IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISON, PRETORIA)

Case No.: **36027/2020**

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

07/ 08/ 2023
DATE

[redacted]
SIGNATURE

In the matter between:

HOSMED MEDICAL SCHEME	First Applicant
SIZWE MEDICAL FUND	Second Applicant
HARRIET MASHA	Third Applicant

and

THE REGISTRAR OF MEDICAL SCHEMES	First Respondent
THE COUNCIL FOR MEDICAL SCHEMES	Second Respondent

JUDGMENT

SARDIWALLA J:

[1] This is an urgent appeal application in terms of the provisions of Rule 6(12)(a) of the Uniform Rules of Court and in terms of section 63(12) of the Medical Schemes Act 131 of 1998 (the "MSA") for an appeal against the first respondent's decision in terms of section 63(6)(c) and of on 21 July 2020, to decline to confirm the exposition of the proposed amalgamation between the first and second applicants.

[2] The applicants sought the following relief:

> "1. Dispensing with the forms and service provided for in the uniform rules of the above honourable Court and allowing that the service of these application papers be affected by way of email and/or hand-delivery, dispensing with the time provided for in the uniform rules and directing that this matter be dealt with as one of urgency in terms of uniform rule 6(12)(b);
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> 2. Upholding the applicant's appeal the first respondent's decision in terms of section 63(6)9c) of the Medical Schemes Act 131 of 1998 (the MSA"), to decline to confirm the exposition of the proposed amalgamation between the first and second applicants, which decision was communicated to the applicants on the 31 July 202;
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> 3. Setting aside the first respondent's aforesaid decision in terms of section 63(12) of the MSA;
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> 4. Confirming the exposition of the proposed amalgamation between the first and second applicant's in terms of 63(12) of the MSA and/or making such order as the Honourable Court may deem necessary;
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> 5. Ordering the first respondent to pay the costs of this application, including the costs occasioned by the employment of two counsel;
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> 6. Should any other party/person oppose the present application, ordering such party/person to pay the costs of this application, including the costs occasioned by the employment of two counsel, jointly and severally with the first respondent;
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> 7. Granting the applicants further and/or alternative relief."

Background to the Application:

[3] The sequence of events of the proposed amalgamation which had been conceived during 2019 is as follows:

3.1 A comprehensive and detailed process was embarked upon to reach an agreement in principle, prepare the necessary documents, including the amalgamation agreement and the exposition, regular engagement with the office of the first respondent, arranging for members to vote on the proposed amalgamation, due diligence investigations etc.

3.2 The process culminated in the exposition, which complies with the requirements of the Guideline and which was approved for publication by the first respondent.

3.3 Circular 40 of 2020 was published by the CMS on 26 May 2020 giving notice of the proposed amalgamation between the first and second applicants, including that the exposition and the supporting documents of the proposed merger would remain open for inspection for 21 days from 27 may 2020 to 24 July 2020 for the submission of comments or objections.

3.4 On 5 June 2020 the first respondent directed a letter to the first and second applicant stating that the amalgamation process was to be indefinitely suspended pending the investigation into certain persons whose identities were unknown and not disclosed in the letter.

3.5 In a letter dated 11 June 2020 the second applicant requested information pursuant to the letter of 5 June 2020 in order to understand the basis of the suspension.

3.6 on 17 June 2020. Werksmans attorneys, acting on behalf of the second applicant directed a letter to the first respondent.

3.7 On 18 June 2020 the first respondent replied recording that he had not taken a decision to suspend the amalgamation between the first and second applicant and referred to alleged “irregularities which have come to light as a result of the section 43 enquiry and your client’s draft management report for financial year ended 31 December 2019”.

3.8 The first respondent was aware of the irregularities and having applied his mind thereto and being satisfied that they had been and/or were being addressed and materially, did not constitute a lawful basis to halt the amalgamation, the first respondent was satisfied to publish the circular 40 of 2020 on 26 May 2020 in relation to the exposition that had been prepared in respect of the amalgamation, as he was statutorily enjoined to do.

3.9 The first respondent had launched an application for curatorship under case number 28986/2020 to place the second respondent under curatorship without affording the second applicant an opportunity to prepare its answering affidavits. The application was before Avvakoumides AJ on 14 July 2020 and was struck from the roll due to a lack of urgency.

3.10 On 22 July 2020, the applicant's attorneys of record Malatji & Co addressed a letter to the attorneys acting for the first respondent in the curatorship application stating that the answering affidavit should now address the matters raised in the curatorship application and could now consider the proposed amalgamation and provide a write undertaking that he would do so and provide the parties with his decision in terms of section 63(6) and (7) of the MSA by 31 July 2020.

3.11 On 23 July 2020 the attorneys of record for the first respondent, Ndobela Lamola replied to the letter of 22 July 2020 that the first respondent declined to give a written undertaking and that it was recorded that the first respondent would abide and conduct himself within the confines of the MSA, specifically section 63 and would endeavour to make a decision by 31 July 2020" to the extent that the integrity of the transaction process under section 63 is not compromised or undermined".

3.12 On 24 July 2020 Malatji & Co directed a further letter to Ndobela Lamola that the first respondent has undertaken in his letter of 18 June 2020 to Werksmans attorneys that he would inform the second applicant of any action taken or intended to be taken against the second applicant before such action is taken and when there is a legal obligation to do so.

3.13 Although, the first respondent signed the letter on 18 June 2020, he had already sought the concurrence of the CMS on 17 June 2020 to place the second applicant under curatorship.

3.14 on 27 July 2020, Ndobela Lamola replied on behalf of the first respondent as follows:

"1. We refer to the abovementioned matter as well as your letter dated 24 July 2020.
2. we have read your letter and wish to respond as follows:
    2.1 we would like to place it on record that at no point did we suggest or insinuate that the process of the amalgamation is compromised or undermined;
    2.2 We reiterate that our client is. Statutory body who will act in accordance with section 63 of the Act in the consideration of the merger;
    2.3 Lastly we would like to confirm that there is(sic) no facts or information that may impugn the integrity of the amalgamation transaction.
3. We hope you find the above in order."

3.15 On 28 July 2020 Ndobela Lamola directed a further letter to Malatji & Co recording that they had instructions to enrol the curatorship application on the opposed roll and requested the second applicant file its supplemented answering affidavit by 4 August 2020.

3.16 Despite the lapse of 14 days from 14 July 2020 when the matter was scheduled to take place the first respondent did not deliver its replying affidavit.

3.17 In the meantime, on 23 July 2020 the South African Local Government Bargaining Council ("SALGBC") addressed a letter to the first respondent which stated that the first applicant's accreditation with the SALBGC would not transfer to the second respondent upon approval of the intended amalgamation. This letter was sent to the first applicant on 25 July 2020 by the first respondent.

3.18 On 30 July 2020, the first applicant provided a detailed response to the SALGBC that the first and second applicants would file an addendum to their amalgamation agreement with a suspensive condition that the accreditation of the first and second

applicants by the SALGBC would be a requirement for the consummation of the amalgamation. A supplementary application was submitted to grant the first applicant accreditation for 2022 and to approve the transfer of the accreditation to Hosmed-Sizwe Medical Scheme upon amalgamation of both the first and second applicants from the effective date.

3.19 On 30 July 2020 the first applicant directed a letter to the first respondent informing the first respondent of the response to the SALGBC including that the first and second applicants adopted an alternative and uncontroversial approach to achieve the underlying purpose of the amalgamation whilst at the same time addressing the SALGBC's concerns. That the schemes were of the view that the concerns raised by the SALGBC presented no impediment for the first respondent to confirm the exposition in terms of section 63 of the MSA.

3.20 On 31 July 2020 the first respondent directed a letter to the first and second applicants of his decision to decline to confirm the exposition and that the amalgamation could not be proceeded with.

[4] It is this decision by the first respondent that the applicants are appealing against. The parties agreed and requested that the appeal and the curatorship application be heard together on 24 August 2020 when the curatorship application was set down on the motion court roll and not the 18 August 2020 when the urgent application was set down. However, the Deputy Judge's President's office confirmed that although the parties could have both applications heard together they would need to do so on 18 August 2020 on the urgent roll as there were no other special allocations that could be provided as there was no spare judges. For this reason only the urgent application proceeded before me.

Grounds of Appeal

[5] The applicants grounds of appeal are as follows:

5.1 The first respondent failed to apply the correct test in arriving at the decision;

5.2 The first respondent has considered matters which are immaterial and irrelevant for the purposes of arriving at the decision as contemplated in terms of section 63(7);

5.3 The grounds relied on by the first respondent do not support the conclusion that the transaction is not in the best interests of the members of the first and second applicants;

5.4 The exposition documents indicates in detail how the amalgamation will benefit the members of the first and second applicants, but the first respondent altogether failed to dela with the content of the exposition document and he has not advanced any grounds that would negate any of the aspects thereof;

5.5 The amalgamation meets the requirements of section 63(7)(a) of the MSA in that it will not be detrimental to the interests of the majority of the beneficiaries of the first and second applicants. It is in their interests that the beneficiaries stand to gain:

5.5.1 Differentiated product suite that does not impact members, and tiered levels of cover across multiple price points;

5.5.2 Greater variety of options to choose from in the amalgamated scheme;

5.5.3 greater membership retention and growth;

5.5.4 Reduced scheme expenses per member;

5.5.5 Larger and more stable risk pool to reduce volatility and reduction of net deficits; and

5.5.6 Economies of scale and bargaining power to support the medium to long-term strategy of the amalgamated scheme.

5.6 The proposed amalgamation meets the requirements of section 63(7)(b) of the MSA in that it would not render the amalgamated scheme unable to meet the requirements of the MSA or to remain in sound financial condition;

5.7 This is evidently so because in accordance with the projections in the exposition, the accumulated funds of the amalgamated scheme will amount to R 1 370 021 000.00; with a solvency rate of 33.0% which is in excess of the ratio of 25% as prescribed in Regulation 29 of the Regulations promulgated under the MSA.

Applicant's Argument

[6] The applicants submitted that the appeal was urgent and if not determined as a matter of urgency it would result in the failure of the proposed amalgamation and seriously prejudice the members of the first and second applicants as well as result in significant loss of costs for the proposed amalgamation. They submitted that whilst section 63(8) and 63(12) permit the parties that are aggrieved by the decision can appeal the decision to the Appeal Board or the High Court or where the first respondent has declined to confirm to apply to the CMS to have the exposition confirmed that these provisions were peremptory. That there was no purpose in applying to the CMS for confirmation as the decision of the first respondent was taken in concurrence of the CMS, hence the decision to appeal the decision directly to this Court in terms of section 63(12).

[7] Medical Schemes are required by the first respondent to submit their benefit options for the year 2021 for approval by 31 August 2020 or 1 September 2020. These approvals are done by the first respondent on 30 September 2020 and the medical schemes have the opportunity to market their 2021 offering from 1 October 2020 to 30 November 2020. The first and second applicants have submitted their applications for accreditation to SALGBC for the year 2021. Without the accreditation, a scheme cannot market itself amd its product to employees and the local government sector. Therefore, if this application is not disposed of on an urgent basis the accreditation applications of both the first and second respondents are at risk and would have a serious impact on the members being deprived of significant benefits offered by the proposed amalgamation. They would then be compelled to apply to other medical schemes.

[8] They averred that the decision of the 31 July 2020 was the third attempt by the first respondent to derail the amalgamation and taken without the first respondent applying the correct test as he considered irrelevant, incorrect and immaterial reasons and not the real criteria set out in section 63(7) and therefore failed to act in the interest of the beneficiaries of the first and second applicants. That whilst the first respondent contends that there are adverse

consequences that cannot be ignored that there is simply no alleged adverse consequences that could have justified the decision.

[9] There is no finding that the proposed amalgamation would be detrimental to the interests of the majority of the beneficiaries of the medical schemes concerned as contemplated in section 63(7)(a), in fact that the first respondent confirms in his answering affidavit that the two schemes would be better off merged. The benefits of the proposed amalgamation have been demonstrated to be in the best interests of the members.

[10] The curatorship application was an abuse of process and has no merit.

First Respondent's Argument

[11] The first respondent opposes this application on the basis that the application lacks urgency and is without merit. It argues that it the only reason that the application has been lodged on an urgent basis is to circumvent the curatorship application. If the applicants wanted the curatorship application to be heard expeditiously then they should have applied for a consolidation of the matters. Whilst the approval process takes time all schemes are advised to inform members that all proposed changes are subject to the first respondent's approval. Further that the applicants are misleading this Court that the accreditation date with the SALGBC is 15 August 2020 when in fact it has already passed and was 20 May 2020 and was extended to 29 May 2020. Further that when the second applicant signed the addendum it has not applied for accreditation with the SALGBC. Therefore the assertion that of this matter is not heard on an urgent basis that the SALGBC will not be able to make the determination is incorrect as the period has already lapsed. Nor is there any indication that the application will be successful. The first respondent's decision to decline the amalgamation does not suspend the business operations of the medical schemes and therefore still able to submit their benefit schemes for 2021. The fact that its members may choose other medical schemes that are accredited with the SALGBC is a consequence of the applicants own making. The assertion that the proposed amalgamation will fail if not heard on an urgent basis in incorrect as it will fail due to the lack of the SALGBC accreditation.

[12] The matter is not of national importance and the fact that the applicants requested that the matter be moved from 18 August 2020 to 24 August 2020 in itself concedes the lack of urgency and therefore should be dismissed with costs.

[13] In respect of the merits of the appeal the respondents aver that the decision of the first respondent was based on a number of anomalies in the process of amalgamation. It is their version that the court order would not assist the applicants as there are still a number of hurdles it needs to overcome which would make the order effectively unenforceable. The issue of the SALGBC accreditation and the lapse of the application dates means that the applicants have to wait until next year to apply for accreditation and this leaves the new entity in a state of limbo which is not in the interests of the beneficiaries. The council from its experience has learnt that trade unions rivalry cannot be ignored and their opinions should not be alienated. The first respondent has concerns that the new entity will constitute persons whose integrity is questionable. The fact that shared services were utilised instead of independent service providers to conduct due diligence casts doubt on whether, professional scepticism was employed.

Urgency

[14] The general principles applicable in establishing urgency are dealt with in Rule 6(12) of the Uniform Rules of this Court. The importance of these provisions is that the procedure set out in Rule 6(12) is not there for the mere taking. Notshe AJ said in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[1] in paras 6 and 7 as follows:

> '[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.
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> [7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is

[1] (11/33767) [2011] ZAGPJHC 196 (23 September 2011)

> something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard."

[15] Urgent applications must be brought in accordance with the provisions of rule 6(12) of the Uniform Rules of Court, with due regard to the guidelines set out in cases such as *Die Republikeinse Publikasies (Edms) Bpk vs Afrikaanse Pers Publikasies (Edms) Bpk*[2] as well as a well-known case of *Luna Meubelvervaardigers (Edms) Bpk v Makin and Another*[3].

[16] This leaves the requirement of the applicant's ability to obtain proper substantive redress in due course, for consideration. Obviously, and where a matter is struck from the roll for want of urgency, then the merits of the application remains undetermined. It follows that the application can still be considered and granted by a Court in the ordinary course. However even if the application failed on urgency, it is possible, in appropriate circumstances, to even dispose of the matter on the merits, where a matter is regarded as not being urgent, instead of striking the matter from the roll. The Court in *February v Envirochem CC and Another*[4] dealt with this kind of consideration, and even though the Court accepted that urgency was not established, the Court nonetheless proceeded to dismiss the matter in the interest of finality and so the matter should be dealt with once and for all.

[17] In the judgment of *In re: Several Matters On Urgent Roll 18 September 2012*[5] *t*he Court held that:-

> "Further, if a matter becomes opposed in the urgent motion court and the papers become voluminous there must be exceptional reasons why the matter is not to be removed to the ordinary motion roll. 'The urgent court is not geared to dealing with a matter which is not only voluminous but clearly includes some complexity and even some novel points of law.' See

[2] 1972(1) SA 773 (A) at para 782A - G

[3] 1977(4) SA 135 (W), see further also Sikwe vs SA Mutual Fire and General Insurance 1977 (3) SA 438 (W) at 440G - 441A.

[4] (2013) 34 ILJ 135 (LC) at para 17. See also Bumatech (supra) at para 33; Bethape v Public Servants Association and Others [2016] ZALCJHB 573 (9 September 2016) at para 53.

[5] (2012) 4 All SA 570 (GSJ) 8 para 15.

Digital Printers vs Riso Africa (Pty) Limited case number 17318/02, an unreported judgment of Cachalia J delivered in this division."

[18] The Court further held that:

> "Urgency is a matter of degree. … Some applicants who abuse the court process should be penalised and the matters should simply be struck off the roll with costs for lack of urgency. Those matters that justify a postponement to allow the respondent to file affidavits should in my view summarily be removed from the roll so that the parties can set them down on the ordinary opposed roll when they are ripe for hearing, with costs reserved.[6]"

[19] The abovementioned principle was further considered in the case of *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others*[7] in which this Honourable Court confirmed:

> "I proceed to evaluate the respondent's submission that the matter is not urgent. The evaluation must be undertaken by an analysis of the applicant's case taken together with allegations by the respondent which the applicant does not dispute. Rule 6(12) confers a general judicial discretion on a court to hear a matter urgently … It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.
>
> Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondent's and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency."

[20] The abovementioned decisions were also confirmed in *Export Development Canada v West Dawn Investments*[8]. An applicant must show the absence of substantial redress

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[6] At para 18

[7] (2014) JOL 32103 (GP) at para63 – 64.

[8] (2018) 2 All SA 783 (GJ)

eventually. It is not equivalent to irreparable harm that is required before the granting of interim relief. If the matter is enrolled to be heard in the normal course the applicants will still be able to prove their case and obtain the necessary redress, should a court find in their favour. There will still be the possibility of substantial redress in future.

[21] The applicants explained that it applies in terms of section 63(12) of the MSA to this Court. It further submits that an application to the Appeal Board in terms of section 63(12) and to the CMS in terms of section 63(8) was in its opinion pointless as the CMS was concurrent on the application for curatorship of the second applicant. Therefore it sought to appeal directly to this Court for intervention. Whilst, I can agree with the reasoning of approaching this Court directly in terms of section 63(12) as it is the applicants right to do so, the determining factor in this present appeal is whether the enrolment of the matter as urgent instead of on the ordinary roll was correct and that they would not gain substantial redress eventually.

[22] Possible financial prejudice does not entitle a party to any preference before other parties. The loss that the applicants may allegedly suffer in this matter is not sufficient to allow the applicant to be afforded an immediate hearing and it is not the kind of loss that justifies the disruption of the roll and prejudice to other parties, who are awaiting their turn to be heard.[9] The fact that irreparable loss may be sustained is in any event in itself not sufficient to establish urgency, *especially where an applicant took no action against the respondents for some time*[10].

[23] There is a tendency by applicants in urgent applications to lay the blame for their own lack of timeous conduct against the other parties. Although, there are appropriate circumstances that lead to matters being dispensed with as was decided in *February v Envirochem CC and Another*[11] for the interests of finality, I am reluctant to deal with the merits and grant the relief for the following reasons:

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[9] [8] L & B Marcow Caterers (Pty) Ltd v Greatermans SA Lt and another 1981 (4) SA 108 (C)

[10] Trustees BKA Besigheidstrust v Enco Produkte en Dienste 1990 (2) SA 102 (T)

[11] (2013) 34 ILJ 135 (LC) at para 17. See also Bumatech (supra) at para 33; Bethape v Public Servants Association and Others [2016] ZALCJHB 573 (9 September 2016) at para 53.

23.1 The applicant who is not yet accredited by the SALGBC will have the proposed amalgamation confirmed without such accreditation, circumventing the established statutory requirements in terms of section 63 of which the first respondent is tasked to supervise compliance in accordance of this provision.

23.2 The majority of members of the two schemes will have lost the benefit of the protection of a scheme that is SALGBC accredited;

23.3 If the respondents succeed in the impending curatorship application but in the meantime the current relief is granted, this would not be in the interests of the majority of the beneficiaries as the new entity would not be in or attain a sound financial condition; and

23.4 The financial loss would on a balance of probabilities affect the applicants more than it would affect the interests of the majority of its members who would still have the option of electing SALGBC accredited schemes which are available.

[24] **I accordingly make the following order:**

1. The application is struck off, and the applicants are ordered to pay the costs of this application including the costs of the employment of two counsel.

SASRDIWALLA J

Judge of the High Court

Appearances:

For the applicants:	Terry Motau SC E. Kromhout R. Tshetlo
Instructed by:	Malatji & Co attorneys

For the Respondents:	S. Poswa-Lerotholi SC N.Mgcima
Instructed by:	Ndobela and Lamola Incorporated