IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: 18755/2013

In the matter between:

GENESIS MEDICAL SCHEME Applicant

And

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

JUDGMENT: 24 December 2014

DAVIS J

Introduction

[1] This is an application to review and set aside a decision of first respondent communicated to the applicant on 19 June 2013 to reject the annual financial statements and returns of appellant for the 2012 financial year (the 2012 AFS) in terms of s 38 of the Medical Schemes Act 131 of 1998 ('MSA'). This application is brought in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') on the basis that first respondent's decision to reject the 2012 AFS was materially influenced by an error of law. See s 6 (2) (d) of the PAJA.

[2] It does not appear to be disputed that, as first respondent is a public official who took a decision pursuant to powers granted in terms of s 38 of the MSA, the decision constitutes administrative action as defined in PAJA.

[3] Applicant lodged an appeal against the decision of first respondent to the Appeal Committee of the second respondent ('CMS'). However, applicant contends that, neither the Registrar nor the CMS is in a position to rule that the decision of the then Transvaal Provincial Division by Du Plessis J upon which first respondent based its own decision to reject the financial statements and returns of the applicant is wrong in law. **Registrar of Medical Schemes v Ledwaba NO and others** [2007] JOL 19202 (T) (referred to as the Omnihealth case). In other words, applicant contends that when the matter arrives before the CMS, the appeal would have to be dealt with in terms of the Omnihealth decision. Accordingly, the outcome of the appeal would be a foregone conclusion in that it will have to be based on this decision. Thus, the applicant submits that obliging it to proceed by way of an internal appeal will waste time and cost money in circumstances where the judgment cannot be challenged in this appeal. The applicant thus submits that this is an exceptional case into which applicant should be exempted from the obligations to exhaust its internal remedies provided by s 49 and 50 of the MSA and that it would be in the interests of justice to exempt it in terms of s 7 (2) (c) of PAJA.

[4] Mr Brett, who appeared on behalf of the respondents, contended that the **Omnihealth** judgment was substantially different from the issue in the current dispute and that the rejection of the accounting treatment of the 2012 AFS was based on the opinion of first respondent; that is on his interpretation of the MSA and the regulations promulgated thereunder. Accordingly, Mr Brett submitted that the applicant had been unable to demonstrate exceptional circumstances warranting exemption from the obligation to exhaust its internal remedy. In particular, he cited

De Ville *Judicial Review of Administrative Action in South Africa* at 153 -154 to the effect that there was little reason to contend that a court's interpretation of a statutory provision would always be preferable to that of an administrative body, especially where the body has developed an expertise within a specific field. See also Hoexter *Administrative Law in South Africa* (2nd edition) at 556.

[5] If however, the decision by first respondent is based on the legal interpretation as set out in Omnihealth, then the question does not arise as to whether the court is as well qualified as the original authority to make a decision but rather on an interpretation of the law. This would be binding on administrative agencies when set out in a judgment of a court which had not been held to be incorrect. The critical question arises as to whether the impugned decisions were based on the **Omnihealth** judgment, in which case, in my view, it would be in the interests of justice to exempt the applicant in terms of s 7 (2) (c) of the PAJA. For this reason, it is necessary to turn to the basis of the decision.

First respondent's decision

[6] Section 37 (2) of the MSA provides as follows:

> 'The annual financial statements referred to in subsection (1) shall be furnished to the Registrar in the medium and form determined by the Registrar and shall inter alia consist of
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> (a) a balance sheet dealing with the state affairs of the medical scheme;
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> (b) an income statements;
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> (c) a cash-flow statement;
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> (d) a report by the auditor of the medical scheme; and
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> (e) such other returns as the Registrar may require.'

[7] First respondent's decision to reject the applicants annual financial statements and returns for the 2012 financial year was taken in terms of s 38 of the MSA which provides as follows:

> 'The Registrar, if he or she is of the opinion that any document furnished in terms of section 37 does not comply with any of the provisions of this Act or does not correctly reflect the revenue and expenditure or financial position, as the case may be, of that medical scheme, may reject the document in question, and in that event-
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> (a) he or she shall notify the medical scheme concerned of the reasons for such rejection; and
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> (b) the medical scheme shall be deemed not to have furnished the said document to the Registrar.'

[8] On the basis of these provisions, first respondent decided as follows:

> 'We have received all the documents submitted in terms of s 37 of the Medical Scheme Act 131 of 1998 (the MSA'), and are of the opinion that the AFS and returns do not comply with the provisions of the MSA and the Regulations ('the Regulations') promulgated thereunder as well as do not correctly reflect the financial position of the scheme or its revenue.
>
> This letter therefore constitutes the notice foreshadowed in section 38 of the MSA in terms of which I reject the AFS and returns of the scheme.
>
> This action is based on the following grounds:
>
> 1. Following on the decision in the Omnihealth case, schemes were advised in Circulars 38 of 2011 and 5 of 2012 to comply with the rulings handed down in that case regarding the nature and treatment of members' personal medical savings accounts (PMSA).

2. In addition the South African Institute of Chartered Accounts (SAICA), after conferring with the Accounting Practice Committee, ruled on the correct way to report on PMSA in the annual financial statements of medical schemes. SAICA is the controlling body who determines the reporting and accounting standards for South African entities subject to IFRS (International Financial Reporting Standards.)
3. Schemes were advised in Circular 41 of 2012 of these reporting requirements.
4. The Omnihealth case decided that PMSA funds are trust property and are subject to the requirements of the Financial Institution (Protection of Funds) Act 28 of 2001 (FI Act)
5. The FI Act requires trust funds to be invested and kept separately from the scheme's own funds and that they do not form part of the scheme's assets.

In our opinion by not complying with the above requirements the AFS and returns do not comply with the provisions of the MSA and the Regulations as well as do not correctly reflect the financial position of the scheme in the following manner:

1. The statement of financial position of the scheme is misleading in that it does not indicate that the PMSA funds are trust monies and do not form part of the scheme's assets. Refer to the statement of financial position and notes 3, 4 and 6 to the AFS and parts 4.5.1 and 4.5.2 of the annual returns.
2. The interest earned as stated in the statement of comprehensive income is overstated as it includes interest earned on trust monies which does not belong to the scheme. See the statement of comprehensive income and notes 15 and 6 and parts 4.5.1 and part 4.22 of the annual returns.
3. The net surplus and reserves are overstated owing to interest due to the members being credited to the income statement.

4. The liability owning to members who have PMSA balances is understated as it excludes interest rightfully earned on the trust monies comprising the PMSA balances. See note 6 and part 4.5.1.
5. The auditors' assurance report in terms of s 36, 37 and 39 of the MSA is incorrect as it omitted the prescribed paragraphs 13, 14 and 15 of the prescribed auditors' assurance report.'

[9] It is clear from the reproduction of this decision that the **Omnihealth** case played a significant role in the decision taken by the first applicant. It is therefore necessary to turn to this decision.

The Omnihealth case

[10] In **Omnihealth**, Du Plessis J was confronted with the wording of s 30 (1) (e) of the MSA which provides that the rules of the Medical Scheme may provide that members of the scheme may be allocated personal medical savings accounts (PMSA). The purpose of a personal medical savings account is to provide a facility for members to set aside funds with which to meet health care costs not covered in terms of the scheme's benefits. Members may pay an agreed monthly amount into the personal respective personal medical savings accounts.

[11] The applicant in this case, (the Registrar) contended that the amounts standing to the credit of members in their personal medical savings account constituted trust money and that the money did not form part of Omnihealth insolvent estate. The applicant contended that the amounts standing to the credit of those members in their PMSA must be transferred to the KwaZulu-Natal Medical Scheme, to which it appeared, most of the erstwhile members of Omnihealth had

become members. In respect of those members of **Omnihealth** that had not joined another medical scheme the applicant contended that the amounts standing to their credit must be paid out to them. The crisp question for determination In the **Omnihealth** case concerned the credit balances on the members personal medical savings account and whether these moneys constituted trust property. Du Plessis J held as follows:

> 'In law it does not follow, because the amount standing to the credit of a member's personal savings account is regarded as a liability, that the PMSA-funds must be an asset of the scheme. When a trust-creditor hands trust money to the trustee, the former immediately becomes a creditor of the trustee for the amount held in trust. That is so regardless of whether the trustee keeps the trust money in a separate account and does not become the owner thereof (**Fuhri v Geyser NO and another** 1979 (1) SA 747 (N) particularly at 749 A – 750 A).'

[12] To a considerable extent, the liquidators, who opposed this application relied on s 35 (9) of the MSA which reads:

> '(9) For the purposes of this Act, the liabilities of a medical scheme shall include-
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> (a) the amount which the medical scheme estimates will be payable in respect of claims which have been submitted and assessed but not yet paid
>
> (b) the amount which the medical scheme estimates will become payable in respect of claims which have been incurred but not yet submitted; and
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> (c) the amount standing to the credit of a member's personal savings account.'

[13] It was argued that, as in terms of s 35 (9) (c), an amount outstanding to the credit to the PMSA was a liability of the scheme, it followed that the actual funds in

the members personal savings accounts must be regarded as an asset of the scheme. Du Plessis J rejected this argument, not only because of the legal position as set out above, but because it was to be accepted that as paragraphs (a) and (b) of s 35 (9) required it these items were to be regarded as a liability for the purposes of the MSA, although they might not ordinarily be so reflected by way of an accounting treatment. Thus ,even if the argument that trust debts are not ordinarily regarded as liabilities were to be proved to be correct, such debts as with other items referred to in s 35 (9) in terms of s 35 (9) (c) must be regarded as liabilities for the purposes of the MSA. Accordingly, 'that does not mean that for all purposes the nature of the trust debt is altered. It is concluded that the credit balances in the PMSA constitute trust property'.

[14] The court then turned to examine whether the funds form part of **Omnihealth's** assets.

[15] The liquidators submitted that the MSA fund fell within Omnihealth's insolvent estate. In particular, reference was made to s 4 (4) of the Financial Institutions (The Protection of Funds) Act 28 of 2001 (FI Act) which requires that a financial institution to keep trust property separate from its own assets. Omnihealth did not so comply with these provisions but deposited all funds, including PMSA funds into six bank accounts, without distinguishing between trust and other funds. For this reason , it was argued that PMSA funds became the property of the relevant banks and had thus lost their identity.

[16] Du Plessis J held that it was correct that the relevant banks had become owners of the PMSA funds when the funds were deposited with the banks. That would have been the position, he noted, even if the funds had properly been invested in a separate banking account. However 'the fact the relevant banks are the owners of PMSA funds does not mean … that if the funds are withdrawn, Omnihealth somehow becomes the owner thereof.' He went on to hold that:

> '[a]t best for the liquidators the only right that derived from Omnihealth *vis a vis* the PMSA funds was to withdraw it from the bank. Upon doing so, the insolvent estate does not become the owner of the funds but may only deal with it in accordance with the agreement in terms whereof Omnihealth received the money, that is Omnihealth's rules… In short the liquidators do not have proprietary rights that Omnihealth never had and could not attain.'

[17] In addition, Du Plessis J referred to s 4 (5) of the FI Act which provides as follows:

> ''Despite anything to the contrary in any law or the common law, trust property invested, held, kept in safe custody, controlled or administered by a financial institution or a nominee company under no circumstances forms part of the assets or funds of the financial institution or such nominee company.'

[18] For these reasons the court directed that the PMSA funds constituted trust property as defined in the FI Act and directed the liquidators to pay such of the PMSA funds as pertained to those members of Omnihealth who had become members of KwaZulu-Natal Medical Scheme.

[19] Pursuant to this judgment, but about four years later on 28 September 2011, second respondent issued a circular headed 'Personal Medical Savings Accounts'. This circular referred to the Omnihealth judgment and advised members to correct their records so as to treat funds from the PMSA as a form of trust fund. In a further circular issued by second respondent on 31 October 2012 ('Prescribed format for the statement of Comprehensive Income and Disclosure required in respect of Personal Medical Savings Accounts') the following was said:

> 'The Omnihealth judgment emphasised the need to better describe the various components of a medical scheme contract, to clearly indicate which income and expenditure represents scheme income and expenditure and which represents cash flows that are managed on behalf of the members. This clear distinction is necessary in both the statement of comprehensive income as well as in the disclosure notes to the annual financial statements…
>
> Annexure B to this Circular contains the required disclosure necessary to provide members with sufficient information on how the PMSA monies are managed on their behalf. These disclosures are also included in the SAICA Medical Schemes Accounting Guide for the year ending 31 December 2012. When a specific line item in the prescribed disclosure is not relevant to a scheme, that specific line item may be omitted. Where additional information is necessary, either due to materiality or in terms of IFRS, such additional disclosure should be provided.'

[20] Turning to the rejection of the 2012 AFS in this case, it was clear from the letter of first respondent of 19 June 2013 which is reproduced earlier in this judgment that first respondent rejected the 2012 AFS on the basis of the **Omnihealth** judgment and the circulars to which I have made reference.

[21] It is important to emphasise that the applicant accepts that, if the **Omnihealth** judgement is correct, first respondent may be entitled to reject the 2012 AFS on the basis that it does not correctly reflect the financial position of the scheme because it did not indicate that the PMSA funds are trust property and do not form part of the assets of the applicant. Accordingly, applicant has challenged the decision of first respondent only on the grounds that it was vitiated by the error of law which it avers flows from the Omnihealth judgment and which holding was applied by the first applicant.

Applicant's case

[22] Mr Fagan, who appeared together with Ms van Huyssteen on behalf of the applicant, referred to the decision **Louw NO and others v Coetzee and others** 2003 (3) SA 329 (SCA) at para 12 where the court set out the relevant common law position thus:

> 'It is trite that when a customer of a bank deposits money in an account the money becomes the property of the bank, which in turn, is the debtor of the customer, has an obligation to pay the customer as creditor the amount deposited. The bank does not hold the money for the customer as agent or trustee: it becomes the owner and has only a personal obligation to pay the amount together with interest as agreed. Accordingly, where a bank is liquidated the customer has only a concurrent claim against the estate.'

[23] In **De Villiers NO v Kaplan** 1960 (4) SA476 (C)at 477E van Winsen J had reflected the position thus:

> 'Money paid to an attorney by a client to be held and dealt for the client clearly becomes the attorney's property even although it might be paid into a trust account,

> and when it is so paid in the right to claim the money from the bank similarly remains its property.'

However, the common law position was altered by the Attorney's Act 23 of 1934. Section 33 (3) of the Act provided that no amounts standing to the credit of an attorney's trust account shall form part of the assets of the attorney. Van Winsen J noted that this section 'left unimpaired the right of the attorney to direct the bank at which the trust account is kept to dispose of the amount outstanding to the creditor of that trust account in a manner as directed by him.' (at 479 A) The attorney retained the right to direct the bank to pay the money in his trust account to his trust creditors or to persons to whom such creditors had instructed him to make payment. He also retained the right, if there was a sum in such account in excess of that required to meet the trust obligations, to then direct the bank to pay the excess to his personal creditors or to himself personally.

[24] Van Winsen J held therefore that even although the amount in the trust account , while it was still in such account, was not an asset belonging to the attorney, he had a right of disposal over such an amount, which right empowered him to deal with it in such a way as to make it to, or an equivalent thereto as part of the assets. (479 C)

[25] Accordingly the court held that the provisions of s 33 (3) of the Attorney's Act did not prevent the conclusion that the amounts standing to the credit of an attorney's trust account in the bank formed part of the attorney's asset and thus was his property in terms of the meaning of s 2 of the Insolvency Act 24 of 1936.

[26] This statute was also the subject of analysis in **Fuhri v Geyser NO and another** 1979 (1) SA 747 (N). In this case the court was required to determine whether the trust creditor of an attorney, whose estate had been sequestrated and in his trust account there was a deficiency, was entitled to prove a claim against the insolvent estate for the full amount owing to him.

[27] Mr Fagan sought reliance upon aspects of the judgment of Hefer J (as he then was) even though this judgment was relied upon by Du Plessis J in **Omnihealth**, *supra.* In this case Hefer J referred to s 33 (7) of the Attorney's Act which provides that no amounts standing to the credit of such trust account … shall be regarded as forming part of the assets of the attorney concerned. Hefer J found, notwithstanding the separation of trust monies from the attorney's assets as envisaged by this provision,

> 'It is clear that trust creditors have no control over the trust account: ownership in the money in the account vests in the bank or other institution in which it has been deposited. The only right the trust creditors have, is the right to payment by the attorney of whatever is due to them, and it is to that extent that they are the attorney's creditors. This right to payment only arises from the relationship between the parties and has nothing whatsoever to do with the way in which the attorney handles the money in his trust account… When an attorney receives an amount of money for the account of a client, a debt immediately arises (subject to any agreement that may exist between the parties) for payment of this amount to the client, or viewed from the clients side, the latter becomes entitled to payment of the amount in demand.' (749 D –G)

[28] In summary, Mr Fagan's submitted that the common law position had not altered primarily because of the principle of *commixtio*. He also referred in this connection to two further cases. In **Wypkena v Lubbe** 2007 (5) SA 138 (SCA) of para 7 the court said:

> 'When an attorney draws a cheque on his trust account, he exercises his right to dispose of the amount standing to the credit of that account and does so as a principal and not in a representative capacity.'

This point was reinforced in a later decision of Mthiyane AP (as he then was) in **Capricorn Beach Home Owners Association v Potgieter t/a Nil and another** 2014 (1) SA 46 (SCA) at para 16 where the principle laid down in **Wypkena**, supra was confirmed.

[29] On this legal basis, Mr Fagan submitted that, by a parity of reasoning, if money in an attorney's trust account constitutes the property of the attorney and is not a debt which arises but a liability, that is an obligation to account, the same must hold true insofar as the PMSA moneys were concerned. Thus, the relation between the member and the medical scheme is that of a debtor and a creditor, precisely because the member loses ownership of the PMSA funds. These funds become part of the assets of the medical scheme; hence the claims from members to payment of the PMSA funds constitute a liability of the medical scheme towards these members as provided for in s 35 (9) of the MSA.

[30] In Mr Fagan's view, this interpretation was also supported by an examination of s 35 (1) (a), read with s 35 (3) of the MSA. Section 35 (1) (a) provides 'a medical

scheme shall at all times maintain its business in a financially sound condition by (a) having assets as contemplated in subsection (3). Subsection (3) provides that a medical scheme shall have assets, the aggregate value of which, on any day, is not less than the aggregate of (a) the aggregate value on that day of its liabilities; and (b) the nett assets as may be prescribed. By contrast, if the approach adopted in **Omnihealth** is correct and the MSA funds are defined as trust property for the purposes of FI Act, that is funds that do not constitute assets of the medical scheme concerned, then for the purposes of the calculation required by s 35 (3) of the MSA, the amount standing to the credit of a member's PMSA must be regarded as a liability in terms of s 35 (9) but the funds themselves may not be treated as assets of the fund.

Respondent's arguments

[31] Mr Brett referred to s 30 (1) (e) of the MSA which provides that a medical scheme may, in its rules, make provision for the allocation to a member of a PMSA, within the limit and in the manner prescribed from time to time, to be used for the payment of any relevant health service. This section should be read together with Rule 14.5 of applicant's rules. It provides that the balance standing to the credit of a member in terms of any benefit option which provides for personal medical savings accounts shall, at all times, remain the property of the member, subject to the provisions relating to savings accounts in Annexure B of the rules.

[32] Mr Brett contended thus that the decision in Omnihealth was not the binding factor in this case; Rule14.5 was the determinative issue. Notwithstanding the judgment in Omnihealth, Rule 14.5 governed the agreement between the parties.

[33] Mr Brett further submitted that recourse to s 35 (9) of the MSA deemed the amounts standing to the credit of the PMSA to be treated as a liability of the medical scheme. If the amount in the account must be treated as an asset as well, then one would have expected a similar deeming provision to have been introduced by the legislature to cater for such a situation. For this reason, Mr Brett submitted that s 4 of the FI Act clearly provided, in terms of s 4 (4), that a financial institution must keep trust property separate from assets belonging to that institution and must in its books of account clearly indicate trust property as being property belonging to a specified principal. This was, in his view, the governing principle which had been followed by first respondent and for this reason assailing the **Omnihealth** decision was of no assistance to the applicant.

Evaluation

[34] In my view, s 4 of the FI Act does not assist the respondent's case. After all, the key question which arises is whether the funds in this case constitute trust property as defined. Section 4 (4) of the FI Act provides that the financial institution must keep 'trust property' separate from the assets belonging to the institution. Trust property is defined to mean any corporeal, incorporeal, movable or immovable assets invested, held, kept in safe custody, controlled, administered or alienated by any person, partnership company or trust for, or on behalf of, another person, partnership, company or trust, and such other person, partnership, company, or trust is here in after referred to as the principal. The text does not give an answer to the key question: is this trust property? Only once this determination is complete, can it be said that the section applies.

[35] It is significant, in the light of respondent's arguments concerning Rule 14.5, that Regulation 10 (3) (GNR1262 in GG20556: 20 October 1999 as amended) provides that funds deposited in a PMSA shall be available for the exclusive benefit of a member and his or her dependants. It is therefore striking that the provision does not refer to ownership but uses the phrase 'available for the exclusive benefit to the member'. Furthermore, if s 35 (9) (c) of the MSA implies that not only the amounts standing to the credit of the members personal savings account must be treated as a liability but that these monies which form the basis of the PMSA constitutes an asset of the applicant, then Rule 14.5 should surely not be able to trump this legislative provision.

[36] Returning to the MSA, s 35 (3) provides that a medical scheme shall have assets, the aggregate value of which on any day may not be less than the aggregate value of its liabilities and the net assets as prescribed. This would appear to mean gross assets less liabilities, which would then be deemed to include those included in terms of s 35 (9). Logically, this would then mean that the monies in the PMSA would have to be treated both as an asset and as a corresponding liability.

[37] In the broader analysis of this dispute, it is important to provide an interpretation that allows the statutory scheme to make financial sense as doubtless it was intended to do. Section 35 (1) (b) and (c), read together with s 35 (3), provides that a medical scheme must hold assets equivalent to the total value of its liabilities. That is the aggregate value of the assets cannot be less than the aggregate value of its liabilities. Assume that the medical scheme, such as

applicant, has R 20 million of PMSA funds under its control, it would have to have assets which correspond to this R 20 million. On respondent's argument, the assets could not include PMSA funds. Accordingly, for every rand of PMSA funds under its control, the medical scheme would have to find an additional, in this example R 20 million in order match its assets with liabilities. That is both an unworkable and unjustifiable interpretation which should give way to one that promotes a practical and business like outcome.

[38] To return to Omnihealth, it is clear from the answering affidavit deposed to by Mr Lehutjo, the Acting Registrar, that the decision which was taken against applicant was based on the Omnihealth judgment. For example paragraph 57.2 of Mr Lehutjo states: 'The Registrar's decision is correct and was based on the applicable statutory framework as interpreted by the court in the Omnihealth judgement'. See also para 58.2 of the answering affidavit. At para 58.3 he states:

> 'Genesis rules are similarly consistent with the applicable statutory provision as was found to be the case in the Omnihealth judgment. Accordingly, in the present matter, there is no reason to deviate from the interpretation and the application of the applicable statutory framework as set out in the Omnihealth judgment'.

In para 63.2 he says

> 'It is submitted that the Registrar's decision was based on a correct interpretation of the applicable statutory framework which was, in turn correctly interpreted by the Court in the **Omnihealth** judgment.'

Further at 63.3 he says in particular,

> 'The Registrar's decision correctly states the applicable rule has applied to Genesis 2012 AFS and returns…'

There can be no doubt, when the answering affidavit is so examined, that the reasoning employed by first respondent was based upon the **Omnihealth** judgment. If the **Omnihealth** judgment is wrong in law, then it surely must follow that the decision of first respondent must be set aside on that ground as it was made in error of law.

[39] To return again to the judgment in **Omnihealth** : critical to this decision is a passage which has already been cited in this judgment and for its importance to this section of the analysis must be recapitulated:

> 'When a trust creditor hands trust money to the trustee, the former immediately becomes the creditor of the trustee for the amount held in trust. That is so regardless of whether the trustee keeps the trust money in a separate account and does not become the owner thereof…'

The authority for this proposition is given as **Fuhri** at 749 A - 750 A.

[40] As indicated above, I am uncertain whether **Fuhri**, *supra* supports the position that trust property creates a liability without a corresponding asset. All that Hefer J appears to have said is that when an attorney receives an amount of money 'for the account of a client a debt immediately arises… for payment of that amount of the client.' (at 749 F) Whether this debt is a liability in the sense in which this word was used in s 35 (9) of the MSA must be open to doubt. In any event, as indicated earlier, the Supreme Court of Appeal In **Wypkena**, *supra* and **Capricorn Beach Homeowners Association**, *supra* confirmed that money in an attorney's trust account constitutes the property of an attorney and is therefore not a debt which

arises but a liability that is an obligation to an account. In addition, **Fuhri** can surely be of no assistance in answering the key question as to whether the funds in the PMSA constitutes an asset of the member or of the medical scheme. That, as was indicated earlier in the judgment, is critical to the determination as to whether the PMSA funds form trust property in terms of the definition of trust property as set out in s 1 of the FI Act and therefore stands to be dealt with in terms of s 4 (4) of that Act.

[41] In my view, a medical scheme under the MSA is the owner of all funds held by it, including funds in the PMSA. This is confirmed by Regulation 10 which makes it clear that the funds placed in the PMSA are a portion of the contributions paid by a member (allocated to a PMSA by the medical scheme), provides further that the funds in the PMSA may be used to offset debt owed by the member to the medical scheme following that member's termination of his or her membership and further provides for the transfer of credit balance in the members PMSA to another medical scheme or benefit option.

[42] For these reasons, I find that the Omnihealth judgment is wrong in law and accordingly the decision of the first respondent which were predicated directly and exclusively on that holding constitutes an error in law. It therefore follows that the applicant is entitled to the relief it seeks.

[43] The following order is made:

1. The applicant is exempted from the obligation to exhaust the internal remedies of an appeal to the second respondent's Appeal Committee

and the Appeal Board in terms of sections 49 and 50 of the Medical Schemes Act 131 of 1998.

2. The rejection by first respondent of the applicant's annual financial statement and returns from the 2012 financial year is reviewed and set aside.

3. First and second respondents are jointly and severally ordered to pay the costs of this application, including the costs of two counsel.

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DAVIS J