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

CASE NO: 15268/14

In the matter between:

GENESIS MEDICAL SCHEME	Applicant
And	
THE MINISTER OF HEALTH	Respondent
And	
MEDI-CLINIC SOUTHERN AFRICA (PTY) LTD	First applicant to intervene
HOSPITAL ASSOCIATION OF SOUTH AFRICA	Second applicant to intervene
THE COUNCIL FOR MEDICAL SCHEMES	Third applicant to intervene
THE REGISTRAR OF MEDICAL SCHEMES	Fourth applicant to intervene
B BRAUN AVITUM (PTY) LTD	Fifth applicant to intervene
MULTIPLE SCLEROSIS SOCIETY OF SOUTH AFRICA	Sixth applicant to intervene
INFERTILITY AWARENESS ASSOCIATION OF SOUTH AFRICA	Seventh applicant to intervene
THE SOUTH AFRICAN PRIVATE PRACTITIONERS FORUM	Eighth applicant to intervene
PETER FRANCOIS COLIN	Ninth applicant to intervene
And	
TREATMENT ACTION CAMPAIGN NPC	First applicant for admission as *amicus curiae*
THE SOUTH AFRICAN DEPRESSION AND ANXIETY GROUP	Second applicant for admission as *amicus curiae*
PEOPLE LIVING WITH CANCER	Third applicant for admission as *amicus curiae*

JUDGMENT DELIVERED ON 29 JULY 2015

BLIGNAULT J

[1] This judgment deals with a number of applications brought by various parties for leave to intervene in pending review proceedings in which an order is sought that Regulation 8 made under the Medical Schemes Act 131 of 1998 ('the Medical Schemes Act') be reviewed and set aside. I shall refer to the review proceedings as the main application.

[2] Applicant in the main application is Genesis Medical Scheme ('Genesis'), a medical scheme registered in terms of section 24 of the Medical Schemes Act having its registered office at 4th Floor, The Terraces, Black River Park, Fir Street, Observatory, Cape Town.

[3] Respondent in the main application is the Minister of Health, c/o The State Attorney, Cape Town. He has the power and duty to make regulations in terms of the Medical Schemes Act. He does not oppose or support the main application and he abides the decision of the court.

[4] Genesis seeks the following relief in the main application: An order reviewing and setting aside Regulation 8 of the regulations made in terms of the Medical Schemes Act, published by the Minister of Health in Government Notice R.1262 in Government Gazette *11677* of 20 October 1999 and amended by Government Notice R1360 published in Government Gazette 24007 of 4 November 2002.

[5] A number of parties applied for leave to intervene in the main application in order to oppose it. The first applicant to intervene was Medi-Clinic Southern Africa (Pty) Ltd but it withdrew its application. The second applicant to intervene is the Hospital Association of South Africa. Its application is opposed by Genesis. The

third and fourth applicants to intervene are The Council for Medical Schemes and The Registrar of Medical Schemes. Genesis does not oppose their applications.

[6] Fifth applicant to intervene is B Braun Avitum (Pty) Ltd. Sixth applicant to intervene is the Multiple Sclerosis Society of South Africa, seventh applicant to intervene is the Infertility Awareness Association of South Africa, eighth applicant to intervene is The South African Private Practitioners Forum and the ninth applicant to intervene is Peter Francois Colin. Their applications to intervene are opposed by Genesis.

[7] The Treatment Action Campaign NPC, the South African Depression and Anxiety Group and People Living with Cancer apply to be admitted as *amici curiae.* Their applications are not opposed.

[8] Genesis' founding affidavit was deposed to by Mr Dennis Van der Merwe, its principal officer. Genesis' first main contention is that Regulation 8 is *ultra vires* in that it is in conflict with and extends beyond what is contemplated by sub-sections 29(1)(o) and (p) and sub-section 67(1) of the Medical Schemes Act. Its second main contention is that Regulation 8 is not rationally connected to the purpose for which it was made. Genesis' challenge to the validity of Regulation 8, he says, is based on the principles of legality, rationality and the rule of law.

[9] Mr Van Der Merwe claims that Genesis has standing in the main application. As a registered medical scheme it is subject to the Medical Schemes Act and the regulations made thereunder. Genesis is therefore directly affected by Regulation 8 which deals with *'Prescribed Minimum Benefits'* (PMBs). Regulation 8 impacts materially on the benefits that Genesis is required to pay and the scheme rules that Genesis must have registered. Genesis therefore brings this application, in the

first instance, in its own interest. In addition, Genesis also brings this application in the public interest. It is not in the interests of the public for there to be an ultra vires, unlawful and irrational regulation in force, and more particularly one which has a deleterious effect on the viability of medical schemes.'

The statutory framework

[10] Mr Van der Merwe describes the statutory framework. Regulation 8 bears the heading *'prescribed minimum benefits'*. He submits that certain provisions of the Medical Schemes Act are particularly relevant. Sub-section 29(1) precludes any medical scheme from carrying on business unless provision is made in its rules for the matters listed in paragraphs (a) to (u) of that sub-section. Paragraphs 29(1)(o) and 29(1)(p) read as follows:

> *'(o) The scope and level of minimum benefits that are to be available to beneficiaries as may be prescribed* [by regulation].
>
> *(p) No limitation shall apply to the reimbursement of any relevant health service obtained by a member from a public hospital where this service complies with the general scope and level as contemplated in paragraph (o) and may not be different from the entitlement in terms of a service available to a public hospital patient.'*

[11] In terms of paragraphs (g) and (q) of sub-section 67(1) of the Medical Schemes Act the Minister is empowered to make regulations with regard to the following matters:

> *'67 Regulations*
>
> *(1) The Minister may, after consultation with the Council, make regulations relating to -*
>
> *… …*

(g) the prescribed scope and level of minimum benefits to which members and their registered dependants shall be entitled to under the rules of a medical scheme;

… …

(q) all other matters which he or she considers necessary or expedient to prescribe in order that the purposes of this Act may be achieved.'

[12] The Minister made Regulation 8 in terms of section 67(1)(g) or 67(1)(q) of the Medical Schemes Act. It must be read with the definitions contained in Regulation 7. They read as follows:

7 Definitions

For the purposes of this chapter-

'designated service provider' means a health care provider or group of providers selected by the medical scheme concerned as the preferred provider or providers to provide to its members diagnosis, treatment and care in respect of one or more prescribed minimum benefit conditions;

'emergency medical condition' means the sudden and, at the time, unexpected onset of a health condition that requires immediate medical or surgical treatment, where failure to provide medical or surgical treatment would result in serious impairment to bodily functions or serious dysfunction of a body organ or part, or would place the person's life in serious jeopardy;

'prescribed minimum benefits' means the benefits contemplated in section 29(1)(o) of the Act, and consist of the provision of the diagnosis, treatment and care costs of-

(a) the Diagnosis and Treatment Pairs listed in Annexure A, subject to any limitations specified in Annexure A; and

(b) any emergency medical condition;

'prescribed minimum benefit condition' means a condition contemplated in the Diagnosis and Treatment Pairs listed in Annexure A or any emergency medical condition.'

[13] Regulation 8 reads as follows:

'8 Prescribed Minimum Benefits

(1) Subject to the provisions of this regulation, any benefit option that is offered by a medical scheme must pay in full, without co-payment or the use of deductibles, the diagnosis, treatment and care costs of the prescribed minimum benefit conditions.

(2) Subject to section 29(1)(p) of the Act, the rules of a medical scheme may, in respect of any benefit option, provide that-

(a) the diagnosis, treatment and care costs of a prescribed minimum benefit condition will only be paid in full by the medical scheme if those services are obtained from a designated service provider in respect of that condition; and

(b) a co-payment or deductible, the quantum of which is specified in the rules of the medical scheme, may be imposed on a member if that member or his or her dependant obtains such services from a provider other than a designated service provider, provided that no co-payment or deductible is payable by a member if the service was involuntarily obtained from a provider other than a designated service provider.

(3) For the purposes of subregulation (2)(b), a beneficiary will be deemed to have involuntarily obtained a service from a provider other than a designated service provider, if-

(a) the service was not available from the designated service provider or would not be provided without unreasonable delay;

(b) immediate medical or surgical treatment for a prescribed minimum benefit condition was required under circumstances or

at locations which reasonably precluded the beneficiary from obtaining such treatment from a designated service provider; or

(c) there was no designated service provider within reasonable proximity to the beneficiary's ordinary place of business or personal residence.

(4) Subject to subregulations (5) and (6) and to section 29(1)(p) of the Act, these Regulations must not be construed to prevent medical schemes from employing appropriate interventions aimed at improving the efficiency and effectiveness of health care provision, including such techniques as requirements for pre-authorisation, the application of treatment protocols, and the use of formularies.

(5) When a formulary includes a drug that is clinically appropriate and effective for the treatment of a prescribed minimum benefit condition suffered by a beneficiary, and that beneficiary knowingly declines the formulary drug and opts to use another drug instead, the scheme may impose a co-payment on the relevant member.

(6) A medical scheme may not prohibit, or enter into an arrangement or contract that prohibits, the initiation of an appropriate intervention by a health care provider prior to receiving authorisation from the medical scheme or any other party, in respect of an emergency medical condition.'

[14] Annexure A to Regulation 8 lists a large number of prescribed minimum benefits. The list is preceded by the following Explanatory Note:

'The objective of specifying a set of Prescribed Minimum Benefits within these Regulations is two-fold:

(i) To avoid incidents where individuals lose their medical scheme cover in the event of serious illness and the consequent risk of unfunded utilisation of public hospitals.

(ii) To encourage improved efficiency in the allocation of Private and Public health care resources.

The Department of Health recognises that there is constant change in medical practice and available medical technology. It is also aware that this form of regulation is new in South Africa. Consequently, the Department shall monitor the impact, effectiveness and appropriateness of the Prescribed Minimum Benefits provisions. A review shall be conducted at least every two years by the Department that will involve the Council for Medical Schemes, stakeholders, Provincial health departments and consumer representatives. In addition, the review will focus specifically on development of protocols for the medical management of HIV/AIDS. These reviews shall provide recommendations for the revision of the Regulations and Annexure A on the basis of:

(i) inconsistencies or flaws in the current regulations;

(ii) the cost-effectiveness of health technologies or interventions;

(iii) consistency with developments in health policy; and

(iv) the impact on medical scheme viability and its affordability to Members.'

[15] For illustrative purposes I quote the description of two prescribed minimum benefits:

Categories (Diagnosis and Treatment Pairs) constituting the Prescribed Minimum Benefits Package under section 29(1)(o) of the Medical Schemes Act (listed by Organ-System chapter)

Brain and nervous system

CODE: 906A

DIAGNOSIS: ACUTE GENERALISED PARALYSIS, INCLUDING POLIO AND GUILLAIN-BARRE

TREATMENT: MEDICAL MANAGEMENT; VENTILATION AND PLASMAPHERESIS

CODE: 341A

DIAGNOSIS: BASAL GANGLIA, EXTRA-PYRAMIDAL DISORDERS; OTHER DYSTONIAS NOS

TREATMENT: INITIAL DIAGNOSIS; INITIATION OF MEDICAL MANAGEMENT'

[16] Mr Van der Merwe provides a short description of the nature of medical schemes. A medical scheme is a non-profit organisation that is owned by its members. The essential element of its business is to pay for healthcare services provided to its members by healthcare providers in return for the payment of a premium or contribution.

[17] Medical schemes typically offer members and prospective members a choice of benefits to suit a member's particular healthcare needs. There is a correlation between the benefits offered and the contribution asked. The Medical Schemes Act compels every medical scheme to balance its risk. This means that it must levy members a monthly contribution that is sufficient to meet likely claims, maintain sufficient reserves and ensure that the medical scheme is financially sound at all times. It is essential that medical schemes should be able to limit benefits.

[18] Mr Van der Merwe submits that section 21(1)(p) of the Medical Schemes Act is ungrammatical and vague. He explains his view of the proper interpretation of section 29(1)(p):

> *'Based on the first part of the paragraph, it would appear at first glance there are two potential options in this regard: it could be the "reimbursement" or the "service" that "may not be different" from the entitlement in terms of a service available to a public-hospital patient. However, on closer analysis, it is clear that what must have been intended by the legislature was for the word "service" to be the subject of the last portion of the paragraph. In other words, the latter portion of section 29(1)(p) merely indicates that the scheme's obligation to provide full reimbursement for PMBs obtained from public hospitals relates to services which are no different from, and thus no more or*

no less than, he sort of services which public hospitals provide to their ordinary patients.'

[19] That interpretation, he says, would not detract from the first part of section 29(1)(p), which appears to limit a medical scheme's obligation to provide reimbursement for PMBs to those instances where the service is obtained from a public hospital. When read in that way, section 29(1)(p) also protects both the members and the medical schemes: The member is protected by ensuring that he or she is entitled to ordinary public-hospital care at full reimbursement which the scheme is protected by not having to provide full reimbursement where the member, because of his or her medical-aid membership, receives a more extensive service than would have been provided to any ordinary public-hospital patient.

[20] Mr Van der Merwe argues that a medical scheme is only required to provide reimbursement in full for a service falling within the prescribed scope and level of minimum benefits where (i) the service is provided by a public hospital; and (ii) such service corresponds with (ie is not more extensive than) the service which such hospital provides to its ordinary public-hospital patients. He submits further that Genesis' interpretation is consistent with sections 67(1)(g), 29A(2) and (3) of the Medical Schemes Act.

[21] According to Mr Van der Merwe Regulation 8 and sections 29(1)(o) and (p) of the Medical Schemes Act are accordingly incompatible. Regulation 8 also exceeds what is permitted by section 67(1).

[22] The purposes of the Medical Schemes Act, he says, are undermined by regulations which result in potentially ruinous expenses for medical schemes, thereby threatening their very existence. The option of increasing contributions to

match the cost of PMBs is not generally available to medical schemes. First, there is the difficulty of unpredictability. Secondly, contributions would in all probability have to be increased to such an extent that even fewer people than at present would be able to afford membership of a medical scheme. Thirdly, experience shows that the Registrar will not allow schemes to increase their contribution rates significantly. Far from being *'necessary or expedient',* Regulation 8 thus impedes the implementation of the objectives and provisions of the Medical Schemes Act.

[23] Mr Van der Merwe contends that section 33(2) of the Medical Schemes Act is a further indication that Regulation 8 is the *ultra vires*. The Registrar is precluded by that subsection from approving any benefit option submitted to him for his approval by a medical scheme unless the Council for Medical Schemes ('CMS') is satisfied, amongst other things, that the option (a) includes the prescribed benefits, (b) will be self-supporting in terms of financial performance, (c) is financially sound, and (d) will not jeopardise the financial soundness of any existing benefit option within the scheme.

[24] In terms of Regulation 8 as presently worded, PMBs have at least two distinct characteristics. They are unpredictable on the basis of past experience, and therefore extremely difficult to factor in to an option's actuarial projections of the contributions that will be required to cover benefits payable in the ensuing year. They are potentially ruinously expensive in the light of the fact that regulation 8 requires medical schemes to pay without limitation for the treatment of PMB conditions.

[25] In conclusion Mr Van der Merwe summarises Genesis' contentions. It was beyond the power of the Minister to make regulations requiring medical schemes to

reimburse members in respect of services obtained from providers other than public hospitals. It was also beyond the power of the Minister to make regulations requiring schemes to provide reimbursement in an amount exceeding the actual cost of obtaining the service in question from the public hospital concerned. It was also beyond the power of the Minister to impose effectively unlimited reimbursement obligations on medical schemes, inasmuch as even the obligation of full reimbursement in a public hospital is only applicable where the service is not more extensive than the service ordinarily provided by the hospital in question to its public-hospital patients.

Second applicant to intervene

[26] Second applicant to intervene is the Hospital Association of South Africa ('HASA'). It was previously an association not for gain, incorporated and registered as such under section 21 of the Companies Act 61 of 1973. HASA is now, by reason of item 4(1)(a) of transitional arrangements forming part of Schedule 5 to the 2008 Companies Act, deemed to be a non-profit company, as that term is defined in section 1 of the 2008 Companies Act.

[27] HASA's founding affidavit was deposed to by its chief executive officer, Mr Dumisani Sizwe Bomela. He contends at the outset that HASA seeks leave to intervene to oppose the main application for the following reasons. HASA represents its members and, as such, has a direct and substantial legal interest in the subject matter of the review application. The interests of each of the members of HASA may be prejudicially affected by the judgment of the court in the review application, HASA has *prima facie* grounds for opposing the review application and its application is not frivolous or vexatious and is seriously made.

[28] Mr Bomela describes HASA's direct and substantial interest in the subject matter of the main application. HASA, he explains, is a voluntary association which has as its members a number of private hospital groups and private hospitals operating within South Africa. It is an umbrella body which represents the vast majority of South Africa's private hospitals. It acts on behalf of its members, but does not do so to the exclusion of its members who will themselves often participate individually and to the extent of a particular interest that they may have in any issue in respect of which HASA acts.

[29] HASA's 212 members constitute more than 80% of South Africa's private hospitals by bed numbers. The objects and purposes of HASA include to assist the private hospital industry in expanding access to healthcare and preserving the quality of healthcare services. It seeks to do so by facilitating collaboration between private hospitals and government, other local and international healthcare stakeholders, the media and public. HASA represents its members *inter alia* in engaging with regulatory bodies and stakeholders in the formulation of regulations and legislation governing the provision of healthcare services generally and private hospitals in particular. HASA represents its members in respect of legal and social policy and those areas of policy as agreed to from time to time by its members.

[30] Insofar as the members of HASA provide services to a member of a medical scheme or his or her dependants, the payment for such a service or for such services must be effected within the terms of the Medical Schemes Act. In a number of instances the members of HASA contract directly with medical schemes, in a manner permitted under the Medical Schemes Act and the Regulations (including as designated service providers), in terms of which the prices at which services are provided by HASA's members to medical schemes are agreed between those

members and the medical scheme concerned. These prices would apply irrespective of whether or not a service is provided that falls under the rubric of PMBs or not.

[31] There are no tariffs imposed on the costs of PMBs in the private healthcare sector and heathcare providers are fully reimbursed by medical schemes for the costs of APMBs that are provided to the beneficiaries of the medical schemes. Accordingly, the members of HASA are fully reimbursed by medical schemes for the PMBs that are provided to the beneficiaries of the medical schemes. This reimbursement arises from the operation and application of Regulation 8.

[32] Mr Bomela submits that should Genesis succeed in the review application, and should the court set aside Regulation 8, the interests of each of the members of HASA shall be affected, as the members of HASA will no longer be fully reimbursed by medical schemes for the PMBs provided to beneficiaries of the medical schemes. The members of HASA will subsequently be reimbursed for PMBs by medical schemes in accordance with a tariff determined unilaterally at the discretion of the medical scheme concerned. Therefore, any contracts that members of HASA have with medical schemes for the provision of PMBs shall be negatively affected by the imposition of a tariff by each medical scheme. This is so because the members of HASA shall no longer be fully reimbursed for the provision of PMBs to beneficiaries of the medical schemes in accordance with Regulation 8.

[33] He argues, in short, that the members of HASA shall be reimbursed for PMBs in accordance with a tariff determined at the discretion of each medical scheme. This will in turn be dependent upon the benefit option of the beneficiary of that medical scheme. The result would be, for example, that in the case of an

emergency admission to a private hospital arising from a motor vehicle accident, the member of HASA who admits that patient will be faced with the uncertainty of not knowing if the medical scheme will meet the costs of that admission and, if so, what the extent of that reimbursement will be. It will not know if a co-payment is required or a deductible, under the rules of the medical scheme concerned. It may be forced to either limit access to its private hospital or, more likely, to admit at risk to itself of not being able to recover the expenses and costs. This will almost certainly limit or curtail access to healthcare services on the part of members of the public.

[34] In light of the above, the imposition of a tariff by a medical scheme on healthcare providers for the provision of PMBs will be materially prejudicial to the interest of the members of HASA and to the public generally and members and beneficiaries of medical schemes.

[35] It follows that any application that concerns the proper interpretation and application of the provisions of the Medical Schemes Act and Regulation 8 has a direct bearing on the nature of the business activities conducted by each of the members of HASA. Those members would themselves have a direct and substantial interest in the outcome of the main application. As the mandated representative of its members HASA itself has a direct and substantial interest in the relief sought in such an application.

Third and fourth applicants to intervene

[36] Third applicant to intervene is the Council for Medical Schemes ('the Council') and fourth applicant to intervene is the Registrar of Medical Schemes ('the Registrar'). Their applications are supported by an affidavit deposed to by Mr Daniel Malesela Lehutjo, the acting Registrar and the acting Chief Executive of the Council.

[37] The Registrar and the Council intend to oppose the main application. The neutral attitude of the Minister prompted them to take up this attitude. Mr Lehutjo describes the functions of the RMS and the CMS. They include, *inter alia*, the power to implement Regulation 8. He contends that the setting aside of Regulation 8 will affect their own functions but also the rights and interests of members of medical schemes.

Fifth applicant to intervene

[38] Fifth applicant to intervene is B Braun Avitum (Pty) Ltd ('Braun') a South African private company carrying on business at 253 Aintree Road, Hoogland Ext 41, Northriding, Johannesburg, Gauteng.

[39] Its founding affidavit in this application for intervention was deposed to by its managing director Ms Marguerite Claire Anderson. She is a registered nurse and midwife and she has a certificate in Business Management from the University of Witwatersrand Business School. She has had extensive training and experience in the field of kidney dialysis.

[40] Braun is a provider of dialysis and related services and equipment to some 32 clinics located both within and outside of private hospitals throughout South Africa. They typically provide between 5 and 15 dialysis stations at such institutions and they treat a total of approximately 900 patients around the country at any one time. Some of these services are provided to patients at, or from, state hospitals and the balance are provided to patients being treated at private hospitals and clinics. Nationwide, there are approximately 10 000 patients on dialysis. The state is able to provide dialysis services to a maximum of approximately 20% of these patients. The

remaining patients receive dialysis from Braun and other similar private service providers.

[41] One of Braun's principal reasons for wishing to intervene is that the setting aside of Regulation 8, particularly in the manner in which Genesis seeks to do, will have severe and deleterious consequences for many, if not most, members of Medical Schemes in South Africa who suffer from kidney disease and who are in need of life saving dialysis and other such treatments. Dialysis treatment is a costly services to provide as it involves, *inter alia*, expensive equipment, highly trained personnel and the provision of physical facilities at which the time consuming procedures may be carried out. This means that there are very few people in South Africa who could, without considerable financial assistance, afford to undergo this treatment. A typical session costs a private patient approximately R1 600,00 per session. Typically patients receive three sessions of dialysis a week.

[42] Braun cannot provide this service and meet all of the costs consequent upon the service at the rates paid by state hospitals for dialysis in terms of the service level agreements entered into between the state and Braun. The charges levied and paid to Braun by the state for these state patients are to some extent subsidised by Braun. Were Braun to be limited to charging patients (and hence medical schemes) at state hospital rates it would go out of business in South Africa and it would not be able to provide dialysis services to either private or to state institutions and their respective patients. The situation for these patients would be considerably worse if Genesis were to get its way and confine treatment for PMBs to state hospitals and facilities only.

[43] Ms Anderson submits that in circumstances where Braun alone (excluding other private dialysis service providers) were unable to provide its services, some 900 South Africans would be deprived of dialysis services and simply die of renal failure. As it is, there are already insufficient dialysis facilities available in this country to treat all of those who require such treatment and the effect of the setting aside of Regulation 8 would considerably worsen the situation for those South Africans who suffer from kidney disease.

[44] She contends that Braun accordingly has a direct and substantial interest in maintaining the existence and application of Regulation 8, at the very least in substantially the same form as it is now applied in practice in order to sustain its business and to enable it to provide these life-saving services in South Africa. The state cannot accommodate all of the patients who are presently cared for in private health care institutions and private health care institutions cannot treat patients at the cost levels that state hospitals are able to do.

[45] Mr Anderson summarises Braun's claim to intervene in the main application. It wishes to intervene as a party acting in its own interest inasmuch as the constitutionality of Regulation 8 is in issue. The right to access health care services and to receive medical treatment, which is guaranteed in the Bill of Rights, will be threatened or infringed should Regulation 8 be declared invalid. Braun furthermore has a direct legal and financial interest which will be prejudicially affected should Regulation 8 be declared invalid. Braun also acts on behalf of the kidney patients who will be affected.

Sixth applicant to intervene

[46] Sixth applicant to intervene is the Multiple Sclerosis Association of South Africa ('MSSA'). It is a non-profit organisation represented in this application by its Vice-chairperson Ms Samantha Ann Gregory. She holds the degrees of MBChB and LLB. She has practised as a doctor since 1994 and she commenced practising as an attorney in 200. Although her primary profession is that of a patent attorney, she continues to practise medicine. She has experience of the everyday interactions between patients with Multiple Sclerosis and their medical schemes. In her capacity as attorney she also represents Braun and seventh applicant, the Infertility Awareness Association of South Africa, in the present matter.

[47] The MSSA is a registered non-profit organization aimed at advocating the needs of those who suffer from MS. Its aim and purpose is to increase awareness of the condition and, most relevantly, to secure continued and affordable healthcare for Multiple Sclerosis patients. The MSSA and its branches have a current membership of approximately 1 500 members. It is estimated that between 6 000 and 7 000 people in South Africa have been diagnosed with one of the various forms of Multiple Sclerosis. The MSSA represents its members in bringing this intervention application. Its opposition will also work to the benefit of those Multiple Sclerosis patients who are not members of the MSSA.

[48] Dr Gregory provides a full description of the nature and symptoms of Multiple Sclerosis. It is a chronic and ongoing neurological disorder. There is no cure for multiple sclerosis. Treatment typically focuses on speeding recovery from attacks, slowing the progression of the disease and managing various symptoms.

[49] Dr Gregory refers to a number of considerations which support the contention that the MSSA has *locus standi* to intervene in the main application. The MSSA as the representative of its members and as an advocate of those with Multiple Sclerosis is an interested party to the proceedings and has a direct and substantial interest in the outcome of the application. The setting aside of Regulation 8 and the PMBs will have a severely detrimental effect on patients with MS. The fact that the facilities offered by the state are unable to meet the public demand for these treatments means that the private facilities perform a valuable and life-saving function. Most Multiple Sclerosis patients will be unable to obtain any treatment at a public facility at all. Accordingly and in the event that it is permitted to intervene in the main application, the MSSA would oppose any declaration of invalidity of Regulation 8. Ms Anderson submits that this would be in the interests of justice in that its members would then continue to be able to access their rights to healthcare in terms of the provisions of section 27 of the Constitution of the Republic of South Africa 108 of 1996 ('the Constitution'). In addition, there can be no prejudice occasioned to any other party by the intervention of the MSSA in the main application.

Seventh applicant tor intervene

[50] Seventh applicant to intervene is the Infertility Awareness Association of South Africa ('IFAASA'). Its chairperson, Ms Meggan Jill Zunckel deposed to its founding affidavit in this matter.

[51] IFAASA is a non-profit company. The object of the company is to raise public awareness and understanding of infertility as a disease, provide an educational platform for individuals suffering from infertility as well as information for family and

friends, to lobby for change in policies and laws relating to infertility and, most importantly for purposes of the main application, to advocate on behalf of the infertile patient with medical schemes.

[52] The relief which Genesis seeks in the main application will impact negatively upon the right of IFAASA's members to receive full compensation, the PMB, for the diagnosis and treatment of infertility. The relief sought by Genesis will also impact on those members of the public suffering from infertility who are members of medical schemes but are unaware of the main application. The interpretation which Genesis attempts to attach to Regulation 8(1) will result in financial hardship for IFAASA's members and, in some instances, may even result in patients being unable to afford the treatment to which they are entitled.

[53] For many women, having access to appropriate health services such as those provided for in Annexure 'A' can mean the difference between recurrent miscarriages and a pregnancy resulting in a live birth. Denying access to the PMBs, which would be the effect of the relief sought by Genesis, could result in women not seeking medical intervention due to issues of affordability. Such treatments would otherwise have been available to prevent complications of infertility such as recurrent miscarriages. Recurrent miscarriages can be life-threatening to a woman.

Eighth and ninth applicants to intervene

[54] Eighth and ninth applicants to intervene are the South African Private Practitioners Forum ('SAPPF') and Dr Peter Francois Colin ('Dr Colin'). They are jointly referred to herein as 'the doctor applicants'. The SAPPF is a not for profit company representing approximately 2 400 specialist medical practitioners. Dr Colin is a psychiatrist in private practice and a part-time consultant in the Department of

Psychiatry at the University of Pretoria. He is also the Chairperson of the SAPPF. The founding affidavit of SAPPF in the present application was deposed to by Mr John Christopher Archer, its chief executive officer. Mr Archer also represents Dr Colin.

[55] Mr Archer contends that the SAPPF is entitled to intervene in its own interest, in the interest of its members, in the interest of patients who benefit and stand to benefit from the health services provided by its members and in the public interest. Dr Colin is entitled to intervene in his own interests and in the interests of his patients.

[56] The SAPPF has been constituted, amongst other things, to serve as a representative body of private medical practitioners in South Africa and to promote the practice and professional and allied interests of its members in South Africa. In terms of its memorandum of incorporation, SAPPF has standing to sue and be sued.

[57] It is Dr Archer's contention that the relief sought by Genesis will have a material impact on the members of SAPPF and on Dr Colin. PMB conditions are largely (though not exclusively) specialist or hospital based. Whichever approach is adopted, the extent to which a medical scheme reimburses a doctor has a material impact on the amount that the doctor charges (and is paid) for the service, which, in the case of emergency medical treatment, the doctor is obliged to perform.

[58] If Genesis is successful in obtaining the relief it seeks, the regulatory scheme pursuant to which doctors are reimbursed will be unlawful and new regulations will have to be made. Doctors' existing rights to full reimbursement from medical schemes (as provided by Regulation 8) will be removed. A probable consequence is that medical schemes would be able to determine, without regulation, the rate at

which doctors are reimbursed for minimum benefits in the private sector, to the detriment of doctors.

[59] The doctor applicants contend that Regulation 8 is a measure intended to facilitate access to health care services by ensuring that privately insured patients (ie medical scheme beneficiaries) have access to a minimum package of care from their medical schemes. Doctors in turn are obliged to give effect to such care. If Regulation 8 is set aside it will materially alter this package with potentially adverse consequences for doctors and the patients they care for.

[60] Regulation 8 seeks to ensure an equitable allocation of resources within the health care and public health care sectors. The relief sought by Genesis, if granted, will have material consequences for the privately insured sector. It will result in medical schemes having the power to determine for themselves the basis upon which they will reimburse patients and service providers for a minimum care package. In short, the full costs of the minimum care package will no longer have to be insured by medical schemes. This will inevitably have an impact on the provision of healthcare, the sharing of the cost of healthcare and the allocation of available resources, including the accessibility of doctors to patients. Furthermore, it may lead to privately insured patients having to seek services from the public sector as their private medical insurance may no longer cover a minimum package of care.

[61] The doctor applicants accordingly seek leave to intervene in the main application in order to oppose it.

The *amici curiae*

[62] The three applicants to be admitted as *amici curiae* are the Treatment Action Campaign ('TAC'), the South African Depression and Anxiety Group ('SADAG') and People Living with Cancer ('PLWC'). They intend to oppose the main application.

[63] Their applications to be admitted are motivated in an affidavit deposed to by Mr Anele Boyce Yawa, the Chairperson of the TAC. Ms Zane Wilson on behalf of SADAG and Ms Janie du Plessis on behalf of PLWC confirmed her allegations insofar as they apply to their organisations.

[64] Mr Yawa provides particulars of the manner in which the proposed *amici curiae* complied with the requirement of High Court Rule 16A(6). He also describes in some detail the nature of their respective activities and their interest in the subject matter of the main application. He submits finally that all three proposed *amici curiae* qualify to be admitted as such.

Discussion

[65] The applications of third and fourth applicants to intervene and the applications of the *amici curiae* are not opposed by Genesis. I have considered these applications and I am satisfied that each of these parties has made out a proper case to intervene or be admitted as an *amicus curiae,* as the case may be. I accordingly propose to grant orders to that effect.

[66] I proceed to discuss the opposed applications. The applications were heard together on 25 June 2015. Second applicant to intervene was represented by two counsel. Fifth, sixth and seventh applicants to intervene were jointly represented by the same counsel. Fifth, eighth and ninth applicants to intervene were represented

by two counsel and Genesis was represented by three counsel. I propose to deal with submissions on behalf of these applicants to intervene as one unit. I trust that I am not neglecting any material element of their arguments.

[67] The contentions of counsel for the applicants to intervene are basically straightforward. They argued that the affidavits filed on behalf of their clients show clearly that they and their members and the public have real, direct and substantial interests in the retention of Regulation 8 in its present form. They provided full reasons for the contention that these interests will be affected substantially if Regulation 8 were to be set aside. They accordingly wish to avail themselves of the opportunity to defend the validity of Regulation 8.

[68] It appears from the submissions of counsel for Genesis that they do not appear to dispute the factual allegations upon which the applicants to intervene rely. Nor do they deny that financial interests of these applicants and their members may be affected if Regulation 8 is set aside. Their argument appears to be that the alleged losses do not afford these applicants a *'legal right'* to intervene as respondents in the main application.

[69] The starting point of their argument is the well-known statement of Corbett J in *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (CPD) at 416BC:

> *'… when one comes to examine the decisions to intervention it would seem that the test of a direct and substantial interest in the subject-matter of the action is again regarded as being the decisive criterion.'*

[70] The gist of the argument on behalf of Genesis appears from the following passages in their heads of argument:

'19. As to what a direct and substantial interest involves: it is well-established that what is entailed is a "legal interest" in the litigation which may be prejudicially affected by the judgment of the court, and not merely a financial interest (which is only an indirect interest in the litigation), or another form of an indirect or derivative interest. Examples of persons having a direct and substantial interest are joint owners, joint contractors and partners. By contrast, a sub-tenant or another person with a contractual relationship with a tenant does not have a direct and substantial interest, but merely a derivative one.

20. A person with a direct and substantial interest would – as HASA asserts – be entitled to be cited as a respondent in the first place; and the failure to join such a person would accordingly render an application defective and susceptible to a special plea of non-joinder. However, that merely makes the point about how narrow the range of persons with a direct and substantial interest in a matter really is. For it is well-established that the right to claim that another person should have been joined in proceedings is a very limited and confined one, and would essentially be confined to a situation where the court order sought would directly (and not indirectly) affect the legal interests of a third party adversely.'

[71] The argument thus appears to rest on two legs. The first is that a mere financial interest or another form of an indirect or derivative interest is not sufficient to confer *locus standi* on a proposed respondent. The second is that a person only has a legal right to intervene as a respondent if it is required as a matter of law that it be joined. The applicants to intervene, so it was submitted, do not qualify in terms of any one of these two criteria.

[72] It seems to me, however, that Genesis' contentions do not hold water. The first leg of the argument is based on a wrong premise. If a particular financial interest is a mere indirect interest, then it is, by definition, not a direct interest. In the

present case, however, the evidence produced by the applicants to intervene provided ample proof that their interests will be directly and substantially affected by the setting aside of Regulation 8.

[73] The problem with the second leg of Genesis' argument is that it fails to distinguish between two kinds of joinder, namely joinder of necessity and joinder of convenience. This distinction has been applied in the common law even before the advent of the Constitution. It is summarised in the judgment of Cilliers AJ (Goldsmith J and Joffe J concurring) in *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (WLD) para [11]:

> *'[11] It is important to distinguish between necessary joinder (where the failure to join a party amounts to a non-joinder), on the one hand, and joinder as a matter of convenience (where the joinder of a party is permissible and would not give rise to a misjoinder), on the other hand. In cases of joinder of necessity the Court may, even on appeal, mero motu raise the question of joinder to safeguard the interests of third parties, and decline to hear the matter until such joinder has been effected or the court is satisfied that third parties have consented to be bound by the judgment of the Court or have waived their right to be joined.'*

[74] Cilliers *et al* Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* 5th edition 208 – 209 describes the difference between the two forms of joinder in similar terms:

> *'It is important to distinguish between necessary joinder, where the failure to join a party amounts to a non-joinder, and joinder as a matter of convenience, where the joinder of a party is permissible but does not give rise to non-joinder. In cases of joinder of necessity, if the parties do not raise the issue of non-joinder, the court should raise it mero motu to safeguard the interests of third parties and it should decline to hear the matter until such joinder has*

been effected, or until the court is satisfied that the third parties have consented to be bound by the judgment or have waived their right to be joined. This can be done even on appeal.'

[75] Erasmus *Superior Court Practice* B1-96 deals with the difference between these two forms of joinder as follows:

'Apart from the obligatory joinder of a party who has a direct and substantial interest in the subject-matter of the litigation, a defendant may be joined under the common law on grounds of convenience, equity, the saving of costs and the avoidance of multiplicity of actions.'

[76] In a footnote to this text the authors refer to a line of cases in which joinder of convenience was allowed. I quote from two of them. In *Roberts Construction Co Ltd v Verhoef* 1952 (2) SA 300 (W) at 308H-309A it was said:

'This established practice is no doubt based on considerations of convenience in the administration of justice. Convenience is a factor of great and often decisive importance in matters of procedure. See Van der Lith v Alberts and Others, 1944 T.P.D. 17 at p. 22, and the further cases cited arguendo by counsel for the appellant at p. 18 of the report. I do not decide that the present case is one where the respondent could claim as of right that the present employer should be joined. I need go no further than to say that this is a case where I consider it desirable that the present employer should have an opportunity of being heard. This is in the exercise of the discretion referred to by VAN DEN HEEVER, J.A., at p. 666, in fine, of the report of Sheshe's case, and I base myself on considerations of convenience.'

[77] In *Ploughmann NO v Pauw and Another* 2006 (6) SA 334 (C) para [15] H J Erasmus J said this:

'The second respondent was joined by an order of Court. This was clearly done under the inherent power of the Court to order the joinder of a further party to an action which has already begun, in order to ensure that persons interested in the subject-matter of the dispute and whose rights may be affected by the judgment of the Court shall be before the Court, and it also

enables the Court to avoid multiplication of actions and to avoid waste of costs (see SA Steel Equipment Co (Pty) Ltd and Others v Lurelk (Pty) Ltd 1951 (4) SA 167 (T) at 172H - 173A; Harding v Basson and Another 1995 (4) SA 499 (C) at 501I). In my view, the second respondent has been properly joined.'

[78] In the present case the applicants to intervene do not claim that they should have been joined as a matter of necessity nor does the court. They accept that their joinder is to be regarded as a joinder of convenience which is in the discretion of the court.

[79] The contentions on behalf of Genesis do not, furthermore, attach sufficient weight to the judgments in which the Constitutional Court which are to the effect that a broader and more expanded test of standing should be applied in constitutional litigation. See, for example, *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para [229] (per O'Regan J):

'This expanded approach to standing is quite appropriate for constitutional litigation. Existing common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people.'

And in the same matter at para [165] (per Chaskalson P):

'I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the

mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.'

[80] In *Kruger v President of Republic of South Africa and Others* 2009 (1) SA 417 (CC) at para [24] the standing of an attorney was recognized in a case dealing with the validity of a proclamation in the area of law in which he practised. The Constitutional Court (per Skweyiya J) said this:

'We should in my view nonetheless adopt a generous approach to standing in this case. In so doing I am mindful of the fact that constitutional litigation is of particular importance in our country where we have a large number of people who have had scant educational opportunities and who may not be aware of their rights. Such an approach to standing will facilitate the protection of the Constitution.'

[81] In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) para [41] Cameron J summarised the position with regard to own-interest standing as follows:

'These cases make it plain that constitutional own-interest standing is broader than the traditional common law standing, but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct. The authorities show:

(a) To establish own-interest standing under the Constitution a litigant need not show the same "sufficient, personal and direct interest" that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.

(b) This requirement must be generously and broadly interpreted to accord with constitutional goals.

(c) The interest must, however, be real and not hypothetical or academic.

(d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation

purely financial self-interest may not be enough – the interests of justice must also favour affording standing.

(e) Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.

(f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed.'

[82] Counsel for Genesis argued, however, that the approach reflected in the Constitutional Court cases referred above, dealt with the *standing* of an applicant or plaintiff and not the right of a defendant or respondent to join as a defendant or respondent. According to counsel this is a material difference.

[83] I do not agree with the latter submission. In terms of section 34 of the Constitution everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Genesis' contentions would result in a situation which is in conflict with section 34. It would not be rational or equitable, furthermore, to limit the right of access to the courts in a case of competing litigants to the party who is the first to institute the proceedings in question. I may add that I have not been referred to any authority supporting the distinction sought to be drawn by counsel for Genesis.

[84] Counsel for Genesis invoked the judgment of Van Heerden J in *Gory v Kolver NO and Others* 2007 (4) SA 97 (CC) in support of an argument that a direct and substantial interest in the subject matter of the litigation has become a more stringent

requirement for standing under the Constitution. They base this argument on a statement by the learned Justice which is to the effect that a direct and substantial interest in the subject matter of the litigation is a necessary but not sufficient condition for standing. In paras [12] and [13] Van Heerden AJ said this:

> *'[12] In disputes concerning the constitutional validity of a statute, it would – so it was submitted be impractical if "the test of a direct and substantial interest in the subject-matter of the action is again regarded as being the decisive criterion" (*emphasis added). *This Court would not be able to function properly if every party with a direct and substantial interest in a dispute over the constitutional validity of a statute was entitled, as of right as it were, to intervene in a hearing held to determine constitutional validity.*
>
> *[13] This submission is a convincing one. In every case this Court must ultimately decide whether or not to allow intervention by considering whether it is in the interests of justice to grant leave to intervene. Thus, in cases involving the constitutionality of a statute, while a direct and substantial interest in the validity or invalidity of the statute in question will ordinarily be a necessary requirement to be met by an applicant for intervention, it will not always be sufficient for the granting of leave to intervene. Even if the applicant is able to show a direct and substantial interest, the Court has an overriding power to grant or to refuse intervention in the interests of justice. Other considerations that could weigh with the Court in this regard include the stage of the proceedings at which the application for leave to intervene is brought, the attitude to such application of the parties to the main proceedings, and the question whether the submissions which the applicant for intervention seeks to advance raise substantially new contentions that may assist the Court.*

[85] In my view, however, the *Gory* judgment it does not advance Genesis' case. It is not inconsistent with the wide approach to standing which was confirmed in the

Constitutional Court judgments referred to above. What the judgment shows is that the court exercises a wide discretion when it decides whether a particular litigant has the required standing to approach a court. The overarching criterion is the interests of justice.

[86] In the present case I am of the view that there are a number of material considerations which support the applicants' right to intervene as respondents. The interests of these applicants and their members in the relief sought by Genesis are real, direct and substantial. The applicants act on behalf of huge numbers of healthcare providers. The relief would probably also affect the availability of healthcare services to many members of the public. The Minister of Justice elected to abide the court's judgment. In these circumstances it is desirable that Genesis' attack on the validity of Regulation 8 be properly defended. Applicants to intervene further propose to lead evidence which would be representative of the vantage point of each of them.

[87] In the light of all these considerations I am firmly of the view that it would be in the interests of justice to grant leave to all the applicants to intervene in the main application.

Costs of suit

[88] The applications of second, fifth, eighth and ninth applicants to intervene were opposed by Genesis. These applicants are successful in the present application and they ask for orders that Genesis pay their costs. Genesis submitted, however, that their costs should be costs in the cause. I do not agree. The success of the applicants in the present intervention applications is independent of the outcome of the main application. Second, fifth, eighth and ninth applicants to intervene are

accordingly entitled to their costs, which, in the case of second, eighth and ninth applicants to intervene, include the cost of two counsel.

[89] Third and fourth applicants asked for costs only in the event of opposition by Genesis. Genesis did not oppose their applications and it is therefore not liable for their costs. Counsel for sixth and seventh applicants to intervene informed the court that their legal representatives rendered their services on a *pro bono* basis. The applications of the *amici curiae* were not opposed and they do not ask for costs.

Conclusion

[90] In the result, I grant the following orders:

(1) Second, third, fourth, fifth, sixth, seventh, eighth and ninth applicants to intervene are granted leave to intervene as respondents in the main application.

(2) First, second and third applicants for admission as *amici curiae* in the main application, are admitted as such.

(3) Genesis is ordered to pay the costs of second, fifth, eighth and ninth applicants to intervene, which include the cost of two counsel.

SIGNED

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A P BLIGNAULT