



REPORTABLE

CASE NO: SA 18/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMIBIAN ASSOCIATION OF MEDICAL AID FUNDS	First Appellant
NAMIBIA MEDICAL CARE MEDICAL AID FUND	Second Appellant
NAMIBIA HEALTH PLAN MEDICAL AID FUND	Third Appellant
RENAISSANCE HEALTH MEDICAL AID FUND	Fourth Appellant
BANKMED MEDICAL AID FUND	Fifth Appellant
NAMDEB MEDICAL AID SCHEME	Sixth Appellant
NAPOTEL MEDICAL AID SCHEME	Seventh Appellant
ROADS CONTRACTOR COMPANY MEDICAL AID SCHEME	Eight Appellant
NAMMED MEDICAL AID FUND	Ninth Appellant

And

NAMIBIA COMPETITION COMMISSION	First Respondent
NAMIBIA PRIVATE PRACTITIONERS FUND	Second Respondent

Coram: SHIVUTE CJ, DAMASEB DCJ and SMUTS JA

Heard: 21 June 2017

Delivered: 19 July 2017

Summary: The issue raised in this appeal is whether the Competition Commission established under the Competition Act, 2 of 2003 (the Act) has jurisdiction over registered medical aid funds for the purpose of s 23 of the Act which prohibits anti-competitive conduct between undertakings as defined in the Act.

The Namibian Association of Medical Aid Funds (NAMAF), established under the Medical Aid Funds Act, 23 of 1995 (the MAF Act) and medical aid funds registered under the MAF Act applied to the High Court for an order declaring that they are not undertakings as contemplated by the Act and that the Commission would consequently not have jurisdiction over them.

The Commission had conducted an investigation under the Act and notified NAMAF and the funds that their conduct of setting prices for medical services by setting benchmark tariffs after collective negotiations amounted to a contravention of s 23 which proscribes concerted practices between undertakings which directly or indirectly fix purchase or setting prices.

NAMAF and the funds contended in their application that they are not undertakings as defined in the Act because they do not carry on business for 'gain or reward' as is presupposed by the definition in the Act. They maintained that they are precluded by the MAF Act from distributing profits to fund members or anyone else. They also claimed that the conduct of setting benchmark tariffs is designed to achieve a non-commercial socio-economic objective, thus excluding that activity from the Act by virtue of s 3(1)(b). They also argued that the issue of

benchmark tariffs is authorised by the MAF Act and as a result excluded from the jurisdiction of the Commission by virtue of s 3(3) of the Act.

The Commission disputed these contentions and opposed the application. The High Court rejected each of the arguments and dismissed the application. It found that the funds fell within the definition of undertaking in the Act. The court referred to the definition of a medical aid fund in the MAF Act which states that a fund is a 'business' and found that a fund operates for 'gain' or 'reward' even if its profits are not distributed. The High Court also found that the activity of utilising a benchmark tariff is not excluded from the operation of the Act on the two further grounds raised – s 3(2)(b) or 3(3).

On appeal, the Supreme Court found that whilst funds are businesses in the form of enterprises and are statutorily enjoined to apply sound business principles in their operations, this is to protect their members' interests by ensuring the solvency of funds. Being a 'business' did not mean that a fund's economic activity is market related for the purpose of achieving a gain or reward. The MAF Act precluded funds from distributing a surplus and rendered them non-profit concerns. The social solidarity nature of funds in the context of the protective legislation governing and tightly regulating them and the statutory purpose of promoting funds meant that funds are not businesses carried on for gain or reward for the purpose of the definition of undertaking in the Act, which was also considered in the context of the purpose of the Act to promote and safeguard competition to provide consumers with competitive prices and product choices.

The Supreme Court concluded that medical aid funds are not undertakings within the meaning of the Act and that the Commission does not have jurisdiction over them. As the constituent funds are not undertakings, it also followed that NAMAF also did not fall within that definition.

The appeal was upheld and the High Court's decision reversed on appeal.

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and DAMASEB DCJ concurring):

[1] This appeal concerns whether the Competition Commission (the Commission) has jurisdiction over registered medical aid funds for the purpose of proceedings against them for alleged violations of s 23 of the Competition Act, 2 of 2003 (the Act).

Background facts and litigation history

[2] The first appellant is the Namibian Association of Medical Aid Funds (NAMAF). It is a statutory body corporate, established under the provisions of s 10 of the Medical Aid Funds Act, 23 of 1995 (the MAF Act). The other appellants are medical aid funds (the funds), registered in terms of the MAF Act. Under that Act,¹ NAMAF consists of all registered medical aid funds in Namibia.

¹ Section 11.

[3] The respondent in this appeal is the Commission. It is established under the Act² and has the statutory responsibility to investigate competition infractions under the Act. It initiated protracted proceedings against the appellants for alleged contraventions of s 23 of the Act arising from the use of benchmark tariffs for the healthcare industry determined annually by NMAF and used by registered funds.

[4] The Commission conducted an investigation under the Act and in March 2014 notified the appellants that their conduct contravened the prohibition contained in s 23 against concerted practices which directly or indirectly fix purchase or selling prices by the setting of benchmark tariffs after collective negotiations. The Commission concluded that doing so had the object and effect of restricting competition in the provision of financial assistance for medical costs. The Commission also expressed the view that, by establishing and publishing benchmark tariffs, NMAF had acted beyond its powers under the MAF Act. The Commission invited the appellants to come to a settlement pursuant to s 40 of the Act. The appellants declined this invitation and, as they had previously asserted, claimed that the Commission lacked jurisdiction over them and their activities.

[5] In May 2014, the Commission issued a notice to the appellants under s 36 of the Act that, as a result of the investigation, it proposed to make a decision that a Part 1 prohibition had been infringed by them. The Commission also expressed the intention to approach the High Court for relief including the imposition of penalties against the appellants. But it was stated that it had not as yet made a final decision and invoked s 36 to invite representations from the appellants. The appellants again contested the Commission's jurisdiction and disputed that the

² Section 4.

setting of benchmark tariffs amounted to conduct which fell foul of the Act. A conference took place on 19 August 2014 and the Commission indicated that its final decision would be made by the end of September 2014.

[6] After subsequent fruitless enquiries as to when the Commission's decision would be given, the appellants prepared an application and approached the High Court in mid-December 2014 for an order declaring that they do not fall within the ambit of the Act alternatively that the conduct of the first appellant (NAMAF) in issuing benchmark tariffs does not fall within the purview of the Act. They also sought to interdict the Commission from continuing with its investigation.

[7] At the same time as the appellants lodged their application with the High Court, the Commission published its decision in the Government Gazette to institute proceedings against the appellants under s 38 of the Act.

[8] In their application, the appellants contend that the Commission lacks jurisdiction over them on three grounds. Firstly, they maintain that they are not 'undertakings' as defined in the Act because the funds do not carry on business for 'gain' or 'reward' as they are precluded by the MAF Act from distributing any profits to members or anyone else. In the second instance, the appellants claim that the benchmark tariffs are designed to achieve a non-commercial socio economic objective, thus excluding this activity from the operation of the Act by virtue of s 3(1)(b). It was thirdly contended that the issuing of the benchmark tariffs is authorised by the MAF Act and is consequently excluded from the jurisdiction of the Commission pursuant to s 3(3) of the Act. The Commission disputed all three of these contentions.

[9] Each of these arguments was rejected by the High Court which found that the appellants and their conduct of setting benchmark tariffs are subject to the reach of the Commission and the Act. The appellants appeal against its judgment and order.

The appellants and the MAF Act

[10] In terms of s 10(3) of the MAF Act, the first appellant, NAMAF's statutory object is to 'control, promote, encourage and co-ordinate the establishment, development and functioning of funds in Namibia'. For the purpose of achieving this object, s 12 of the Act empowers NAMAF to:

'consider any matter affecting medical aid funds or the members of such funds and make representations or take such action in connection therewith as the Association may deem advisable.'

[11] This section further provides that NAMAF may:

'generally, do anything that is conducive to the achievement of its objects and the exercise of its powers, whether or not it relates to any matter expressly mentioned in this section.'

[12] The eight other appellants are funds registered under the MAF Act and thus members of NAMAF. A fund is defined in s 1 of the MAF Act as:

'any business carried on under a scheme established with the object of providing financial or other assistance to members of the fund and their dependants in defraying expenditure incurred by them in connection with the rendering of any

medical service, but does not include any such scheme which has been established in terms of an insurance policy’.

[13] This definition also sets out the object of a fund which is to provide financial or other assistance to its members and dependants in defraying medical expenditure. In the founding affidavit, it is explained that there are two types of funds. There are ‘open’ and ‘closed’ funds. Open funds are those open to any member of the public whereas closed funds are only for employees or members of a particular company, profession, trade, industry, association or union. The second to fourth appellants are open funds whilst the remaining appellants are closed funds.

[14] Medical aid funds must be registered with the Registrar of Medical Aid Funds, a position occupied by the chief executive officer of the Namibia Financial Institutions Supervisory Authority (Namfisa), established under its empowering legislation, Act 3 of 2001. The MAF Act prohibits any person from carrying on the business of a fund unless registered under the Act.³

[15] Every fund is required by the MAF Act⁴ to have rules which prescribe the minimum and maximum benefits to which members and their dependants are entitled. The rules must also provide for payment of those benefits ‘according to a scale or specific directives, set out in the rules’.⁵

[16] As is explained by the appellants in their papers, members pay contributions to a fund which results in the pooling of contributions. In return for

³ Section 22(1).

⁴ Section 30 (1) (e).

⁵ Section 30 (1) (m).

their contributions, members are entitled to be reimbursed for expenses incurred for medical treatment according to the scales or directives set out in the fund rules. It is also made clear in the founding papers, and not disputed, that medical aid funds 'provide protection against potentially impoverishing health care events,' given the expensive cost of medical care. It is also contended by the appellants that funds operate on a 'social solidarity principle' as members who claim less (such as the young and healthier members) effectively subsidise the older and less healthy members.

[17] Fund rules are thus required by the MAF Act to spell out the minimum and maximum benefits according to a scale or directive. In practice, this is done with reference to benchmark tariffs set by NAMAFA annually as a guide as to what the reasonable costs of medical services are for stipulated items and procedures which are individually coded and cover the complex range of medical services and goods available. These tariffs are reviewed annually for NAMAFA by actuaries as independent expert consultants. In this annual review exercise, these consultants obtain input from healthcare service providers and funds in order to determine whether the coded services or items cater for the latest medical developments and innovations. The consultants also review the tariffs themselves with reference to inflation and its effect upon service providers, their capital costs, the effect of exchange rate fluctuations, lending rates, extent of utilisation and depreciation periods. The determination of tariffs in this setting thus entails a degree of transparency from service providers to justify prices and increases with reference to those factors.

[18] In this way, the benchmark tariffs establish a scale of tariffs in respect of the entire range of medical services which are coded.

[19] As stated in the founding papers and confirmed in reply, NAMAFA and the independent expert consultants engaged by it do not engage in negotiations during the process of setting benchmark tariffs.

[20] The entire gamut of medical services available are separately coded and updated when technological advances justify that. There is also some flexibility for new advances including medicines which are introduced during any given year, pending the forthcoming annual update. There are in excess of 30,000 codes which are constantly updated.

[21] The benchmark tariffs themselves thus are intended to serve as guidelines as to the reasonable cost of the specified categories of medical services. They are not compulsory - either as a minimum or maximum. Each fund would determine its own benefits and member contributions with reference to the benefit options as set out in their rules. It is not disputed that each fund has different benefit options which in turn differ in how they are structured. The benefits (levels of reimbursement) are usually specified as a percentage of the benchmark tariff.

[22] The funds make use of actuarial advice in setting their contributions with reference to the benefit structures offered in their rules. The variations in benefits offered by funds relate to types of services and procedures covered and the extent and level to which they are covered as a percentage of the benchmark tariff.

[23] The funds in turn pay medical service providers relative to the benchmark tariffs as a percentage that can exceed 100 per cent. This is done through their administrators.

[24] The appellants stress that the use of a benchmark tariff is to be viewed within the context of the special features of the healthcare industry where normal market conditions do not always apply. The reasons given for this are that health care consumers would seldom have the opportunity to compare prices when in need of a specific healthcare service, especially when urgently required. Furthermore, the prices of those services are not always in the public domain. The decision as to whether most specific services are required is also invariably made by the provider who often stands to gain by the provision of those services in circumstances where a consumer would frequently not have adequate information or knowledge to make an informed decision as to the need for and nature of the service.

[25] The tariff is in practice also utilised by the Motor Vehicle Accident Fund, the Social Security Commission and the medical aid fund for public servants (which is excluded from the operation of the MAF Act).⁶

The approach of the High Court

[26] The High Court dismissed the appellants' application. It found that the funds fell within the definition of 'undertaking' in the Act. The court referred to the definition of a medical aid fund in the MAF Act, which states that a fund is a 'business' and found that a fund operates for gain and reward even if profits are

⁶ Section 2 of the MAF Act.

not distributed. The court further found that the activity of utilising benchmark tariffs is not excluded from the operation of the Act by s 3(1)(b) or s 3(3).

Submissions on appeal

[27] Mr Cockrell SC, together with Mr Obbes, appeared for the appellants. Much of his oral argument was focussed on the primary relief sought by the appellants – declaring that NAMA and the funds do not fall within the ambit of the Act because they are not undertakings as defined. He argued that the funds are not involved in the supply of goods or the provision of services for gain or reward. Both he and Mr Unterhalter SC who, together with Mr Phatela, appeared for the Commission referred to European jurisprudence.

[28] Mr Cockrell pointed out that Arts 101 and 102 of the Treaty on the Functioning of the European Union contain the centrepiece of the European Competition Law. Article 101 prohibits anti-competitive agreements between ‘undertakings’ and Art 102 prohibits the abuse of a dominant position by ‘undertakings’. But unlike the Act, the Treaty does not define an ‘undertaking’. It was left to the courts in Europe to give meaning to the term.

[29] Mr Cockrell pointed out that the decisions of courts in Europe determining whether entities constitute undertakings for the purpose of Arts 101 and 102 of the Treaty emphasise the principle of social solidarity. Even though the Treaty similarly prohibits certain anti-competitive conduct between undertakings both Mr Cockrell and Mr Unterhalter conceded the different context of those decisions – because the sickness funds in those jurisdictions referred to would appear to be

compulsory and because of the absence of a definition of undertaking in the Treaty, unlike the Act.

[30] Mr Cockrell argued that funds do not engage in market activities and should not be subject to the reach of the Act. He pointed out that funds are prohibited from distributing profits to members and emphasised the social solidarity nature of their activities. Members are only guaranteed financial assistance to defray actual medical expenses unlike insurance policies where more than that may be paid upon the occurrence of an insured event. He also submitted that there is no reason of public interest for the Act to apply to funds and their activities. He referred to the complaints and submissions directed at the benchmark tariff which appeared to motivate the Commission's decision. These were made to the Commission by health professionals and service providers and were based rather upon a concern that prices of medical services were being suppressed because of the benchmark tariff and not about selling prices for consumers.

[31] Mr Unterhalter on the other hand forcefully contended that, despite some elements of social solidarity, funds engage in commercial activity and in the market for the purpose of making a surplus as they are required to follow business principles in their operations. This, he argued, amounts to being businesses for reward or gain when a surplus arises and thus brings funds within the ambit of the Act. He furthermore pointed out that open funds compete with each other for members. Other indicators, which he said suggested market based activities on the part of funds, include the commercial exchange involved with their members and the contractual relationship which underpinned that involvement. He also referred to the admonition contained in the MAF Act that funds are to be run in

accordance with sound business principles. This, he argued, translated itself into ensuring a surplus is secured, as was evident from the financial statements of two of the funds attached to the Commission's answering papers. A surplus in this context meant that the funds have as their purpose operating for gain or reward, so he contended.

[32] Mr Unterhalter cited a recent judgment of the (South African) Constitutional Court in *Genesis Medical Scheme v Registrar of Medical Schemes & another*⁷ which referred to the nature of the business of a medical aid scheme similarly defined in the South African statute:⁸

' . . . (W)ithin the confines the statute stipulates, the definition is steeped in the language of a business-based, contractual relationship. It frames two parties dealing with each other in a commercial setting for a statutorily regulated bargain: that of undertaking liability in return for payment of a premium or contribution.'⁹

[33] Mr Unterhalter also referred to the provisions in the MAF Act relating to winding up, judicial management and dissolution of funds which emphasise their solvency which in turn reinforces their commercial setting.

[34] Mr Unterhalter also stressed that in the definition (of undertaking), the terms 'gain' or 'reward', are disjunctively used. He argued that gain is a term wider than profit. Had the legislature intended to use the term 'profit', this would have been done. Instead a wider concept was utilised in the definition.

⁷ [2017] ZACC 16 at paras 23 and 26 (*Genesis*).

⁸ The Medical Scheme Act, 131 of 1998.

⁹ *Genesis* at para 26.

[35] In reply, Mr Cockrell referred to different context in which the statements in *Genesis* were made. That matter involved a dispute concerning the way in which assets in a medical scheme were to be reported in its annual financial statements submitted to the registrar – and not in a competition context.

Are medical aid funds undertakings for the purpose of the Act?

[36] Section 23(1) of the Act prohibits agreements or concerted practices ‘which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia’. This form of unlawful collusion between competitors was aptly described by Mr Unterhalter as a most serious potential contravention of a competition law regime with potentially serious ramifications for consumers. This prohibition however only applies to agreements or concerted practices ‘between undertakings’.

[37] An undertaking is defined in the Act as:

‘any business carried on for gain or reward by an individual, a body corporate, an unincorporated body of persons or a trust in the production, supply or distribution of goods or the provision of any service.’

[38] The critical question is whether medical aid funds are businesses carried on for ‘gain’ or ‘reward’ with regard to the provision of services. Since competition law is, in a broad sense, intended for the protection of the consumer, the object it pursues is that those who for gain or reward provide goods and services in a defined market consisting of competitors do not engage in cartel conduct or in other manners proscribed by the Act. Not only must competitors be encouraged to

compete, they must be prevented from colluding to maximise profit or to secure market dominance with the object or effect of lessening competition. The issue confronting us is whether medical aid funds fit that paradigm.

[39] This court in *Total Namibia v OBM Engineering and Petroleum Distributors*¹⁰ recently referred to the approach to be followed in the construction of text and cited the lucid articulation by Wallis JA of the approach to interpretation in South Africa in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹¹.

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.'

[40] In the *Total* matter, this court also referred to the approach in England¹² and concluded:¹³

¹⁰ 2015 (3) NR 733 (SC) at para 18.

¹¹ 2012 (4) SA 593 (SCA) at para 18.

¹² As set out by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 – 913.

¹³ *Total* para 19.

'What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.'

[41] To paraphrase what was stated by this court in *Total*,¹⁴ the approach to interpretation would entail assessing the meaning of the words used within their statutory context, as well against the broader purpose of the Act.

[42] The context in this matter is the Act and its purpose. That is set out in s 2 of the Act. Its purpose is to promote and safeguard competition in Namibia in order to *inter alia* provide consumers with competitive prices and product choices. The protection of the consumer from prejudicial anti-competitive conduct is of paramount importance. Section 23 prohibits restrictive practices which have as their object the prevention or lessening of competition. It is against this statutory backdrop that the meaning to be given to undertaking in the definitions section is to be ascertained. Before reverting to the statutory context in which the term is used, the interpretation given to the same term by the European Court of Justice is briefly referred to.

[43] Although the context of the European jurisprudence differs because of the fact that the Treaty does not define undertaking in the way the Act does, the approach of the European Court of Justice (ECJ) in *Christian Poucet v Assurances*

¹⁴ At para 24.

*Generales de France and Caisse Mutuelle Regionale du Languedoc-Roussillon*¹⁵ in addressing the question as to whether the scheme in question was an undertaking for the purpose of the Treaty is instructive. The case concerned sickness and maternity insurance schemes for the self-employed. Contributions were proportionate to income but benefits were standardised. There was an extent of cross-financing between the different schemes. The issue was whether an entity 'charged with managing a special social security scheme is to be regarded as an undertaking for the purpose of Arts 85 and 86 of the Treaty'.¹⁶ The court answered this question in the negative. What weighed heavily with the court was that the schemes 'pursue a social objective and embody the principle of solidarity' and should thus fall outside the reach of the provisions proscribing anti-competitive conduct.

[44] The ECJ stressed that the schemes provided coverage against the risks of the sickness regardless of the financial status and state of health at the time of affiliation of those who contributed to the schemes.¹⁷ The court further stated:

- '10. The principle of solidarity is, in the sickness and maternity scheme, embodied in the fact that the scheme is financed by contributions proportional to the income from the occupation and to the retirement pensions of the persons making them; only recipients of an invalidity pension and retired insured members with very modest resources are exempted from the payment of contributions, whereas the benefits are identical for all those who receive them. Furthermore, persons no longer covered by the scheme retain their entitlement to benefits for a year, free of charge. Solidarity entails the redistribution of income between those who

¹⁵ [1993] ECR I-637.

¹⁶ Para 4.

¹⁷ Para 9.

are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover.

.....

12. Finally, there is solidarity between the various social security schemes, in that those in surplus contribute to the financing of those with structural financial difficulties.
13. It follows that the social security schemes, as described, are based on a system of compulsory contribution, which is indispensable for application of the principle of solidarity and the financial equilibrium of those schemes.¹⁸

[45] The court concluded:

- '18. Sickness funds, and the organizations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions.
19. Accordingly, that activity is not an economic activity and, therefore, the organizations to which it is entrusted are not undertakings within the meaning of Articles 85 and 96 of the Treaty.'

[46] The ECJ also found in *Cisal di Battistello Venanzio v INAIL*¹⁹ that an entity managing a scheme providing insurance against workplace accidents and occupational diseases was not an undertaking for the purpose of Arts 85 and 86 of the Treaty. The reasoning of the court in reaching its conclusion is likewise instructive. In the first instance, the court stressed that the scheme applied the principles of social solidarity. It was financed by contributions where the rate was

¹⁸ Paras 10, 12 and 13.

¹⁹ EU Case C – 218/00.

not 'systematically proportionate' to the risk insured.²⁰ Secondly, the amount of benefits paid was not necessarily proportionate to the contributors' earnings. There was thus an absence of a direct link between the contributions paid and benefits granted, thus entailing 'solidarity between better paid workers and those who, given their low earnings, would be deprived of proper social cover if such link existed'.²¹

[47] A further factor listed by the court was that the rate of contributions and benefits were set by the State²² and concluded:

'44. In summary, it is clear from the foregoing that the amount of benefits and the amount of contributions, which are two essential elements of the scheme managed by the INAIL, are subject to supervision by the State and that the compulsory affiliation which characterises such an insurance scheme is essential for the financial balance of the scheme and for application of the principle of solidarity, which means that benefits paid to insured persons are not strictly proportionate to the contributions paid by them.

45. In conclusion, it may be stated that in participating in this way in the management of one of the traditional branches of social security, in this case insurance against accidents at work and occupational diseases, the INAIL fulfils an exclusively social function. It follows that its activity is not an economic activity for the purposes of competition law and that this body does not therefore constitute an undertaking within the meaning of Articles 85 and 86 of the Treaty.²³

²⁰ Para 39.

²¹ Para 42.

²² Para 43.

²³ Para 44 – 45.

[48] In another matter²⁴ the ECJ held that sickness funds were not undertakings, following the reasoning in *Poucet and Cisa*:²⁵

- '51. Sickness funds in the German statutory health insurance scheme, like the bodies at issue in *Poucet and Pistre*, are involved in the management of the social security system. In this regard they fulfil an exclusively social function, which is founded on the principle of national solidarity and is entirely non-profit-making.
52. It is to be noted in particular that the sickness funds are compelled by law to offer to their members essentially identical obligatory benefits which do not depend on the amount of the contributions. The funds therefore have no possibility of influence over those benefits.'

[49] The court further stated:

- '55. It follows from those characteristics that the sickness funds are similar to the bodies at issue in *Poucet and Pistre* and *Cisa* and that their activity must be regarded as being non-economic in nature.
56. The latitude available to the sickness funds when setting the contribution rate and their freedom to engage in some competition with one another in order to attract members does not call this analysis into question. As is apparent from the observations submitted to the Court, the legislature introduced an element of competition with regard to contributions in order to encourage the sickness funds to operate in accordance with principles of sound management, that is to say in the most effective and least costly manner possible, in the interests of the proper functioning of the German social security system. Pursuit of that objective does not in any way change the nature of the sickness funds' activity.

²⁴ *AOK Bundesverband v Ichthyol-Gesellschaft Cordes, Hermani & Co* 601CJ0264 (2004).

²⁵ Paras 51 – 52.

57. Since the activities of bodies such as the sickness funds are not economic in nature, those bodies do not constitute undertakings within the meaning of Articles 81 EC and 82 EC.²⁶

[50] But that was not the end of the enquiry in that matter. It was raised that, besides the social nature of the sickness funds within the framework of the German social security system, whether funds and their associations representing them engage in operations which have an economic and not a social purpose such as the determination of fixed maximum amounts of medical products to be borne by sickness funds. Pharmaceutical companies contended that this constituted economic activity and thus for that purpose meant that the funds were undertakings for the purpose of the Treaty. The maximum price levels were not dictated by legislation but decided upon by fund associations having regard to criteria laid down in legislation.²⁷ Furthermore the discretion of fund associations 'relates to the maximum amount paid by the sickness fund in respect of medicinal products which is an area where the latter do not compete'.²⁸

[51] The court concluded:

'63. It follows that, in determining those fixed maximum amounts, the fund associations do not pursue a specific interest separable from the exclusively social objective of the sickness funds. On the contrary, in making such a determination, the fund associations perform an obligation which is integrally connected with the activity of the sickness funds within the framework of the German statutory health insurance scheme.

64. It must accordingly be found that, in determining the fixed maximum amounts, the fund associations merely perform a task for management of

²⁶ Paras 55 – 57.

²⁷ Paras 61 – 62.

²⁸ Para 62.

the German social security system which is imposed upon them by legislation and that they do not act as undertakings engaging in economic activity.

65. The answer to the first question must therefore be that groups of sickness funds, such as the fund associations, do not constitute undertakings or associations of undertakings within the meaning of Article 81 EC when they determine fixed maximum amounts corresponding to the upper limit of the price of medicinal products whose cost is borne by sickness funds.'

[52] Despite two differences already highlighted (the inclusion of a definition of undertaking in the Act and the compulsory nature of participation in the schemes in question in Europe), the reasoning of the ECJ in excluding the entities in question from the reach of the anti-competitive conduct provisions in the Treaty is after all with reference to the concept of an undertaking in a context of the regulation of competition.

[53] Because the term was not defined in the Treaty, the ECJ was required to interpret the term within its context of promoting competition and proscribing anti-competitive conduct. The approach of the ECJ in this context can be of some assistance in interpreting the term as defined in the Act.

[54] The legislature in Namibia has instead defined that concept to mean for 'gain' or 'reward'. Factors which weighed heavily with the ECJ in excluding entities from the concept of undertaking in that context included the social objective of the scheme and its embodiment of the principle of solidarity, as well as the statutory supervision and compulsory affiliation and the non-profit making objective of the schemes.

[55] I turn to examine the nature of medical aid funds registered under the MAF Act and the nature of their operations.

[56] In the MAF Act, a fund is defined as a business carrying on a scheme with the object of providing financial assistance to members in defraying expenditure incurred for medical services.

[57] A fund's rules must under the MAF Act²⁹ preclude any portion of a surplus realised by a fund being distributed to its members or any other person. Any surplus would become part of the reserves of a fund. A fund's objective is not to make a profit for its members but to provide financial assistance to them to defray expenses incurred for medical expenses. A profit motive is in fact expressly precluded by the MAF Act.

[58] As was pointed out by Mr Unterhalter, s 28 of the MAF Act enjoins Funds to carry on their business as funds in accordance with sound business principles.³⁰ But as Mr Cockrell countered, so too are the Social Security Fund³¹ and the Employees' Compensation Fund³² statutorily required to run their funds in accordance with sound business principles.³³ This statutory injunction is to be viewed within the context of the MAF Act. According to its long title, the MAF Act is to provide for the control and promotion of medical aid funds. Viewed as a whole, the MAF Act is in essence protective social legislation, requiring registration of funds with the registrar (the chief executive officer of Namfisa). The registrar is to

²⁹ Section 30(1)(d).

³⁰ Section 28.

³¹ Established under the Social Security Act 34 of 1994.

³² Established under the Employees' Compensation Act 30 of 1941.

³³ In s 20 of Act 30 of 1941; s 16 of Act 34 of 1994.

supervise and control the operation of funds. In doing so, the registrar is empowered to require the production of books and documents from funds,³⁴ approve grant registration of a fund³⁵ and approve any changes to the rules of a fund and receive its financial statements.³⁶

[59] The registrar is precluded from registering a fund unless satisfied that its establishment will be in the public interest. The registrar is also to be satisfied that the applicant will be able to establish the proposed fund successfully as a fund, its business will be carried on in a prudent manner and that its organisation and management is appropriate for the carrying on of the fund in accordance with its rules and the MAF Act.³⁷

[60] A fund is also expressly precluded from carrying on any business other than that of a fund.³⁸ Funds are also required to appoint auditors and file their annual financial statements with the registrar within six months of a financial year end.³⁹ No person may carry on the business of a fund unless the fund has been duly registered under the Act.⁴⁰

[61] These regulatory and supervisory provisions accentuate the statutory purpose behind the MAF Act of providing protection for members of funds in the public interest in pursuit of the purpose of a fund.

³⁴ Section 4.

³⁵ Section 24.

³⁶ Section 24.

³⁷ Section 29.

³⁸ Section 28.

³⁹ Section 33.

⁴⁰ Section 30(1).

[62] The purpose of the funds themselves is to provide financial or other assistance to members in defraying expenditure for medical services. Members make contributions to their funds – into the collective pot of the fund. In any given year a member may claim less benefits than his or her contributions while other members may recover more than they contributed. At the commencement of that year members would not know into which category they could fall. But by being a member they throw in their lot with other members. The purpose of the fund and its characteristics determined by the MAF Act accord with the social solidarity principle emphasised by the ECJ as a crucial factor in determining whether an entity is an undertaking for the purpose of the provisions in the Treaty regulating competition. These features accentuate the social purpose of funds as part of social security facilitated by the MAF Act.

[63] Funds are thus highly regulated in the public interest to protect their members and ensure that the business of a fund is conducted within the confines of the Act. The legislature has provided this protective framework in the interest of members. This is no doubt because of the statutorily endorsed social function funds perform where members subsidise each others' medical costs on a principle of social solidarity thus rendering access to expensive medical services as widely as possible. It is plainly in the public interest that as many people as possible enjoy the benefits of fund members (to receive assistance in defraying medical expenses) to relieve the public purse from providing those medical services to those members. The purpose of the MAF Act is not only for control to be exercised over funds but is also, according to its long title, to promote funds because of the useful societal function they perform.

[64] Whilst funds are businesses in the form of enterprises and are statutorily enjoined to apply sound business principles in their operations (to protect members' interests and ensure the solvency of funds), these considerations do not mean that their economic activity is market related for the purpose of achieving a gain or reward. The reasoning employed by the ECJ in *AOK Bundesverband*⁴¹ resonates in this context.

[65] Fund members are precluded from receiving more than what is paid for any medical services. There is thus no question of a 'gain' and 'reward' for members in the running and operation of funds. They are merely reimbursed for the whole or a portion of the payments they make for medical services. As has been pointed out, if a fund makes a surplus, it cannot be paid out to members or anyone else and is to be retained for the future benefit of members such as a reserve when claims in the fund exceed the contributions of members.

[66] The statutory framework within which funds operate requires that they are not to distribute a surplus. That they are thus non-profit concerns. This is reinforced by the fact that funds will not be registered unless they can satisfy the registrar that they will be run prudently.⁴² That is the language of consumer protection in the public interest and not of profit.

[67] Whilst the membership of a fund under the MAF Act is not statutorily obligatory as part of social security unlike the position in the European jurisdictions in the cases referred to, funds under the MAF Act plainly have a statutorily ordained social function within the context of a social security system. They are

⁴¹ In paras 55 – 57 quoted in para 49 above.

⁴² Section 24.

non-profit-making and have elements of the social solidarity principle, as already outlined.

[68] Even though gain would appear to be a wider concept than profit. Their social solidarity nature within this statutory context further means that funds are not businesses which are carried on for gain or reward for the purpose of the definition of undertaking contained in the Act. They therefore do not constitute 'undertakings' within the meaning of the Act. It follows that the Commission does not have jurisdiction over them for the purpose of s 2 of the Act.

[69] Once it is accepted that the funds do not fall within the definition of undertaking, then NAMAFA is also not an undertaking for the purpose of the Act. It after all comprises the sum of the funds and is established by the MAF Act to control and co-ordinate the functioning of funds. In discharging its statutory obligations in respect of funds which are not undertakings, it follows that NAMAFA itself would also not fall within that definition, particularly given the fact that its own activities ordained by statute as an association are not for gain or reward.

[70] The nature of the complaints and submissions raised by service providers which are at the heart of the Commission's investigation serve to demonstrate that the public interest and object of the Act of protecting consumers do not impel the inclusion of medical aid funds within the sweep of the Commission's powers. The interest underpinning the complaints and submissions is the impact the tariff has on suppressing selling prices of healthcare services and because any increases in those prices are subject to tariffs where those prices must be objectively justified in a transparent mathematical manner. The funds, in any event, do not compete in

respect of the prices or tariffs set by the benchmark tariff. Whilst the fixing of purchase prices can constitute deleterious anti-competitive conduct, as was pointed out by Mr Unterhalter, it would on the contrary seem that the setting of a benchmark tariffs within socially protective and utilitarian statutory context would not be adverse to the protection of consumers which both the Act and MAF Act seek to achieve and would instead appear to serve the public interest and consumers.

[71] It follows that the funds and NAMAFA are not undertakings within the meaning of the Act. In view of this conclusion, it is not necessary to deal with the alternative relief sought in the appellant's application and the other grounds raised in support of it.

[72] It further follows that the appeal succeeds and the High Court should have granted the primary relief in para 1 of the notice of motion.

[73] Both sides correctly conceded that a cost order should include the costs of two instructed counsel, given the novelty and complexity of this appeal. I agree. This is reflected in the costs order.

Order

[74] The following order is made:

- (a) The appeal succeeds with costs;

- (b) The order of the High Court is set aside and the following is substituted for it:

‘1. The second to eleventh applicants, as funds established pursuant to the Medical Aid Funds Act, 23 of 1995 and first applicant as the association of those funds, are declared not to fall within the definition of undertaking within the Competitions Act, 2 of 2003.

2. The first respondent is to pay the applicants’ costs, including the costs of one instructing and two instructed counsel.’

- (c) The costs of appeal are to include the costs of one instructing and two instructed counsel.

SMUTS JA

SHIVUTE CJ

DAMASEB DCJ

APPEARANCES

APPELLANTS:

A Cockrell, SC (with him D Obbes)

Instructed by ENSafrica | Namibia,
Windhoek.

RESPONDENTS:

D N Unterhalter, SC (with him T C
Phatela)

Instructed by AngulaCo. Inc,
Windhoek