



REPORTABLE

CASE NO: SA 77/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HERITAGE HEALTH MEDICAL AID FUND

Appellant

and

**REGISTRAR OF MEDICAL AID FUNDS
MINISTER OF HEALTH AND SOCIAL SERVICES
NAMFISA BOARD OF APPEAL**

**First Respondent
Second Respondent
Third Respondent**

Coram: DAMASEB DCJ, SMUTS JA and FRANK AJA

Heard: 5 October 2022

Delivered: 21 November 2022

Summary: The appellant brought an application for review against the first respondent seeking declaratory relief regarding the annual contribution increase of medical aid funds, and whether such an increase forms part of an amendment of the rules of the appellant, therefore requiring approval from the first respondent. This

contention arose from registrar of Medical Aids' rejection to approve the appellant's application to approve the annual contribution increase for 2019.

The court *a quo* refused to grant declaratory relief sought. It was found that the annual contribution amount and/or calculation forms part of the rules of the fund. Thus, the approval of the registrar was seen as necessary for any changes to the contribution amount.

Further, the court *a quo* found that there were indeed numerous opportunities for *audi* created during the process of dealing with the application of amendment of the rules submitted by Heritage Health to the registrar of Medical Aid Funds.

Further, the court *a quo* was also satisfied with the process that was followed by the registrar in dealing with the matter, hence was not inclined to grant the requested relief.

On appeal, the issues were whether the decision of the registrar could be set aside based on the alleged non-compliance with the *audi alteram partem* rule or on any other recognised review grounds for which a case had been made on the record. The appellant particularly contended unreasonableness of the decision by the registrar as a ground for setting aside.

On appeal, the court reasoned that there were two reasons underpinning the decision of the registrar, the first related to reinsurance or insurance that was recommended by the actuaries of the Fund. The second related to the '30 per cent self-fund gap' which was a feature of some of the benefit structures offered by the Fund. While the registrar conceded that the 'self-fund gap' formed part of the business plan of the Fund from the outset, that the product was offered from its inception, and that complaints in respect thereof had been made to his office, he maintained that he could not sanction a 30 per cent increase in respect of the removal of the 'self-fund

gap' as this was attributable to the removal of the 'unapproved and unlawful self-fund gap practice'.

Held, the general rule in applications, of which review applications are an example, is that the case the respondent(s) must meet is that set out in the founding affidavit and nothing more. Deviation from this general rule may cause prejudice to a respondent as it would amount to a finding against such respondent without she/he having been given the opportunity to deal with such grounds or allegations.

Held, as a principle of natural justice, *audi alteram partem* depends on the circumstances of the case, the nature of the enquiry, the rules under which the decision-maker acts, and the subject matter that is dealt with. Further, fairness is not static but tailored to the particular circumstances of the case. Thus, an applicant cannot complain of lack of *audi* if the registrar on the application itself declines it. In such a case, the registrar's decision can still be assailed on review, provided of course there are grounds for review.

Held, the Fund had a full opportunity to state its case, which it did. In these circumstances, the complaint of a lack of *audi* rings hollow. The real complaint seems to be that the registrar did not agree with the submissions made by the Fund and did not change his view. However, the *audi* point in relation to the self-funding gap was never an issue in the proceedings and needed no further consideration as this was not raised in the founding papers.

Held, the directive of the registrar that the Fund immediately cease to apply the self-funding gap was not challenged along the lines indicated by the court on appeal and the registrar was not called to answer such challenge. This was despite it being unlikely that he may have a satisfactory explanation in an attack based on a misdirection and misapprehension of his discretion.

Held, for the purpose of considering the reasonableness of the decision of the registrar to direct the Fund to immediately cease to implement the self-funding gap without granting it a concomitant increase in contributions, it was accepted for purposes of determination that he was faced with an irregular and unlawful situation (in contravention to s 30(1)(l) and (m) of the Medical Aid Funds Act 23 of 1995 (the Act)). However, in making this decision, the court on appeal noted certain facts and circumstances that the registrar should have been aware of.

Held, the court on appeal was satisfied that a reasonable registrar, in the circumstances of the present matter, would not have made the decision that the registrar made but would have resolved the matter in a manner so as not to cause prejudice to either the Fund or its members. Rather, the decision was neither in the interest of the Fund nor its members, with potentially serious adverse consequences to both.

Held, the court on appeal agreed that the directive of the registrar in relation to the removal of the self-funding gap – without addressing the additional costs this would entail to the fund – was unreasonable.

Held, it could not be suggested that the registrar acted unreasonably and irrationally to seek assurance that the stated risk was addressed by insurance or a viable alternative when the Fund itself was of the same view and sought to address the issue. Thus, the Fund failed to make out a case that the registrar's insistence on insurance or viable alternative was unreasonable or irrational.

Held, it appeared that rule 11(5) of the Rules of the Supreme Court was not kept in mind as numerous duplications of documentation and documents not relevant to the appeal were included in the record of appeal. Furthermore, there was also a failure to comply with rule 11(1)(h) of the Rules concerning the page numbers in the appeal record. As a consequence, it greatly inconvenienced anyone attempting to read the record and made preparations for the appeal more time consuming.

Non-compliance with the rules when it comes to the records filed in the court were too commonplace and this issue must be addressed. The court on appeal did so in the costs order to send out a message that laxity in preparing records would have adverse consequences.

Held, the appeal partly succeeds.

Held further, the registrar is to consider the matter of self-funding gap *de novo* and determine the modalities (inclusive of the costs) in respect of the termination of the said gap, with cognisance of the present judgement.

Costs to be borne by the respondents, save the costs in respect of the compilation and perusal of the record which was limited to 70 per cent of such costs.

APPEAL JUDGMENT

FRANK AJA (DAMASEB DCJ and SMUTS JA concurring):

Introduction

[1] Appellant, Heritage Health Medical Aid Fund (the Fund) is a registered medical aid fund which offers a range of medical aid products to its members. It was registered in 2015 and conducted business as per its business model that accompanied its application for registration up to 2018, when it took a decision to increase the contributions from its members in respect of all its offerings.

[2] For this to happen it submitted its proposals in this regard to the first respondent (the registrar) by the end of October 2018, as was required by the

registrar. The proposed increase in contributions (and changes to benefits) were intended to take effect from 2019. The calendar year is also the financial year for the Fund as well as the period for which benefits are stipulated, ie if a specific benefit is capped at a certain amount it means that is the maximum amount available to members during a specific calendar year.

[3] Whereas the Fund did lodge the application for increased annual contributions from members, it took the position that this was merely for the information of the registrar and not for his approval. The registrar, to the contrary maintained that the change in contributions amounted to an amendment of the rules of the Fund for which his consent was necessary.

[4] Notwithstanding various communications and meetings between the Fund and the registrar with regard to the application by the Fund, the registrar eventually declined the application.

[5] The Fund initially sought to internally appeal the refusal to approve the application to the third respondent and when this turned out to be the wrong entity an appeal was lodged with the second respondent.

[6] The Fund also, in the meantime, implemented the increased contributions as determined by it on (what turned out to be) the overoptimistic assumption that it was

not necessary for it to obtain the approval of the registrar for such increased contributions.

[7] When the registrar ordered the Fund, and placed advertisements to this effect in the news media, to refund its members such portions of the contributions levied which were not approved by the registrar, it also encountered procedural hurdles in its intended internal appeal, it scuppered this internal appeal and approached the High Court for relief.

[8] The attack on the decision of the registrar in the High Court was essentially a two-pronged one. First, it was contended that the approval of the registrar was not necessary as the increase in contributions did not amount to an amendment of its rules. Second, that the Fund was not granted sufficient opportunity to respond to the issues held against it by the registrar, ie that the *audi alteram partem* principle was not adhered to prior to the decision by the registrar.

[9] The court *a quo* found that the proposed increase of annual contributions did constitute an amendment of the Fund's rules and hence that the approval of the registrar for such increase was necessary. It also found that the *audi alteram partem* principle was complied with and dismissed the application to review and set aside the decision of the registrar not to approve the application for the increase in contributions.

[10] There is no appeal against the decision of the court *a quo* that the approval of the registrar was necessary for the proposed increased contributions and this decision thus needs no further consideration. No issue was made in the court *a quo*, nor is any made in this court, in respect of the Fund's decision to abandon its internal appeal and to approach the High Court on review. This aspect thus also needs no consideration from this court. It follows that the disputes *a quo* and in this court are essentially between the Fund and the registrar. The only remaining issues are whether the decision of the registrar can be set aside based on the alleged non-compliance with the *audi alteram partem* rule or on any other recognised review grounds for which a case had been made out on the record. As will become apparent below the Fund submits that the decision by the registrar was unreasonable and that it should be set aside on this basis, should the *audi alteram* point be unsuccessful.

Introductory comments on the Fund's case

[11] As the Fund sought a review of the decision of the registrar not to approve the increase in the benefits it offered together with the amendment of the rules relating to certain of its offerings the application had to set out:

' . . . the decision or proceedings sought to be reviewed . . . supported by affidavit setting out the grounds and the facts and circumstances on which applicant relies to have the decision or proceedings set aside or corrected.'

[12] It is by now trite law that the general rule in applications, of which review applications are an example, is that the case the respondent(s) must meet is that set

out in the founding affidavit and nothing more. Deviation from this general rule may cause prejudice to a respondent as it would amount to finding against such respondent without he or she having been given the opportunity to deal with such grounds or allegations.¹

[13] In this application a review is sought in respect of the registrar's 'decision rejecting the appellant's 2019 annual contribution increases'. On the facts there are two decisions which are of relevance. One communicated per letter dated 26 February 2019 (the first decision) and a varied decision also in essence rejecting the proposed contribution increases dated 25 April 2019 (the second decision). As will become evident below, the second decision was made after the Fund engaged the registrar in respect of his reasons for the first decision in an attempt to persuade him to change or vary the first decision.

[14] After receipt of the second decision the appellant instituted an internal appeal which has to be lodged within 30 days of the decision appealed against. When queried as to whether the appeal was lodged timeously the appellant's stance was that it was indeed filed timeously as the second decision was the final decision as the first decision of the registrar '. . . were the subject of debate between the parties which debate ended in the registrar's letter dated 25 April 2019 . . . It is only in that letter that the decision was made final (in its varied form)'.

¹ *Mbanderu Traditional Authority & another v Kahuure & others* 2008 (1) NR 55 (SC).

[15] However in this court counsel for appellant abandoned the stance taken above and submitted that the final decision was the first decision and seeks to nullify the communications between the Fund and the registrar subsequent to the first decision and running up to the second decision as these communications would impact on an *audi alteram* point appellant wished to pursue. Now, the point is stated as follows in the heads of argument:

‘The court *a quo* erred in law and on the facts in finding that the Fund was afforded alternatively properly afforded the application of the *audi alteram partem* rule (*‘audi’*) before the impugned decision was taken’

[16] Implicit in this submission relating to the *audi alteram* principle is that *audi* was granted prior to the second decision but this was too late. Thus, in this case the appellant for purposes of the appeal seeks to set aside the first decision and disregard the second decision as it is, according to the appellant, invalid as the registrar, being *functus officio* after making the first decision, could not revisit the matter. Needless to say, this *functus officio* point with regard to the second decision was not raised in the review application *a quo* as this would be contrary to the stance that the second decision was the final one. Thus issues are now, on appeal, also raised as to why the first decision was flawed.

[17] The result of this unprincipled approach to the application will become apparent below when I deal with the issues in detail.

Reasons underpinning the decision of the registrar

[18] There are two reasons underpinning the decision of the registrar. The first reason relates to reinsurance that was recommended by the actuaries of the Fund. I interpose here to mention that the words insurance and reinsurance are used interchangeably in the papers. As the Fund is not an insurer when it insures some of its risks, it strictly speaking does not reinsure but insure. I will thus in this judgment continue to refer to insurance. This issue was dealt with by the actuaries in their report as follows:

- ‘4.2.1 Given relatively small membership of the Fund the proposed changes to the benefits offered on the various plans (. . .) and the volatile nature of the claims, we strongly recommend that the Fund insures some portions of the benefits in future.
- 4.2.2 A small number of members reaching the overall limit on the most comprehensive hospital plans would lead to a significant deterioration in the Fund’s financial position, possibly even leading to total financial ruin.
- 4.2.3 Therefore, the Fund should consider at least having insurance in place to mitigate the risk of a small number of large claims placing financial strain on the Fund. An excess of loss or stop loss type insurance treaty must be considered.’

[19] The Fund attempted to address the issue raised by the actuaries by submitting a letter of undertaking from Erongo Agencies (Pty) Ltd, which is stated to be a

member of the Avacare Medical Group, to inject an amount of N\$1 million into the Fund if necessary. The amount would, according to the letter, be sourced from Erongo Agencies (Pty) Ltd or some other (unidentified) entities in the Avacare Medical Group. The registrar however raised a plethora of objections to the approach and insisted on insurance or 'equivalent satisfactory financing' seeing that the undertaking was not acceptable to him. It should be noted that the actuary, in assessing the question of reinsurance after the registrar's concerns in this regard were raised, pointed out that there had been no claims in excess of N\$1,35 million since inception of the Fund and thus recommended that the Fund 'retain the full risk of claims up to N\$1,35 million and negotiate the price of cover above this amount up to N\$2,5 million'. Insurance along these lines could not be considered as potential insurers needed to work on the approved contributions which was still in issue and not finally determined.

[20] The Fund alleges that the insistence of the registrar on insurance is an issue unrelated and irrelevant to the contribution increases and to link the two matters is a material misdirection and a failure to properly apply his mind to the application. In addition, the decision to seek to compel the Fund to obtain insurance or equivalent satisfactory financing is labelled as a contravention of the Fund's article 21(1)(j) constitutional rights and amounts to an exercise of the discretion in a manner that was unfair and unreasonable. This constitutional challenge although argued in the court *a quo*, which rejected it, was not the subject matter of the notice of appeal to this court and thus also needs no further consideration.

[21] The second reason underpinning the decision of the registrar related to the '30 per cent self-fund gap' which was a feature of some of the benefit structures offered by the Fund. This meant that a member would be able to claim up to 60 per cent of the applicable maximum annual benefit (eg N\$6000 if the maximum benefit was stipulated to be N\$10 000) and thereafter had to carry the costs of the next N\$3000 medical expenses (30 per cent) himself or herself whereafter the balance of the benefit would become available to such member within that particular year. On the Fund's affidavits confusion arose as to whether the portion remaining after the member has paid his or her 30 per cent is ten per cent or 40 per cent of the stipulated benefit. The founding affidavit states it is the former but in reply the latter is relied on. However from a perusal of the business plan and the communications to its members it is clear that the latter position applied. This means that once the 30 per cent self-funding was completed a further 40 per cent of the benefit stipulated would become available to a member. Thus for the member to utilise the maximum benefits stipulated in the rules of the Fund his or her medical expenses (claims) has to be 130 per cent or more of the stipulated maximum.

[22] What is clear is that 'self-fund gap' formed part of the business plan of the Fund when its registration was approved and subsequently formed part of its offering to the public and a number of members made use of this offering up to the time of the application to increase the contributions which forms the subject matter of this application.

[23] Indeed the business plan accompanying the application for registration sounded a prescient warning that this offering had the potential to cause problems as it was difficult to explain the 'self-fund gap' to members. The actuarial review accompanying the application for registration describes the situation as follows:

'Once the Medisave and day to day benefits payable from risk have been depleted, the member will be required to self-fund for medical treatment equal to 30% of the overall annual limit to get access to the extended day to day benefit . . . the concept of Medisave is also seen in NHP's silver and bronze options, where it is referred to as a roll-over benefit. This design is innovative and may encourage the members to keep their day to day claims to a minimum. It is however a complicated design structure which may require considerable time and effort to explain to potential members. It is of utmost importance that members understand the structure of these benefits to ensure that there is no downstream member dissatisfaction.'

[24] What the actuaries warned against happened and it is common cause that members laid complaints with the regulator (the registrar) in regard to the 'self-fund gap' and resigned from the Fund for alternative medical aid funds. In fact this members' dissatisfaction led to the application by the fund to abolish the 'self-fund gap' principle. As the maximum benefit remained unchanged the Fund sought to address the costs of the additional claims by seeking a 30 per cent increase in contributions in respect of this benefit in addition to the across the board increase, ie a total increase of 44,4 per cent as a result of abolishing the 'self-fund gap' principle.

[25] While the registrar concedes that the 'self-fund gap' did form part of the business plan of the Fund from the outset, that the product was offered from its inception, and that complaints in respect thereof had been made to his office, he maintained that he could not sanction a 30 per cent increase in respect of the removal of the 'self-fund gap' as this 'increase is attributable to the removal of the unapproved and unlawful self-fund gap practice'. He mentions that he cannot assist the Fund in this regard 'merely to correct the unlawful practice by the Fund'. This, the registrar does under the rubric of 'Public Interest'. Under the rubric of 'Sound Business Principles', he mentions this issue and states '. . . , the implementation of the "self-fund gap" is considered an irregularity as it was not approved by the registrar in terms of s 31(1) of the Act, therefore, it was unlawful and not in line with sound business principles'. The upshot of this is that he refused the increase in this regard and compelled the Fund to, without any increase in contributions, to abolish the self-fund-gap.

[26] The Fund in its heads of argument states its case in this regard as follows:

- '64.4 While ordering the Fund to remove the self-funding gap, the Registrar refused the concomitant increase in contributions. The effect of removing the 30% self-funding gap is to increase the immediate benefit by 30% (as members have no co-payment). The Registrar expects the Fund to remove the self-funding gap but then does not allow it to increase the contributions concomitantly.
65. This is not only unreasonable but plainly irrational. Obviously this substantial increase in benefits must somehow be funded (and can only be substantially

funded by increasing contributions), but this basic precept is what the Registrar flatly refused to recognise.'

Audi alteram partem

[27] In its heads of argument the stance taken by the Fund is that the registrar indicated his decision to refuse the application for an increase in contributions in a letter dated 26 February 2019 and this was the final decision of the registrar which rendered him *functus officio* and meant that he could not revisit it.

[28] The above submission on behalf of the Fund is not borne out by the facts. It is clear that the attitude from both the registrar and the Fund was that this decision was provisional. Thus the Fund further engaged with the registrar in an attempt to persuade him to change tack and change or vary his decision.

[29] As is evident from the replying affidavit of the Fund, this is how it understood the decision conveyed to it on 26 February 2019. It also appears from the extracts in the replying affidavit that the registrar indeed varied his decision in the sense that he did approve an across-the-board increase of contributions of 8,9 per cent subject to the Fund obtaining 'reinsurance cover or equivalent satisfactory financing'. He further also made certain small changes and stated that the 44 per cent increase to remove the self-funding gap would not be in the interest of members although the self-funding gap still had to be abolished. The relevant extracts from the replying affidavits, read as follows:

- (a) 'The Registrar took decisions on 24 January 2019 and 26 February 2019. Then those decisions are debated and varied – also at some length in subsequent correspondence – ultimately resulting in the Registrar' varied decision of 25 April 2019 . . . where he informs Heritage that if it disagreed therewith, Heritage should appeal, which Heritage did in time on 10 May 2019.'
- (b) 'The Registrar's decision in his letters on 24 January 2019 and 26 February 2019, were the subject of debate between the parties which debate ended in the Registrar's letter dated 25 April 2019 . . . it is only in that letter that the decision was made final (in its varied form).'
- (c) 'I reiterate that the final (varied) decision of the Registrar was only made on 25 April 2019 and that Heritage appealed in time on 10 May 2019.'
- (d) 'The non-denial is important and I emphasise that part of the Registrar's initial decision not to approve the 2019 annual contribution increases was because of the so-called self-funding gap, which was debated and became a non-issue by the time the varied decision of 25 April 2019 was made, and appealed in time. This shows that the final decision was only taken on 25 April 2019 and appealed in time.'

[30] The registrar confirms that he made his decision not to approve the contribution increases known to the Fund in his letter of 26 February 2019. In my view not much turns on this as it is clear that the registrar engaged the Fund in respect of his reasons to decline the application for an increase in contributions up to the point where he realised that he did not find the Fund's approaches persuasive and that although he would agree to a 9,8 per cent increase as being in line with medical inflation, he was still not prepared to budge in respect of his view relating to the insurance and self-funding gap issues. At that point he advised the Fund that his decision was final and if the Fund was aggrieved by it, it should seek a remedy elsewhere.

[31] The requirements of natural justice, of which the *audi alteram partem* principle is one, depends on the circumstances of the case, the nature of the enquiry, the rules under which the decision-maker acts, the subject matter that is dealt with, and in this case also, in the context of a medical aid fund that must remain viable and at the same time compete for members with other medical aid funds.² As put by counsel for the respondents in the heads of argument with reference to the case of *Nelumbu & others v Hikumwah & others*³, 'fairness is not static but tailored to the particular circumstances of the case'.

[32] It must be borne in mind that the Fund, in an application to increase contributions and change benefits, must motivate this to the registrar. In doing so, it

² *Mostert v The Minister of Justice* 2003 NR 11 (SC).

³ *Nelumbu & others v Hikumwah & others* 2017 (2) NR 433 (SC) para 52. See also *Vaatz v Municipal Council of the Municipality of Windhoek* 2017 (1) NR 32 (SC) at 48-49.

must address all the issues relevant to such application with reference to the Medical Aid Funds Act,⁴ and other factors relevant to the business of a medical aid fund. This means such applicant has full, free and unfettered opportunity to motivate the proposed increases when the application is lodged with the registrar.

[33] It follows from the foregoing that an applicant cannot complain of lack of *audi* if the registrar on the application itself declines it. In such case the registrar's decision can still be assailed on review, provided of course there are grounds for review. Thus if the registrar in dealing with the application misapprehended the nature of his discretion, misdirected himself on the facts or acted irrationally, such decision would be reviewable on such basis but not on the basis that the Fund was not given a hearing (*audi*).

[34] Where the registrar raises an issue which would not normally feature in such proceedings and relating to information which does not follow from the application which is potentially prejudicial to such applicant or where reliance is placed on factors relating to alleged untoward conduct of such applicant, then this must of course be put to the applicant to respond thereto, as this would have been matters that a reasonable applicant would not have anticipated when lodging an application. The question of the insurance clearly did not fall in this category as the applicant's actuarial report on which it relied mentioned this aspect to avoid the risk of a large claim depleting the resources of the applicant, and the Fund sought to address the

⁴ Act 23 of 1995.

issue in the application by reference to a 'guarantee' from a company in the group of companies forming part of the Avacare Medical Group.⁵

[35] Lastly, in respect of the nature of the enquiry, it must be borne in mind that issues of increased contributions or changes in benefit structure are not a matter of exact science as it involves decisions where competing factors must be considered before, what is essentially a business call, must be made. Thus the effect of inflation must be weighed up against what would be reasonable and competitive to retain existing members and recruit new members and keep the Fund sustainable going forward. In this mix must be thrown the competitive nature of the benefits offered coupled with the costs thereof. It is not unusual in scenarios like this for provisional decisions to be followed by further negotiations. For example, the regulator may indicate that he agrees with the removal of the self-funding gap but that the concomitant once-off increase contribution is unacceptable. The applicant will then approach the regulator and suggest a compromise such as that the self-funding gap then be phased out over say three to five years, with an agreed percentage added on top of the annual increase thereafter. This kind of horse-trading follows from the nature of the enquiry. Whereas this kind of horse-trading can be done prior to an application to avoid problems afterwards, it does not mean if it happens afterwards based on the common understanding between the regulator and an applicant that this deprives such applicant of the requirements of natural justice. In fact, the Fund grudgingly acknowledges that the engagement with the registrar subsequent to the

⁵ *Calvinia Licensing Board & others v Estate Dansky* 1944 AD 37 at 52 and *Down v Malan N.O. en andere* 1960 (2) SA 734 (A) at 742-743.

first decision bore some fruit. It is stated as follows in the replying affidavit: (I only quote the relevant portion) ‘. . . *audi* after the fact in a limited form was only granted after the registrar’s initial decisions, which were later varied’.

[36] Whereas it is true that the removal of the self-funding gap did not feature as a reason for the refusal of the application initially, it became apparent that the registrar considered this aspect in conjunction with the application for increased contributions. He thus declined the substantial increase in contributions in respect of those products where its removal was sought and in fact directed the applicant to abolish it immediately quite separate from the application to increase contributions. The result being that the Fund had to abolish the self-funding gap and bear the burden for doing so. This issue was also fully debated between the Fund and the registrar with the latter refusing to budge and this also formed part of this decision when it was reiterated in essence on 25 April 2019 when he stated that he had made his final decision and the Fund had to seek its remedy elsewhere if it was still aggrieved by this decision.

[37] In view of the facts that all the points that could have been raised by the Fund if it had been given an *audi* were raised by them with the registrar, in an attempt to persuade him to change his initial decision to no avail, what would the point be to set the decision aside on the basis of a breach of the *audi alteram* principle? Who will then deal with the Fund’s points in this regard? The registrar has already considered them and found them unpersuasive. It will serve no purpose to rehash the same

exercise. Had the Fund been of the view that the first decision was a final one, the remedy was, after receipt of the reasons for this decision, to take the matter further on appeal or review. This they did not do because they thought they could persuade the registrar to change his view. They clearly thought this was feasible otherwise they would not have engaged him further in this regard. The registrar did not take the stance that he could not revisit his original decision but engaged further with the Fund. Both parties were clearly of the view that the final decision had not yet been made otherwise they would not have engaged with each other with regard to the decision. In this process the Fund had a full opportunity to state its case, which it did. In these circumstances the complaint of a lack of *audi* rings hollow. The real complaint seems to be, as submitted by counsel for the registrar, that the registrar did not agree with the submissions made by the Fund and did not change his view.

[38] Even assuming for the moment that the crucial decision in this matter was the first decision and that the *audi alteram partem*, particularly in respect of the self-funding gap, only occurred thereafter, I am still of the view that given the circumstances of where there was a common understanding that the Fund would be given the opportunity to persuade the registrar to change his initial decision and the Fund made full use of this opportunity, that this was a case where an *audi* after the initial decision was sufficient compliance with the rules of natural justice. It is clear that both parties engaged with one another subsequent to 26 February 2019 on the acceptance that the registrar retained a sufficiently open mind to allow himself to be persuaded by the Fund.⁶

⁶ *Mostert* at 24A-C.

Self-funding gap

[39] Counsel for the Fund submitted that the first decision taken by the registrar was the crucial one for purposes of the review application. I have indicated above that, in my view, this submission is not correct.

[40] However, premised on the final decision being made on 26 February 2019, it was submitted on behalf of the Fund that it was not granted an *audi* in respect of the directive in the letter of 26 February 2019 that it must 'discontinue the practice of the self-funding gap with immediate effect, if it had not yet discontinued the practice'.

[41] The problem for the Fund in this regard is that the point that it was not given an *audi* in respect of the self-funding gap was not raised in its founding papers at all. The removal of the self-funding gap is stated to be irrelevant and the only issue raised is that mentioned in the heads of argument, namely to direct that the cessation of the use of the self-funding gap principle without the concomitant increase in contributions is unreasonable and irrational.

[42] It follows that the *audi* point in relation to the self-funding gap was never an issue in the proceedings and needs no further consideration.⁷ In any event, as

⁷ *Mbanderu* paras 53-58.

pointed out above, *audi alteram partem* was applied in respect of the self-funding gap when it came to the final decision given per letter dated 25 March 2019.

[43] When it comes to the rationality of the decision by the registrar in this regard, he maintains that the self-funding gap was irregular and not approved by him in terms of s 31(1) of the Medical Aid Funds Act 33 of 1995 (the Act), and contrary to s 30(1) (l) and (m) of the Act, and he thus in essence had no choice but to put an immediate stop to what was unlawful conduct by the Fund. This on the face thereof is clearly a rational response.

[44] I must say I am surprised that the underlying premises for the actions by the registrar were not challenged:

- (a) As pointed out above the business plan accompanying the registration application of the Fund clearly spelt out the self-funding principle and points out that at least one other medical aid fund, Namibia Health Plan (NHP), also made use of this principle in respect of some of its offerings. No queries were raised in this regard by the registrar when the Fund's registration was approved. The use of a self-funding principle was thus not irregular as suggested by the registrar.
- (b) Even if the registrar did not read or see that part of the business plan in the application for registration he became aware of it when complaints

in this regard were lodged with his office by dissatisfied members of the Fund. Why did he not direct the cessation of the use of this principle then?

- (c) The registrar states that 'the practice prohibit members of the Fund from utilising their maximum benefits as per the limits which are prescribed in the Fund Rules', ie members can only utilise 70 per cent of the maximum. This is factually incorrect as pointed out above. The registrar annexes a document to his answering affidavit from which it is clear that members are entitled to their full stated benefits once they have paid the self-funding portion. This document which the registrar clearly had knowledge of as he annexed it to his papers, makes it clear that after a member had paid his or her 30 per cent self-funding portion the remainder of the 40 per cent of the prescribed benefit can be claimed:

'Once you have submitted the proof for the 30 per cent for your self-funding gap then you will qualify for an additional 40 per cent under your Additional Day-to-Day cover within the benefit plan that you have opted for.'

- (d) Presumably, based on the (incorrect) assumption that a member cannot claim the maximum prescribed benefit, the registrar takes the stance that the self-funding gap is contrary to s 30(1)(l) and (m) of the Act. Section 30 stipulates that Funds should have rules which determine 'the minimum and maximum benefits to which members . . . are entitled' (s

30(1)(l) and for 'the payment of such benefits according to scale . . . set out in the rules' (s 30(1)(m)). As is evident from the fact that the members can become entitled to the maximum benefit according to the relevant scale, the application of the self-funding rule is, on the face thereof, not in contravention of the sections in the Act relied upon by the registrar.

[45] The directive of the registrar was however not challenged along the lines as indicated above and he was not called to answer such challenge and, however unlikely it is that he may have a satisfactory explanation for the abovementioned misdirection and misapprehension of his discretion, the matter can thus not be determined on this basis as it was not raised on behalf of the Fund as a ground of review.

[46] I now turn to consider whether the decision by the registrar to direct the Fund to immediately cease to implement the self-funding gap without granting it a concomitant increase in contributions was unreasonable.

[47] In the recent case of *President of the Republic of Namibia & others v Namibian Employers' Federation*⁸ this court dealt with the approach to reasonableness as follows:

⁸ *President of the Republic of Namibia v Namibian Employers' Federation* (SA 53/2020) [2022] NASC (2 September 2022).

[113] Lord Cooke's approach to unreasonableness in *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd* was endorsed by the South African Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*. Writing for the majority, O'Regan J characterised that approach as providing "sound guidance".

[114] Lord Cooke said that "the simple test [is] . . . whether the decision in question was one which a reasonable authority would reach. "The converse [is] . . . "conduct which no sensible authority acting with appreciation of its responsibilities would have decided to adopt"." Lord Cooke added that in assessing whether a decision is reasonable, the court will consider if the decision maker 'has struck a balance fairly and reasonably open to him."

[115] In *Bato Star* O'Regan J went on to state (para 45):

"[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

[116] The *Bato Star* approach is part of our law as exemplified by *Trustco Ltd t/a Legal Shield Namibia & another v Deeds Registries Regulation Board & others* 2011 (2) NR 726 (SC) para [31] and *New Era Investment (Pty) Ltd v Roads Authority and others* 2017 (4) NR 1160 (SC) para [36]. It is therefore settled that conduct or a

decision (in this case a regulation in terms of Art 26(5)(b)) will not be reasonable if no functionary invested with the power to make it, and possessed of all the facts which include its potential harmful consequences, would have taken the impugned decision.'

[48] As no challenge was made to the reasons underlying the directive to cease with the implementation of the self-funding gap principle immediately but the attack was only made on the basis that it was not accompanied by a concomitant increase in contributions, I accept for the purpose of considering the reasonableness or otherwise of the decision of the registrar that he was faced with a situation that was irregular and unlawful (in contravention of s 30(1)(l) and (m) of the Act), in that qualifying members of the Fund were not allowed to utilise the maximum amount stated in the rules of the Fund but only 70 per cent of the stated maximum amount.

[49] In making this decision, the registrar on his own version was aware of or should have been aware of the following facts and circumstances:

- (a) That the Fund's business model on which its registration in 2015 was approved included the self-funding gap principle and at least one other medical aid fund (NHP) also provided an offering to its members using a similar principle. No objection was raised by the registrar to this principle at the time nor to the fact that NHP also used it.

- (b) That the pricing model of the Fund made allowance for the self-funding gap and in the result its removal would come at an additional cost to the Fund if there was no concomitant increase in contributions.
- (c) That, although no contribution increases were sought by the Fund for the years 2016 to 2018, its rules were endorsed by the registrar in respect of each of the years mentioned.
- (d) Complaints were lodged with the registrar by members of the Fund with regard to the operation of the self-funding gap during the period from the inception of the Fund up to the time of the lodging of the application for the contribution increases at the end of 2018. None of the complaints led to the registrar taking action against the Fund on the basis that the self-funding gap was irregular or unlawful. I take it for granted that a reasonable registrar would, when investigating such complaints, have had regard to the manner in which the self-funding gap principle operated.
- (e) It follows from the above facts that the Fund could not be said to have knowingly operated irregularly or contrary to the Act. In fact its utilisation of the self-funding gap principle was, at the very least, tacitly allowed and approved by the registrar.

- (f) The Fund intended to do away with the self-funding gap principle but to cater for this concomitant increase in the claims sought at 30 per cent increase (on top of the normal inflationary increase) to compensate for the abolition of the self-funding gap. This is expressly dealt with in the actuarial report accompanying the application for contribution increases from 2019.
- (g) The Fund was in a financially precarious position and hence the need for insurance or some equivalent financial arrangement. In fact the Fund provided the registrar with calculations by its actuaries indicating to him that the additional costs would lead to the Fund becoming unsustainable which the registrar did not and does not dispute.
- (h) The directive to abolish the self-funding gap would exacerbate this precarious position of the Fund and could potentially ruin the Fund. The financial ruin of the Fund would obviously not be in the best interest of the members of the Fund.
- (i) That the registrar was of the view that the Fund had to carry the costs of the cessation of the self-funding gap as it was 'self-imposed and relate to unsound business decisions'.

- (j) That the registrar is aware of his powers, functions and duties as stipulated in the Act.

[50] In the above circumstances one would expect a reasonable registrar to, at least, acknowledge the role his office played in the situation the Fund found itself and the fact that his office allowed the Fund to cost for and apply the self-funding gap from 2015 to 2018.

[51] The question thus arises how the registrar could have stopped the perceived irregular and unlawful conduct of the Fund without affecting either the Fund or its members detrimentally. The answer, unless one wanted to be vindictive or intended to punish the Fund, seems obvious to me. He should have directed the Fund to alter its rules to reduce the maximum benefit stipulated in respect of the products relevant to the self-funding gap by 30 per cent and to cease to apply the self-funding gap as he could pursuant to the provisions of s 31(3) of the Act. In this way his complaint that the rule misled the members to think the benefit was higher than it actually was would be addressed and the maximum amount indicated would then reflect the amount that he thought the members actually were entitled to, ie 70 per cent of the stated maximum amount. In this way, on his interpretation of the self-funding gap, the members would lose nothing as they would still be entitled to what they always were entitled to and there would also be no adverse effect to the Fund as the costs were already built in to their existing costs structure.

[52] I am satisfied that a reasonable registrar, in the circumstances of the present matter, would not have made the decision that the registrar made but would have resolved the matter in a manner so as not to cause prejudice to either the Fund or its members. Instead he decided to hand out largesse to the members which had the real potential to backfire and not be in their interest as the costs of the largesse was for the Fund which was already in a precarious financial situation, thus running the risk that this added costs would push it into the financial abyss.

[53] The decision was thus neither in the interest of the Fund nor its members with potentially serious adverse consequences to both. To blame this on the unsound business decisions of the Fund is also not correct. What was unsound was the assumption that the members would understand the self-funding gap principle (with the benefit of hindsight it seems even the registrar did not understand it) and not the effect thereof in the costing of the benefit which was provided for. Further it seeks to ignore the role played by the registrar when this principle was in effect approved by him. To, essentially, choose to remedy the perceived irregularity and unlawful conduct in a manner that was potentially devastating to the Fund and its members where it could have been done without such effect did not, in the circumstances of this case, grant a reasonable registrar the option to act in the manner he did.

[54] As the registrar had all the information as to how the self-funding gap worked, one would have expected of a reasonable registrar to have established that it was not correct that members were only entitled to 70 per cent of the stated maximum rate.

As explained above, the self-funding gap made the situation a bit complicated but members whose medical costs exceeded 130 per cent of the stipulated maximum benefit were entitled to such stipulated maximum. With this as a starting point a reasonable registrar would have taken much less severe steps to phase out the self-funding gap or to look at the amendment of the Fund rules or a combination of these two approaches.

[55] In any event, in the circumstances of this case, to place an unnecessary financial burden on the Fund that might lead to its demise, which would obviously not be to the benefit of its members, when the matter could have been approached on a basis where neither the members nor the Fund were adversely affected nor one where the Fund was to face potential economic ruin was, in my view, unreasonable in the sense described above.

[56] I thus agree with the submission on behalf of the Fund that the directive of the registrar in relation to the removal of the self-funding gap - without addressing the additional costs this would entail to the Fund - was unreasonable. The directive of the registrar in this regard amounts not only to a refusal of an increase to contributions but also to a decision to grant more generous benefits to members without addressing the additional costs thereof to the Fund. It follows that the directive must be set aside to this extent so that the issue can be revisited by the registrar.

[57] As the Fund itself intended to abolish the self-funding rule with the costs thereof passed on to their members it did not take issue with the directive to abolish the rule. It only took issue with the fact that the registrar did not address the concomitant costs of such abolition appropriately. It follows that in theory, it is only this costs aspect that will need to be revisited by the registrar. From a practical perspective however the directive and the costs go together. If the directive does not refer to costs at all and this by implication compels the Fund to carry the costs, it follows that if the directive stands pending a reconsideration of the costs aspect by the registrar, that pending such determination the Fund will have to bear the costs. This I have found to be unreasonable and such a result should, obviously, not ensue. The only solution, in my view, is to allow the registrar to revisit the whole matter afresh and to determine the modalities (inclusive of the costs) of how the self-funding gap should be abolished simultaneously. In this manner no lacuna will exist during which the Fund will have the sole responsibility of bearing the costs of the abolition of the self-funding gap.

Insurance

[58] As indicated above the actuaries of the Fund 'strongly recommended that the Fund insure some portion of the benefits in future' and the Fund indeed provided an undertaking that N\$1 million would be available from the Avacare Medical Group should the need arise. The registrar rejected this alternative to insurance for reasons not germane to this appeal as no attack is made on these reasons by the Fund. The upshot was that the registrar insisted on such insurance or an acceptable alternative.

Subject to this insurance or acceptable alternative being in place, he approved a general across the board increase of 8,9 per cent.

[59] The Fund pointed out to the registrar that its actuaries stated that 'a reinsurance review should be performed' so as to determine the impact of insurance arrangements. This Fund then, subsequent to the first decision, mandated their actuaries to do such review which they did with the result that the actuaries recommended that the Fund self-insure for N\$1,35 million and insure for an amount in excess of N\$1,35 million up to N\$2,5 million so as to cut the costs of the insurance. As the Fund could not provide the potential insurers with its income from contributions (as this has not yet been approved by the registrar) only one insurer was prepared to quote which, according to the Fund, was unaffordable.

[60] It was submitted on behalf of the Fund that the registrar's insistence on insurance or a viable alternative was unreasonable and irrational as the assessors only made a recommendation which was up to the Fund to accept or not and that the recommendation was subject to a reinsurance review that had to be performed.

[61] There is, in my view, no substance to this submission. As indicated, the insurance was 'strongly recommended'. This must be seen in the light of the fact that the Fund had such insurance in place previously which it terminated during 2017 and that 'a small number of members reaching their overall limit' on some plans 'would lead to a significant deterioration in the Fund's financial position, possibly even leading to total financial ruin'. Furthermore the Fund itself realised that it had to do

something to address this risk and hence entered into some arrangement with the Avacare Medical Group to make N\$1 million available if and when needed. I must say I find it quite surprising that this arrangement could not be revisited so that the undertaking by the Avacare Medical Group could be changed so as to meet the requirements stipulated by the registrar if the money was indeed available for this intended purpose.

[62] How it can be suggested that the registrar acted unreasonably and irrationally to seek assurance that the stated risk was addressed by insurance or a viable alternative when the Fund itself was of the same view and sought to address the issue with its arrangement with the Avacare Medical Group escapes me. It seems to me basic prudent business sense to seek to address such a risk which may threaten the existence of the Fund and it would clearly not be in the interest of the members to allow the Fund to continue without such risk being appropriately addressed.

[63] It follows that the Fund failed to make out a case that the registrar's insistence on insurance or viable alternative was unreasonable or irrational.

Record of appeal

[64] In terms of rule 11(10) of the Rules of this Court, parties to an appeal must hold a meeting about the record within 20 days of the filing of the notice of appeal 'with the view to eliminating portions of the record which are not relevant to the

determination of an issue on appeal'. Furthermore in terms of subrule (5) 'mere formal documents' must be omitted and 'a document must not be set forth more than once'.

[65] Whereas there was a meeting in terms of rule 11(10) where it was agreed that certain documents be excluded from the record it appears that subrule (5) was not kept in mind as numerous duplications of documentation and documents not relevant to the appeal were included in the record.

[66] The Fund launched an urgent application seeking interim relief pending a review of the decision of the registrar. The urgent application was dismissed and the review application proceeded in the normal course. This meant the registrar discovered a record in respect of the decision to be reviewed. This review record contained no documents that were not in any event attached to the review application or were otherwise relevant to the appeal. The whole review record was nevertheless included in the record on appeal which consisted of 17 volumes. The effect of this is that five of 17 volumes are either repetition of documents already attached to the review application or documents irrelevant to the appeal.

[67] In the review application the parties adopted the practice to refer to the annexures by reference to page numbers. Thus a party would, for example refer to an attachment in an affidavit, as the document at pages 111-135. The trend was set by the Fund when, in its founding affidavit, it initiated the process as follows:

' . . . I attach to this affidavit a bundle which contains copies of all the relevant documents which I have numbered consecutively. Where I refer to an annexure from this bundle I do so by reference to the page numbers at the top right hand corner in the bundle.'

[68] In terms of rule 11(1)(h) 'all references in the record to page numbers of exhibits must be transposed to reflect the page numbers of such exhibit in the appeal record'. The Fund, whose duty it was to prepare a proper record, simply ignored this rule. None of the annexures have any indication of the number it bore in the court *a quo*. This greatly inconvenienced anyone attempting to read the record and made preparations for the appeal more time consuming. For example, a reference to a letter in an affidavit at pages 267-277 meant that one had to search for that letter by reference to its author and date in the record where one would find it at record pages 312-222.

[69] Non-compliance with the rules when it comes to the records filed in this court have become too common place and it is necessary that this issue must be addressed. I shall do so in my costs order and hope this will send out a message to legal practitioners that a laxity in preparing records will have adverse consequences.

Conclusion

[70] It follows from what is stated above that the appeal succeeds to a limited extent in that only that part of the directive of the registrar that the Fund must bear the costs occasioned by the abolition of the self-funding gap was unreasonable. I am

however of the view that this means that the Fund was substantially successful as far as the appeal is concerned and that the costs should follow the result, save for the costs relating to 30 per cent of the record I dealt with above.

[71] It further follows that the order *a quo* will also have to be altered. As far as the costs *a quo* is concerned, the Fund was unsuccessful in respect of its main attack on the registrar, namely that his approval was not necessary for the increase of contributions and consequent changes in benefits and also in respect of its *audi alteram* point. It should only have succeeded in respect of the attack on the decision to direct it with immediate effect to cease implementation of the self-funding gap. In my view, a fair and equitable costs order in respect of the court *a quo* would be to make no order as to costs and in effect make each party bear its own costs.

[72] As far as the costs on appeal are concerned the parties are equally to blame for the unnecessary prolixity of the record and causing the record to consist of 17 instead of 12 volumes. In this circumstance, the costs relating to the perusal of the record shall be limited to 70 per cent of such costs.

[73] In the result I make the following order:

- (a) The appeal succeeds to the extent set out below.
- (b) The judgment of the court *a quo* is altered to read as follows:

- '(i) The declaratory relief sought that the annual contribution increases of medical aid funds does not amount to rule amendments of such funds and hence does not require the approval of the Registrar of Medical Aid Funds is dismissed.

 - (ii) The directive by the Registrar of Medical Aid Funds to Heritage Medical Aid Fund 'to discontinue the practice of providing the self-funding gap with immediate effect' set out in a letter dated 26 February 2019 from the registrar to the Fund and reiterated in a letter dated 25 April 2019 by the registrar to the Fund is hereby reviewed and set aside as it compels the Fund to bear the costs occasioned by the cessation of the self-funding rule.

 - (iii) There shall be no order as to the costs of this application.'
- (c) The Registrar of Medical Aid Funds is to consider the matter of the self-funding gap as applied by the Fund *de novo* and determine the modalities (inclusive of the costs) in respect of the termination of the said gap. In making such determination the registrar must take cognisance of this judgment.
- (d) The costs on appeal shall be borne by the respondents inclusive of the cost of one instructing and two instructed legal practitioners save that

the costs in respect of the compilation and perusal of the record shall be limited to 70 per cent of such costs.

FRANK AJA

DAMASEB DCJ

SMUTS JA

APPEARANCES

APPELLANT:

R Töttemeyer (with him J Jacobs)

Instructed by Van der Merwe-Greeff

Andima Inc.

FIRST RESPONDENT:

A W Corbett

Instructed by Ueitele & Hans Inc.

