice in terms of Rule 6(12)(c) and an answering affidavit.

[16] The provisional curator filed his report on 10 November 2020 the trustees of the respondent filed a response thereto on 27 January 2021 and the curator a reply to the Trustees response on 12 February 2021.

[17] I now proceed to deal with the application for intervention as well as the merits of the dispute.

**The intervention application**

[18] It is common cause that the current trustees of the respondent no longer exercise any control over the respondent, in particular in light of the order of this Court of 16 September 2020 which expressly authorises the curator to take immediate control and in the place of the board of trustees manage the business and operations of the respondent. They accordingly cannot seek to intervene as the board of the respondent as such a board does not exist for now or at the very least is not functional nor possessed of any power or authority. It is the curator who now manages the respondent and who has also assumed the powers of the board.

[19] The intervention of the trustees in their personal capacity is another matter and given that some serious allegations are advanced against them in support of the relief granted including that they failed to properly discharge their duties, it was argued on their behalf that they should be entitled to be joined in their personal capacities.

[20] While the applicant did not oppose their intervention in their personal capacities, the curator did, contending that they did not have a direct and substantial interest in the subject matter of the litigation and that at most they sought to protect their reputation and that reputational damage was hardly a basis to seek intervention.

[21] In ***SA Riding for the Disabled Association v Regional Land Claims Commissioner 2017 (5) SA 1 (CC)*** the Constitutional Court in dealing with an application to intervene stated the position as follows :-

*"[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre- decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.*

*[11] Once the applicant for intervention shows a direct and substantial interest in the subject matter of the case, the court ought to grant leave to intervene. In Greyvenou CC this principle was formulated in these terms:*

*"In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject – matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests."*

[22] The trustees in their personal capacities do indeed have a direct and substantial interest in the relief that the Court is called upon to determine. They have been duly elected as trustees and the confirmation of the rule (if granted) will bring their tenure as trustees to an end. Surely they must have a direct and substantial interest in that issue as well as in the various findings suggesting that material irregularities occurred in the affairs of the Respondent under their watch.

[23] Those allegations relate to their tenure and conduct on the board of the respondent. It would hardly be consistent with the spirit of the *audi alteram partem* rule to deny them the right to intervene and then make a determination that will ultimately impact on their elected position as trustees and the propriety of their conduct as trustees.

[24] I am of the view that a proper case has been advanced for the intervention of the trustees in their personal capacities and they are joined individually as parties to this application.

**The issues for determination**

**The grant of urgent relief was procedurally flawed**

[25] The trustees say that the applicant was less than open in its approach to the Urgent Court and that there was no basis for the application to be brought on the basis of urgency or on an *ex parte* basis. They point out that there was a long history of engagement between the applicant and the respondent which was not disclosed to the Court, that there were allegations made to advance *ex parte* relief that were made without substance - in particular that notice of the application would result in the scheme records being disposed of or the actions of trustees covered up. In this regard it does appear that there was little basis to support the fears of the destruction of documents or a cover up. The respondent had made copies of all documents and its hard drive available during the Morar investigation and had fully engaged with Morar so the attack on the credibility

and the integrity of the trustees (in justification of the *ex parte* proceedings) was without basis and unfounded in my view.

[26] When one has regard to the timeline then indeed questions do arise about the ex parte nature of the proceedings and the justification advanced in support of it as well as the case advanced in support of urgency given the unexplained time lag between February 2020 (when the final report from Morar was received) and July 2020 when the urgent application was issued.

[27] On the other hand the parties were in agreement that the application for reconsideration as well as the confirmation or otherwise of the rule must take into account all of the evidence before the Court and in this regard my view is that I should not exercise my discretion to grant a reconsideration purely on the procedural aspects that related to the bringing of the urgent application but rather have regard to the evidence in its entirety. I will however continue to have regard to those procedural shortcomings at the appropriate time.

**The law**

[28] It is clear that if regard is had to the provisions of both the FI Act as well as the MS Act then the applicant may either 'on good cause shown' or if it is the interest of beneficiaries or desirable to do to because of material irregularities apply for the appointment of a curator.

[29] In dealing with the requirement of 'good cause' under section 5 of the FI Act, the Supreme Court of Appeal in ***Executive Officer FSB v Dynamic Health 2012 (1) SA 453 (SCA)*** held in paragraph 4:

> *"(4) The Registrar must therefore satisfy the Court that there is good cause to appoint a provisional curator. Reading ss(1) together with ss(4) that means that the court must be satisfied*

*on the basis of the evidence placed before it that it is desirable to appoint a provisional curator. Something is desirable if it is 'worth having, or wish for'.*

*The court must assess whether the provisional curatorship is required in order to address identified problems in the business of the financial institution. It assesses this in the light of interest of actual or potential investors in the financial institution, or investors who have entrusted or may entrust the management of their investments to it. It must determine whether appointing a provisional curator will address those problems and have beneficial consequences for investors. It must also consider whether there are preferable alternatives to resolve the problems. And ultimately what will constitute good cause in any particular case will depend upon the facts of the case.*

*(5) In the court below the respondent//ss relied on the judgment in Ex parte Executive Officer of the Financial Service Board: In re Joint Municipal Pension Fund, where it was held that s5 "does not suggest a test which is more lenient than that set by the common law for the removal of trustees" and the court consequently applied in relation to s5(1) of the FI Act the approach to the removal of trustees laid down by this court in Sackville West v Norse and Another. That test is broadly whether the trustees have endangered the trust property by their acts or omissions or shown a want of honesty or capacity on the part of the financial institution and those responsible for managing its affairs will ordinarily justify the appointment of*

*the provisional curators to manage its business under s5(1) of the FI Act. To the extent it is correct to say that circumstances that warrant the removal of trustees of a trust, whether testamentary or inter vivos, would, if present in relation to a financial institution, ordinary justify the grant of an order for the appointment of the provisional curators. However it by no means follow that the power of a court to make such an order is limited to that class of case...*

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

[30] In ***Barnard and Others In re: Registrar of Medical Schemes v Medshield Medical Scheme (56193/12) [2013] ZAGPPHC 184 (5 July 2013)*** *upheld by the* ***Supreme Court of Appeal in Barnard and Others v Registrar of Medical Schemes (628/13) [2014] ZASCA 111; 2015 (3) SA (SCA) (16 September 2014)*** the Court in dealing with the duties of trustees expressed itself as follows :-

*"A registered medical scheme is a public organization and one possessed of a substantial Trust fund. As such, its trustees are*

*bound to observe the utmost good faith and to exercise proper care and diligence with regard to the funds and property of the scheme. They may not deal with or make use of the funds or property in a manner calculated to gain directly or indirectly any improper advantage for themselves, or for any other person, to the prejudice of the scheme. That are obliged further to ensure that proper control systems are employed by or on behalf of the medical scheme, and that the rules, operation and administration over the medical scheme comply with the provisions of the MSA and all other applicable laws. In addition, the board must take all reasonable steps to ensure that the interests of beneficiaries in terms of the rules of the medical scheme and the provisions of the act are protected at all times, and to avoid conflict of interest..."*

[31] It is thus evident that a high bar is set for the performance of trustees and understandably so as they are the repositories of what is often substantial funds. That standard does not only relate to the proper management of the funds at their disposal but also and equally so to matters of good governance and compliance with the rules of the fund.

[32] It is against those legal principles that one must then consider and determine the relief sought.

**The merits**

[33] There are a number of issues raised and relied upon in advancing the urgent relief as well as confirmation of the rule together with the issues the curator relies upon in seeking confirmation of the rule that require consideration.

[34] They are:-

**The Contract of the Chief Executive Officer ('the CEO') of the respondent**

1. The CEO of the respondent was initially appointed in 2009 on a fixed term contract which is what is required by the Rules of the respondent. On 19 March 2013 a new contract was entered into between the respondent and the CEO which was not a fixed term contract but a permanent contract.
2. Rule 20.5 of the 'Keyhealth Medical Scheme' provides that 'The Board shall appoint a Chief Executive Officer who is fit and proper to hold such office for a fixed term period'

[35] Section 32 of the MS Act in turn says the following regarding the binding nature of the rules :-

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

[36] The Morar report says that this constitutes a material irregularity and a transgression of Rule 20.5 of the Scheme Rules. They also say that the minutes of the board meeting of the 19 March 2013 was reviewed and it was found that no discussion regarding the proposed resolution or votes for or against the resolution was minuted.

[37] In fact the resolution of that Board meeting simply records :-

*'That the Chief Executive Officer be permanently appointed as from 1 January 2014 subject to the same terms and conditions contained in his current employment contract.'*

[38] In their response to the draft report the respondent pointed out that while the resolution on the appointment of the CEO was properly recorded, there was no minute of the discussion or vote as these were matters dealt with 'in committee' which they say was the norm when dealing with issues relating to senior employees of the Scheme.

[39] No explanation is offered why a fixed term contract was not entered into as required by the Rules but the respondents point out that terminating the contract would likely constitute an unfair labour practise and in any event the appointment of the CEO on a permanent basis did not involve any further costs to the respondent and that he (the CEO) was due to reach retirement age in July 2021 and that it was envisaged that the contract would run until his retirement.

[40] Even if this was the case then there is no reason why a fixed term contract was not concluded with the termination date being July 2021.

[41] Finally, they record in their response that the board of the respondent resolved to amend Rule 20.5 by deleting the words 'fixed term' thereby providing for permanent contracts.

[42] The curator in his interim report also concludes that the appointment of the CEO was irregular and in conflict with the provisions of Rule 20.5. He remarks further that the board of the respondent is a very experienced board with many members thereof serving since the inception of the board that it was unfortunate that the transgression of the rule took place under the oversight of such an experienced board.

[43] In this regard what is significant is that the rules of the scheme required compliance therewith. The stance of the respondent appears to be that the non-compliance was somehow acceptable in the light of the good service of the CEO and the lack of any financial risk to the respondent.

[44] It appears to miss the essential point that the binding nature of the rules of the scheme are not to be departed from and where there is a departure that is not warranted in law, one would expect of the respondent to concede it and remedy it as opposed to seeking to defend it even by seeking to amend the rule.

[45] It is indeed inexplicable how an experienced board as well as an experienced CEO who one would presume to have intimate knowledge of the rules and be mindful of the need to comply therewith, concluded a contract that was clearly in conflict with the rules. It is also difficult to understand the initial stance of the board that the 2013 open ended contract was not in conflict with the rules when the rule is clear and unambiguous in this regard.

**Alleged Irregularities in the Election of Scheme Office**

[46] Rule 19.1 of the Scheme Rules provide as follows :-

> *"The Board*
>
> *The affairs of the Scheme must be managed according to these Rules by a Board consisting of a maximum of fifteen Trustees who are Members of the Scheme AND FIT AND PROPER TO BE Trustees, constituted as follows:*
>
> *19.1.1 eleven (11) persons who are Members of the Scheme, nominated and elected by the Members of the Scheme:*

*19.2.2 a maximum of four (4) persons may be nominated and appointed by the newly elected Board from the Members of the Scheme to address special skills (as knowledgeable person), and geographic imbalance, transformation and/or representation from larger employers groups."*

[47] Rule 19.4 provides as follows:-

*"The Board may fill by appointment, any vacancy arising during the term of the office of a Trustee of the Board due to such Trustee resigning in terms of rule 19.19 or ceasing to hold office in terms of Rule 19.20 and 19.21. A person so appointed must retire at the first ensuing Annual General Meeting and that meeting may fill the vacancy for the unexpired period of the vacating Trustee of the Board."*

[48] Elections for board members were held during the period June 2018 until 26 July 2018 resulting in the election of 11 Board members. Following complaints received as well as an independent report and an opinion from senior counsel, it was found that there was a conflict of interest in the election process as well as a violation of the respondents Election Code of Conduct on the part of 3 of the 11 trustees elected.

[49] At a board meeting held on 28 November 2018 a resolution was passed voted on by 7 trustees who were present in the following terms :-

*"the Board of Trustees has the jurisdiction and obligation to consider, investigate and resolve on the matter as recommended by the Electoral Officer.*

*Take into account all the "unchallenged facts, documents and allegations" before the Board of Trustees, Messrs. Niehaus, Meyer and Nadooi transgressed the 2018 Election Code of Conduct (ECC).*

*Given the fact that all candidates in the election process including Messers, Niehaus, Naidoo and Meyer agreed and accepted that any transgression of the Code of Conduct for the Election process will result in dismissal, the Board confirms the disqualification of Messrs, Niehaus, Naidoo and Meyer as elected Trustees."*

[50] The remaining seven trustees also thereafter resolved to reduce the required number of trustees to seven which was approved by the applicant who says that when he approved it, he was under the mistaken view that such a resolution was passed at a meeting where there were 11 trustees present.

[51] The Morar report found that the manner in which the removal of the implicated trustees was effected as well as the composition of the board was in conflict with the rules of the Scheme, In particular it found that :-

a) The rules of the Scheme provided for a maximum of 15 trustees of whom 11 had to be elected and an additional 4 could be appointed. Therefore it concluded that a minimum of 11 trustees were required to run the affairs of the Scheme.

b) It therefore found that even though 7 trustees voted unanimously for the resolution to remove the 3 implicated trustees they did not constitute 2/3$^{rd}$ of the threshold set. (I,e 2/3rds of 11) and the resolution therefore lacked validity.

c) That once there was a vacancy on the board it should have been filled in terms of Rule 19.4 which did not happen.

d) That the remaining seven trustees were not competent to take a decision to reduce the size of the board to 7 as 11 trustees were required to properly take such a decision.

[52] Morar took the view that the conduct of the respondent was evidence of a material irregularity.

[53] The response of the respondent disputed the interpretation given by Morar to Rule 19.1 and say that while the starting point may well be 11 elected trustees the rule envisaged that this number may reduce over time and that the remaining trustees should then have the power and authority to fulfil the role of the Board (presumably without a minimum number of trustees being prescribed).

[54] On this basis they say that the resolution concerning the disqualification of the 3 trustees is valid as 7 out of 10 trustees voted in favour of it constituting a 2/3$^{rd}$ vote. For the same reasons they say that the resolution reducing the number of board members from 11 to 7 is valid and not in violation of the Scheme Rules as the Board at that time was validly constituted by the 7 trustees.

[55] The curator takes the view that the rule relating to the minimum number of trustees is not clear and that he is taking advice with regard to amending the rule to ensure that there is no ambiguity with regard to the proper composition of the board.

[56] In this regard one must accept that there is ambiguity in the rule with regard to the composition of the board but what I find disconcerting is the decision to reduce to number of trustees to 7. This would effectively mean that

from a contemplated maximum number of 15 trustees the respondent could now be governed by a board of 7 trustees and if one has regard to the rules relating to quorum and decision making then it is conceivable that 4 trustees could then form a quorum and a decision of 3 trustees could be sufficient.

[57] This in respect of an entity that has an income in excess of over R 2 billion rand and where the original rules envisaged a maximum of 15 trustees must raise concerns about the appropriateness of such a governance model that the board voted to put in place.

[58] The need for an amendment of the rules to provide clarity and certainty as well as an effective governance model is clear.

**Risk rating practises favouring new members who are young as opposed to elderly potential members.**

[59] This issue was not part of the extract from the draft report which was sent to the respondent for their response but was raised with staff of the respondent during the investigation by Morar.

[60] The Morar report found that financial incentives in the form of Commissions payable to brokers and others who marketed Keyhealth products was based on the age of the potential member. The amount of commission decreased as the age of the potential member increased – R0 commission was payable where the member was over 60 while R 400 was payable when the, member was under 50.

[61] Morar found that the commission and incentive structure as it dealt with the age of potential members was in conflict with Section 29(1)(n) of the MS act which provides as follows:-

*(a) The terms and conditions applicable to the admission of a person as a member and his or her dependants, which terms and conditions shall provide for the determination of contributions on the basis of income or the number of dependants or both the income and the number of dependants and shall not provide for any other grounds, including age, sex, past or present state of health, the applicant or one or more of the applicant's dependants, the frequency of rendering of relevant health services to an applicant or one or more of the applicant's dependants other than for the provisions as prescribed.*

[62] The stance of the respondent is that while it did seek to attract younger members to the scheme through its structured incentives, this did not constitute discrimination as contemplated in Section 29(1) of the MS Act as the terms and conditions under which members were admitted did not discriminate on the basis of age. Rather it was pointed out by the respondents that from an actuarial perspective the long term health of the Scheme necessitated a fairly good mix of young and old members. In this regard they say that younger members who are generally healthier place less strain on the finances of the scheme and effectively subsidise the costs of older members.

[63] They accordingly disputed that the practise complained of was discriminatory in terms of the MS Act or at all or that it constituted an irregularity.

[64] This practise has since stopped though there is a dispute whether it was the CEO or the curator who brought it to an end.

**The interim report of the curator**

[65] In his interim the curator raises in addition to the above issues, what he describes as other governance issues and includes amongst them :-

The tenure of terms of the trustees

[66] The current trustees of the respondents have served on the board for periods ranging from 6 years to 24 years with five of them having served for 20 years or more. While there has been a rule amendment to limit the term of trustees the curator points out that this will effectively mean that the 1st term of the trustees elected in 2018 will end in 2022 and they would then be eligible for a second term.

[67] He points out that limited tenure will be line with the best practice in Corporate Governance and the extended stay of trustees might sometimes create blurred or oversight to the organisation's compliance requirement.

[68] The trustees take the view that continuity on the Board is important and that the rule changes will now finally ensure rotation and term limits. They say that the rules are not intended to have retrospective effect and that the Trustees rotation would take some time (at least 8 years) to have run its course.

[69] While this may as matter of law be correct, I wonder from a governance perspective whether trustees who have held office for such long periods should not take a different approach than to rely on non- retrospectivity in asserting their right to continue serving as trustees. If there has not been a *de jure* overstay then there certainly has been a *de facto* overstay.

[70] This is not a criticism of the role and the contribution that trustees make but rather a recognition of the need for term and time limits and the need to balance the demands of stability with the demands of change.

[71] Whatever label one attaches to it, it is an important governance issue. The curator raises a number of other issues which include alleged conflict of interests and interference by external parties in the scheme, divisions and partisan voting in the board, sponsorships and travel and subsistence claims. There are in respect of most of these matters considerable disputes raised on the papers with the trustees largely contending that many of the issues are historical and have been addressed by them while in respect of other issues denying and disputing that there is any cause for concern or any irregularity committed.

[72] The trustees in dealing with the past and in explaining that they are overcoming the difficulties caused by the division in the board also accept that that the effects of the division continue to be felt by the respondent and then say "that had it not been for this the Curator would not have been appointed"

**Analysis**

[73] There is certainly no allegation of serious financial mismanagement in the affairs of the respondent. It does appear to be doing well financially with a growth in its membership and income taking place progressively.

[74] However ***Dynamic Health*** reminds us that compliance with regulatory requirements are just as important and that where there are factual disputes the Registrar cannot be expected to resolve such factual disputes by litigation before obtaining an order appointing a provisional curator.

[75] When I have regard to the issues raised by the applicant and the provisional curator then there does appear to be legitimate concerns about a number of issues :-

a) The process that led to the scheme entering into a contract with the CEO in conflict with the rules of the scheme. The unwillingness of the trustees to accept that there was a violation of the rules is disconcerting and their attempt to characterise an open ended permanent contract as being a fixed term contract is far from convincing. It raises in my view sufficient seriousness about their approach to governance. It is not at the end of the day the materiality or otherwise of the issue but rather an appreciation of the binding nature of the rules and when they have been contravened and the ability to recognise that and embark on positive remedial action. The stance of the trustees appears to be to defend their decision and the status quo at all costs.

b) The composition of the board. The uncertainty regarding the composition for the board will continue to remain a problem until it is properly resolved by a rule change that not only brings certainty but ensures a proper governance model is in place regard being had to the number of trustees that should ideally constitute the board of such a scheme. The Court notes the intention of the provisional curator to address this matter and bring it to finality.

c) The tenure of the trustees. There has been little change in the composition of the trustees for many years now and even the rule change that has been effected will not see change in the near future.

d) The other issues identified by the provisional curator and even though they are disputed remain important matters for the scheme to address moving forward and for proper processes and governance rules to be created to deal with them.

[76] Reverting to the question posed in ***Dynamic Health*** whether a curator is 'something worth having or wishing for' then the answer must be in the

affirmative. The governance problems are by no means insignificant even if all of them have not been the result of deliberate conduct on the part of the trustees but rather a relaxed and casual approach to governance and one characterised by a degree of defensiveness. This is demonstrated in their response to the criticism around the CEO contract, the discussion around the composition of the board and the tenure of the board.

[77] There is therefore the need to place the respondent on a sound footing from a governance perspective, not just as an important regulatory requirement but one that will ensure that in the future the funds and assets of the scheme are managed by a properly constituted an effective governance structure. That there has been no mismanagement of funds in the past is hardly the issue. What is of importance is to ensure proper structures and processes moving forward and a board of 7 members with 4 making up the quorum can hardly be said to conform to the highest standards of governance that an organisation such as the respondent needs. It is a matter that requires to be addressed sooner rather than later.

[78] The report of the provisional curator sets out in some detail the matters he has reviewed and the steps he has taken thus far. It also includes a road map for the election of trustees and the upliftment of the curatorship.

[79] It is for these reasons that I conclude that the reconsideration application must fail and the appointment of the provisional curator be confirmed. The problems identified as well as the solutions proposed will when given effect to result in a better managed respondent with more effective oversight. This can only be to the benefit of its members and beneficiaries of the scheme.

**Costs**

[80] Having regard to my observations and concerns with regard to how the urgent application was launched and the unfounded attack made against the trustees, my view is that the intervention of the trustees was both necessary as well as in the interests of the proper adjudication of the matter. I do not intend making any adverse costs order against the trustees given the unwarranted suggestion that the trustees would act unlawfully and illegally if proper notice of the application was given to them.

[81] That in itself would have justified their intervention and they have been vindicated on that score.

[82] The Court enjoys a discretion in the awarding of costs and even though they have not been successful in the reconsideration application or in their attempt to discharge the rule, my view is that they should not be required to pay the costs of the other parties to the application.

I make the following order :-

1. Jan Hendrik Greyling, is joined in his personal capacity as the second respondent.
2. Pieter Bennet, is joined in his personal capacity the third respondent.
3. Johannes Hendrikus Grobbelaar, is joined in his personal capacity as the fourth respondent.
4. Dauw Petrus Jacobus Kruger, is joined in his personal capacity as the fifth respondent.
5. Edward Peter Sharman, is joined in his personal capacity as the sixth respondent.
6. Prof. Susan Bouillon, is joined in her personal capacity as the seventh respondent.

7. J C (Chris) Landsberg, is joined in his personal capacity as the eighth respondent.
8. The application for reconsideration is dismissed.
9. The rule nisi issued by this Court on the 16 September 2020 is hereby confirmed.
10. The costs of the applicant in bringing this application are to be paid by the first respondent which costs are to include the costs of 2 counsel.

**NJ. KOLLAPEN**
**JUDGE OF THE HIGH COURT, PRETORIA**

**APPEARANCES**

| | | |
|---|---|---|
| **COUNSEL FOR THE APPLICANT** | : | **Adv JJ BRETT SC**<br>**Adv LA MAKUA** |
| **Instructed by** | : | **KHUMALO MASONDO ATTORNEYS INC** |
| **COUNSEL FOR THE RESPONDENT** | : | **Adv MM RIP SC**<br>**Adv J LE ROUX** |
| **Instructed by** | : | **VDT ATTORNEYS INC.** |
| **COUNSEL FOR THE CURATOR** | : | **Adv K TSATSAWANE SC**<br>**Adv L KUTUMELA** |
| **Instructed by** | : | **LAWTON INC** |
| **DATE OF HEARING** | : | **15 FEBRUARY 2021** |
| **DATE OF JUDGMENT** | : | **25 MARCH 2021** |